IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 82608

Electronically Filed
Sep 16 2022 04:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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' ANSWER TO APPELLANT'S PETITION FOR REHEARING

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: September 16, 2022.

McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*
Lisa Wiltshire Alstead (NSBN 10470)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
Tel. 775-788-2000
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

Pursuant to the Court's September 2, 2022 Order Directing Answer to Petition for Rehearing, Respondents City of Reno ("City") and Cannon Cochran Management Services, Inc. ("CCMSI," and with the City, "Respondents") answer the Petition for Rehearing ("Petition") filed by appellant Kimberly Kline ("Kline").

INTRODUCTION

Kline's Petition reargues issues already briefed and decided, raises issues of immaterial fact, and presents new arguments for the first time. None of these arguments constitutes grounds for granting rehearing under NRAP 40. With no material fact overlooked and no misapplication of or failure to apply the law, Respondents respectfully request that the Court deny the Petition and affirm the Order of Affirmance entered on August 11, 2022 ("Order").

ARGUMENT

A. Standard for Rehearing

NRAP 40(c)(2) sets forth when rehearings may be considered by the Court:

> (2) The court may consider rehearings in the following circumstances:
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

The matter for which rehearing is requested must be a "germane legal or factual matter." *In re Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). That the appellate court may have overlooked or misapprehended an

immaterial matter or matter of no practical consequence is not grounds for rehearing. *See id.* Petitions for rehearing should not "***reargue matters considered and decided in the court's initial opinion" and may not "raise new legal points for the first time on rehearing."*** *Id.* at 151, 670 P.2d at 247 (emphasis added).

B. Kline's Petition Fails to Satisfy the Standard for Granting Rehearing.

1. *The Petition Reargues Issues Already Considered and Decided.*

The majority of the Kline's Petition improperly reargues issues already considered and decided by the Court and which cannot constitute grounds for granting rehearing. *Id;* NRAP 40(c)(1). At the end of Part 2.A. and in Part 2.B. of the Petition, Kline again urges the Court to apply the new law set forth in Senate Bill ("S.B.") 289 to this closed claim and, on that basis, remand the appeal to the Department of Administration. (Pet. at 4-6.) Whether S.B. 289 was an intervening law that applied to Kline's closed workers' compensation claim was a central issue argued in detail by the parties in the briefing before this Court. (Appellant's Opening Brief ("AOB") at 1-2, 10-11, 13-17; Respondents' Answering Brief ("RAB") at 1-3, 14-15, 31-38; Appellant's Reply Brief ("ARB") at 3-7.)

Kline also asked the Court to remand the issue for reconsideration by the appeals officer based on two recent Court of Appeal cases remanded to address S.B. 289. (AOB at 15, n. 1.) The City responded explaining why a remand is not appropriate here and how the instant case is distinguishable from the decisions relied

upon by Kline. (RAB at 36-37.) The Court specifically considered and decided that S.B. 289 does not apply and that matter need not be remanded to the appeals officer. (*Id.*; Order at 3-4.)

Further, in Part 2.E., Kline reargues that her claim never closed. (Pet. at 7-8.) This issue was also briefed by the parties. (*See* RAB at 32-34; ARB 1-3). The Court concluded, based on the legal argument regarding waiver in the briefing, that Kline failed to challenge the claim closure date on appeal and therefore waived the argument that the claim closure date should be different. (Order at 3; RAB at 33; *see also* I AA 1-15, 207-228 (neither the Appeals Officer Decision or Order Denying Petition for Judicial Review address claim closure as the issue was not raised).)

Finally, in Part 2.F. of the Petition, Kline reargues her position as to the medical evidence by noting that the Order states there was no rebuttal evidence to Dr. Betz's expert testimony and pointing out that she relied upon the medical reporting of Dr. Jempsa for rebuttal purposes. (Pet. at 8.) Yet, the Order simply indicates that Dr. Betz "presented uncontroverted testimony as to the nature and scope of the pre-existing impairment" at the appeal hearing. (Order at 8.) The Order does not say there was no rebuttal evidence or other medical evidence relied upon by Kline. Rather, it simply recognizes that "Kline offered no expert witness to rebut Dr. Betz's testimony" at the appeal hearing. (Order at 3; I AA 229 – II AA 365.) The weight of the medical evidence and reporting from all doctors, Dr. Betz, Dr. Jempsa,

and Dr. Anderson, was argued and briefed in great detail by the parties at every level, considered by this Court, and decided by the Court. (I AA 76-169, 229 – II AA 365; Order at 3, 8-9.)

2. *The Petition Raises Issues for the First Time.*

Kline next raises an argument for the first time in the Petition. This cannot constitute grounds for granting rehearing. NRAP 40(c)(1); *In re Estate of Herrmann*, 100 Nev. at 151, 670 P.2d at 247. In Part 2.A. of the Petition, Kline ***for the first time*** argues that somehow the claim "remained open for a [permanent partial disability ("PPD")] benefit" and that the "Court misapprehended the scope of the claim closure." (Pet. at 2:21-3:1.) Kline now asks the Court to consider *Flamingo Hilton v. Gilbert*, 122 Nev. 1279, 148 P.3d 738 (2006), allegedly supporting this proposition of a "limited opening of the claim" to allow PPD benefits based on the case. (Pet. at 3:4-5.) This argument and *Gilbert* ***were never raised*** by Kline in any brief before this Court, in any brief before the District Court, or in oral argument before the appeals officer**.** (AOB *generally* and at iii-iv (containing no reference to *Gilbert* in the table of authorities or argument as to the scope of claim closure); ARB *generally* and at ii (same); I AA 76-105, 137-169 (no reference to *Gilbert* of scope of claim closure in Kline's briefs filed with the District Court); I AA 229-II AA 365 (no reference to *Gilbert* or scope of claim closure, or limited opening made in the May 1, 2019 oral argument before the appeals officer).)

Most notably, Kline ***concedes*** she never raised this issue of a carve out to claim closure for PPD benefits with the lower courts or prior to this Petition. (Pet. at 3:24-28.) Simply put, after being unsuccessful on the other arguments advanced, Kline now seeks to have this Court consider new arguments and the *Gilbert* case. Not only can a new argument raised for the first time in the Petition not be grounds for rehearing, here, as discussed below, the new argument is not consistent with the applicable statutes governing a PPD award.

3. *The Petition Raises Immaterial Matters.*

Lastly, Kline's Petition impermissibly seeks rehearing on immaterial matters and where no legal argument was advanced by Kline in prior briefing. *See* NRAP 40(a)(2); *In re Estate of Herrmann*, 100 Nev. at 151, 679 P.2d at 247. First, the Petition at Part 2.C. argues it was not accurate to state that Kline did not raise retroactivity of NRS 616C.490 until the Reply Brief. (Pet. at 6:27-28.) This argument is immaterial. S.B. 289 amended NRS 616C.490. The Order specifically addresses S.B. 289 stating, "[a]s a threshold issue, Kline asserts that recent amendments to NRS 616C.490 apply to her claim. Those amendments apply only to claims open on the date of passage and approval, May 31, 2021. *See* 202 Nev. Stat., ch. 245 §§ 11, 12 (S.B. 289)." (Order at 3.) The Court recognizes because the appeals officer "found Kline's claim had closed . . . on May 8, 2018," and Kline did not challenge claim closure in her petition for judicial review, she waived any argument as to a different

claim closure date. (*Id.*) Thus, it was based on ***both*** the prospective application of S.B. 289 ***and*** Kline's waiver of any challenge to claim closure that the Court determined it was proper to "apply the same version of NRS 616C.490 to her case as used by the courts below." (Order at 4.)

While the Order then indicates it declines to address retroactive application of NRS 616C.490 as it was not raised by Kline until her Reply Brief, that statement is immaterial. The Court considered the enactment language of S.B. 289 indicating it applied prospectively to open claims as of the date of passage and approval of May 31, 2021. The Court confirmed that the statutory amendments do not apply retroactively to closed claims. The Court further found that Kline's waiver of any challenge to the May 8, 2018 claim closure date also precluded the application of S.B. 289. (Order at 3-4.) As such, the Court addressed and decided the merits of whether S.B. 289 applies prospectively or retroactively with respect to Kline's claim. There is no need to reconsider an issue already considered and where, as here, an alternative basis exists for applying the prior version of NRS 616C.490.

Additionally, the Petition at Part 2.D. argues that the Court refers to Kline's prior vehicle accident in the Order as "nonindustrial" and that this is not accurate. (Pet. at 7:10-11.) This matter is immaterial. While the Order makes one misstatement by referring to Kline's prior accident as being "nonindustrial" (Order at 1), the Court clearly recognized the prior accident was "industrial." The Order cites to the

evidence stating, "these findings are related to the ***[industrial] car accident that she was involved in 6 months earlier***. . . ." (Order at 2) (emphasis added.) As such, the Order does recognize the prior accident is industrial and one typographical or clerical error does not constitute grounds for rehearing. Kline does not identify any legal issue that the Court overlooked as a result of this misstatement as required by NRAP 40(a)(2). (Pet. at 7:8-21.) Rehearing on immaterial issues raised by Kline should be denied.

C. Kline Failed to Appeal the Determination on Claim Closure and There is No Jurisdiction to Consider it.

As discussed above, Respondents' briefing presented legal argument that Kline waived any challenge to the claim closure date by not raising the issue before the lower courts. Not only did Kline waive this argument, but also Kline is jurisdictionally barred from challenging claim closure and whether it complied with NRS 616C.235. As set forth in the Respondents' Answering Brief, 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 closing the claim. The April 4, 2018 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; RAB at 32-34.) The determinations on appeal here 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; RAB at 32-34.)

Because Kline failed to appeal the April 4, 2018 determination letter closing the claim within the mandatory timeframes for an appeal set forth in NRS 616C.315 and NRS 616C.345, the appeals officer, and any subsequent courts including this Court, lack subject matter jurisdiction to consider the issue of claim closure. *See Reno Sparks Convention Visitors Auth. v. Jackson*, 112 Nev. 62, 67, 910 P.2d 267, 270 (1996); (RAB at 32-33.) As such, there is no jurisdiction to hear a challenge to the April 4, 2018 claim closure letter and it is not on appeal and cannot be considered on rehearing.

D. There Is No Such Thing As A Carve Out To Closure For PPD Benefits.

Out of an abundance of caution, Respondents address Kline's new argument raised for the first time in the Petition that there can somehow be a carve-out to claim closure that allows the claim to stay open for PPD benefits only. (Pet. at 2-4, 7-8.) There is no such thing. Rather, when an insurer plans to close the claim, it must first tell the injured worker in the written notice of claim closure whether he or she will receive a PPD evaluation. NRS 616C.235. This was done in the April 4, 2018 letter notifying Kline that "[a]s of the date of your scheduled evaluation, whether or not you are present, ***your claim will close for all benefits,*** except the right to request reopening and any ongoing vocational rehabilitation programs." (IV AA 790.) This

is consistent with the workers' compensation statutes which allow vocational rehabilitation to continue after the claim has closed and which allow an injured worker lifetime claim reopening rights. *See* NRS 616C.235; NRS 616C.495(2)(a); NRS 616C.390. Again, Kline did not appeal this April 4, 2018 letter. If Kline had disagreed with whether claim closure was for "all benefits," or believed there should be a carve-out to closure for PPD benefits, she could have appealed the insurer's determination. She failed to do so, thereby waiving that argument, and this Court has no subject matter jurisdiction over the claim closure letter.

Neither does the law provide for any such carve-out of claim closure for PPD benefits. Rather, within 30 days of an injured worker being deemed by a treating physician to be stable and ratable, a PPD evaluation is scheduled. NRS 616C.490(2)(a). Within 14 days of receiving the PPD evaluation, the insurer must offer the injured worker the PPD award. NRS 616C.490(7). A PPD award must be paid on a "monthly basis for 5 years or until the claimant is 70 years of age, whichever is later." *Id.* In lieu of receiving installment payments from the time of claim closure until turning 70 years old, an injured worker can elect to accept up to 30% of the PPD award in a lump sum form. NRS 616C.495. A claim would never close until the worker turned 70 if, as suggested by Kline, it remained open to allow PPD benefits to be paid.

Finally, the statutes contemplate that litigation may ensue as to the percentage of a PPD award after the claim closes and provide means for compensating an injured worker if ultimately successful in litigation. If the insurer disputes the PPD award, it must be paid in installments with no delay for the portion not in dispute. NRS 616C.490(11); NAC 616C.103(7)(a); NAC 616C.505. If the litigation is adjudicated in favor of the claimant, the remaining amount of the PPD award may be paid in lump sum. If resolved in favor of the insurer, the insurer may deduct any amount paid in excess of the uncontested amount from future payments. NRS 616C.380(2). Simply put, ***there is no such thing as a carve-out for PPD benefits***, and a claim can close while the award is litigated. *Gilbert*, which allows ongoing pain management with a ***timely appeal*** of claim closure is inapplicable here and does not create a PPD benefits carve-out as suggested by Kline. *Gilbert,* 112 Nev. at 1283, 148 P.3d at 741. This new argument is contrary to the applicable law on PPD awards.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that Kline's Petition should be denied under NRAP 40.

Dated: September 16, 2022 McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*
Lisa Wiltshire Alstead (NSBN 10470)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
Attorneys for Respondents

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this complies with the formatting requirements, typeface requirements, and type-style requirements of NRAP 40 because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style and does not exceed 10 pages.

Dated: September 16, 2022.

McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*

Lisa Wiltshire Alstead (#10470)
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 September 16, 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: September 16, 2022.

/s/ *Lynda Arzate Reza*
An Employee of McDonald Carano LLP