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IN THE SUPREME COURT OF THE STATE OF NEVADA

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KIMBERLY KLINE Appellant, vs. CITY OF RENO; CANNON COCHRAN MANAGEMENT SERVICES, "CCMSI"; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, an Agency of the State of Nevada; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION APPEALS DIVISION, an agency of the State of Nevada; MICHELLE MORGANDO, ESQ., Sr. Appeals Officer; RAJINDER NIELSEN, ESQ., Appeals Officer; ATTORNEY GENERAL AARON FORD, ESQ., Respondents.	Supreme Court No. 82608 APPELLANT'S PETITION FOR EN BANC RECONSIDERATION PURSUANT TO NRAP 40A

Pursuant to NRAP 40A(a)(1) and (2), Appellant, KIMBERLY KLINE hereby petitions for reconsideration en banc of the Court's panel decision in Kimberly Kline v. City of Reno, et al., and of the denial of the Petition for Rehearing thereof entered on September 27, 2022. This Petition is made under NRAP 40A(a)(1) on the grounds that the Decision undermined the rationale of earlier decisions of this Court, such that reconsideration by the full Court is necessary to maintain the uniformity of this Court's decisions; and under NRAP 40A(a)(2), on the grounds that the Decision

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involved a substantial precedential and public policy issue, with a potential impact beyond the litigants involved herein, on an issue of first impression which the entire Court should address.

I.

FACTUAL OVERVIEW

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 issue before the Court is apportionment of a permanent partial disability (PPD) award and the effect of SB 289 which amended NRS 616C.490 during the 2021 Nevada Legislative Session along with the issue of claim closure under NRS 616C.235.

II.

LEGAL ANALYSIS.

1. STANDARD FOR GRANTING REHEARING.

NRAP 40A states as follows:

> (a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).

2. THE COURT HAS ERRONEOUSLY ASSUMED THAT THE INDUSTRIAL CLAIM IS CLOSED FOR THE PPD BENEFIT.

The Panel centered on the incorrect conclusion that the industrial claim was closed and that the closure was not addressed in prior proceedings. A recap of the timeline of the proceedings is necessary to better understand why claim closure was

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never an issue at the Administrative Appeals level and the District Court level.

The underlying appeal was held before the Appeals Officer on May 1, 2019. ***AA 207.*** The Appeals Officer's decision was made on August 20, 2019. ***AA 207-228.*** The District Court briefing was concluded on May 22, 2020. ***AA0076*** The oral argument was held on November 19, 2020. ***AA 75.*** The District Court Nevada Decision denying the Petition for Judicial Review was filed on February 10, 2021. ***AA 0001.*** NRS 616C.490 was amended by the Nevada Legislature and signed into law on May 31, 2021. Under SB 289, the amendatory provisions 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 the Act. ***AA 0049.*** The PPD was an open issue on the effective day of the Act. The question as to whether the Appellant's claim would be subject to the law was not a consideration until the law came into effect which was well after the Petition for Judicial Review District Court decision, briefing and arguments.

Nevada law is clear as to when the claim closes on the issue of the PPD award. NRS 616C.495 (2) states

> 2. If the claimant elects to receive his or her payment for a permanent partial disability in a lump sum pursuant to subsection 1, all of the claimant's benefits for compensation terminate. Except as otherwise provided in paragraph (d), the claimant's acceptance of that payment constitutes a final settlement of all factual and legal issues in the case. By so accepting the claimant waives all of his or her rights regarding the claim, including the right to appeal from the closure of the case or the percentage of his or her disability, except:
>
> (a) The right of the claimant to:
>
> (1) Reopen his or her claim in accordance with the provisions of NRS 616C.390; or
>
> (2) Have his or her claim considered by his or her insurer pursuant to NRS 616C.392;
>
> (b) Any counseling, training or other rehabilitative services provided by the insurer;
>
> (c) The right of the claimant to receive a benefit penalty in accordance with NRS 616D.120; and
>
> (d) The right of the claimant to conclude or resolve any contested matter which is pending at the time that the claimant executes his or her election to receive his or her payment for a permanent partial disability in a lump sum. The provisions of this paragraph do not apply to:
>
> (1) The scope of the claim;

(2) The claimant's stable and ratable status; and
(3) The claimant's average monthly wage.

In ***SIIS v. Perez***, 116 Nev. 296 (2000), the Court recognized that claim closure occurred after the injured worker accepted a lump sum which then required a request to re-open the claim for further benefits. In addition, in ***SIIS v. Miller,*** 112 Nev 1112 (1996), the Court held that they are not empowered to go beyond the face of an unambiguous statute to lend it construction contrary to its plain meaning and not apparent from the legislative history. Citing ***Cirac v. Lander County***, 95 Nev. 723, 729, 602 P.2d 1012, 1016 (1979). The plain language of NRS 616C.490(2) clearly states that the PPD issue is not "closed" until the injured worker accepts the lump sum. It is then that the claim is closed for the PPD benefit. SB 289, which amended NRS 616C.490, was intended to apply for all claims where the PPD issue was open. Claims where the injured worker accepted the PPD in a lump sum would be precluded from the benefit of the law. In this case, the Claimant never accepted her PPD in a lump sum. This is because she was litigating the percentage of impairment.

The Panel's focus on claim closure and finding that the claim was closed and not appealed is a misunderstanding of the clear and unambiguous language of NRS 616C.495(2). The rule is so clear and unambiguous that a review of past decisions from this Court is void of any decision which holds to the contrary.

If this decision stands, it will force all injured workers to appeal every PPD scheduling letter that has claim closure language in it as arguably the injured worker could be denied the results of the scheduled PPD examination. This will cause an overload of litigation and tax precious judicial resources of the Department of Administration Hearings offices, which are already stretched to the limit in Nevada.

As stated in the Appeals Officer's decision, the closure of the claim, effective May 8, 2018, was only for "additional benefits, medical treatment or compensation." ***AA, Vol 1, page 224, lines 21-23.*** If the claim closed at the time of the PPD evaluation, then how would the Appellant be offered the PPD award? She was

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offered it because the claim was not closed for the PPD award due to NRS 616C.495(2).

In addition, it is settled in Nevada that subsequent determination letters void the prior determination letters covering the same issue. In ***Flamingo Hilton v. Gilbert***, 122 Nev. 1279, 1283 (2006), the Court held "regardless of whether Gilbert was aggrieved by the April 28 letter, the insurer sent him two additional letters within the administrative appeal period, each of which contained a new claim closure date. As a result, Gilbert was entitled to rely on the latest superseding letter. Moreover, even though Gilbert's administrative appeal form did not designate the April 28 determination letter, he expressly contested the closure of his claim within seventy days of that letter. Accordingly, as Gilbert timely administratively challenged the claim closure, the appeals officer properly considered that issue." In the present case, the PPD scheduling has claim closure language in it, however, the Respondent issued subsequent letters which put into question whether the claim was closed. The appealed PPD award letter which was after the noncompliant closure letter (in violation of NRS 616C.235) confirmed that the PPD would be paid in installments, not a lump sum. It is clear from the record that no claim closure letter was ever issued after the PPD award letter was issued.

The Appellant respectfully submits that the Panel has misapprehended the scope of the claim closure and in so doing so, will have the unintended result in voluminous amounts of appeals by injured workers throughout Nevada for fear that they could lose their PPD award if the defective claim closure language is in their PPD scheduling letter. For this reason, an en banc review is needed to consider the unintended effects of the Panel's Decision and to avoid the unintended consequences of the Panel's decision.

3. THE COURT HAS OVERLOOKED NRS 616C.495(2).

Where the court has overlooked a statute that is controlling, a petition for rehearing should be granted. ***Yellow Cab of Reno v. Dist. Ct.***, 127 Nev. 583, 262

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P.3d 699 (2011). SB 289 was enacted to correct the improper application of NAC 616C.490. ***AA, Vol 1, pages 17-49.*** NRS 616C.490 must be looked at with NRS 616C.495 to determine whether the claim was closed. NRS 616C.495(2) states:

> 2. If the claimant elects to receive his or her payment for a permanent partial disability in a lump sum pursuant to subsection 1, all of the claimant's benefits for compensation terminate. Except as otherwise provided in paragraph (d), the claimant's acceptance of that payment constitutes a final settlement of all factual and legal issues in the case. By so accepting the claimant waives all of his or her rights regarding the claim, including the right to appeal from the closure of the case or the percentage of his or her disability, except:
>
> (a) The right of the claimant to:
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> (1) Reopen his or her claim in accordance with the provisions of NRS 616C.390; or
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> (2) Have his or her claim considered by his or her insurer pursuant to NRS 616C.392;
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> (b) Any counseling, training or other rehabilitative services provided by the insurer;
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> (c) The right of the claimant to receive a benefit penalty in accordance with NRS 616D.120; and
>
> (d) The right of the claimant to conclude or resolve any contested matter which is pending at the time that the claimant executes his or her election to receive his or her payment for a permanent partial disability in a lump sum. The provisions of this paragraph do not apply to:
>
> (1) The scope of the claim;
>
> (2) The claimant's stable and ratable status; and
>
> (3) The claimant's average monthly wage.

The claim closes as to the PPD issue only when the injured worker accepts the PPD award in a lump sum. An injured worker who is receiving the PPD award in installments may at any time thereafter make a request for the PPD award to be converted into a lump sum. This is also consistent with NRS 616C.380 which states:

> **NRS 616C.380 Payment pending appeal when decision not stayed; effect of final resolution of claim.**
>
> 1. If a hearing officer, appeals officer or district court renders a decision on a claim for compensation and the insurer or employer appeals that decision, but is unable to obtain a stay of the decision:
>
> (a) Payment of that portion of an award for a permanent partial disability which is contested must be made in installment payments until the claim reaches final resolution.
>
> (b) Payment of the award must be made in monthly installments of 66 2/3 percent of the average wage of the claimant until the claim reaches final resolution if the claim is for more than 3 months of past benefits for a temporary

total disability or rehabilitation, or for a payment in lump sum related to past benefits for rehabilitation, such as costs for purchasing a business or equipment.

2. If the final resolution of the claim is in favor of the claimant, the remaining amount of compensation to which the claimant is entitled may be paid in a lump sum if the claimant is otherwise eligible for such a payment pursuant to NRS 616C.495 and any regulations adopted pursuant thereto. If the final resolution of the claim is in favor of the insurer or employer, any amount paid to the claimant in excess of the uncontested amount must be deducted from any future benefits related to that claim, other than medical benefits, to which the claimant is entitled. The deductions must be made in a reasonable manner so as not to create an undue hardship to the claimant.

The Panel's Decision however ignored these arguments and affirmed dismissal, on the theory that the claim was closed and that the retroactive power of NRS 616C.490 and SB 289 was not brought up in the Appellant's Opening Brief. This is not accurate. A review of the Appellant's Opening Brief clearly documents her argument that the amendment to NRS 616C.490 was retroactive. The applicability of SB 289 and its retroactive effect was presented in the Appellant's Opening Brief at the following pages: page 10, lines 3-4, page 14, lines 14-15, page 14, lines 23-1, page 15, lines 2-13, page 15, lines 18-20, page 17, lines 11-16 and page 20, lines 3-4.

Since the Appellant did indeed raise the retroactively of SB 289 in the Opening Brief and also argued the issue in the Reply Brief due to the representations made by the Respondent in the Answering Brief, the Court En Banc should consider the merits of the argument.

The Panel also overlooked NRS 616C.235. The only way to close an industrial claim before all benefits have been provided is to issue the appropriate determination pursuant to NRS 616C.235. The rule is equally clear that the closure of a claim pursuant to section 1 is not effective unless notice is given as required by the subsection. The rule states in part:

NRS 616C.235 Closure of claim by insurer: Procedure; notice; special procedure if medical benefits less than $800.

1. Except as otherwise provided in subsections 2, 3 and 4:

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> (a) When the insurer determines that a claim should be closed before all benefits to which the claimant may be entitled have been paid, the insurer shall send a written notice of its intention to close the claim to the claimant by first-class mail addressed to the last known address of the claimant and, if the insurer has been notified that the claimant is represented by an attorney, to the attorney for the claimant by first-class mail addressed to the last known address of the attorney. The notice must include, on a separate page, a statement describing the effects of closing a claim pursuant to this section and a statement that if the claimant does not agree with the determination, the claimant has a right to request a resolution of the dispute pursuant to NRS 616C.305 and 616C.315 to 616C.385, inclusive, including, without limitation, a statement which prominently displays the limit on the time that the claimant has to request a resolution of the dispute as set forth in NRS 616C.315. A suitable form for requesting a resolution of the dispute must be enclosed with the notice. **THE CLOSURE OF A CLAIM PURSUANT TO THIS SUBSECTION IS NOT EFFECTIVE UNLESS NOTICE IS GIVEN AS REQUIRED BY THIS SUBSECTION.** [Emphasis added]

When the Respondent originally attempted to close the claim on November 6, 2015, the Respondent utilized the correct form, D-31. ***AA, Vol 2, page 425.*** This Nevada State approved Division of Industrial Relations form was not used in the PPD scheduling letter which confirms that it was not the intent of the Respondent to close the claim completely, but as the Appeals Officer found, was to close the claim for only "additional benefits, medical treatment or compensation" and not the PPD benefit. ***AA, Vol 1, page 224, lines 21-23.*** The claim was open for purposes of determining and finalizing the PPD benefit. It was closed for all other benefits.

The Panel's failure to consider NRS 616C.495(2) and NRS 616C.235 results in a decision which will have a far reaching and harmful effect to the benefits of every injured worker in Nevada. In addition, it will render NRS 616C.495(2) and NRS 616C.235 meaningless.

4. CONCLUSION.

Reconsideration en banc is appropriate under both NRAP 40A(a)(1) and (2). The Panel's Decision not only undermined the uniformity of this Court's prior rulings which essentially confirmed that an industrial claim closes when the lump

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sum is accepted under NRS 616C.495(2), but overlooked NRS 616C.235, therefore apparently rejecting the rationale of this Court's prior precedents in this subject area of the law. Thus, the decision should be reconsidered by this entire Court.

This ruling therefore deserves the attention of this entire Court, en banc, pursuant to NRAP 40A(a)(1) as the Decision of the Panel now stands, the precedential value of cases such as ***Perez*** and ***Gilbert***, have been seriously undermined and called into question claim closure in an industrial claim, thereby disrupting the uniformity of this Court's decisions and the clear and unambiguous reading of NRS 616C.495(2) and NRS 616C.235. While the Decision does not state that the specific outcome in ***Perez*** and ***Gilbert*** have been explicitly overruled, the rationale of those cases, and the need for future courts to apply that rationale as to when an industrial claim closes for purposes of the PPD benefit, has apparently vanished. If the Decision stands, then, in any future litigation regarding a PPD award, involving different litigants than those now before this Court, the Department of Administration Hearings Officers and Appeals Officers addressing these arguments will now be advised that its analysis thereof is no longer to be governed by the principles enunciated in ***Perez*** and ***Gilbert*** as to when and how an industrial claim closes for purposes of the PPD award. The guiding question will now be, "if the PPD scheduling letter has claim closure language in it, the claim is now closed for all benefits including the PPD," thus resulting in every PPD scheduling letter being appealed by every injured worker in Nevada to protect the actual PPD award. This would result in a complete disregard for NRS 616C.495(2) and NRS 616C.235. If such a fundamental change in the area of workers' compensation law is to take place, it should at least first be considered by this entire Court, pursuant to NRAP 40A(a)(1) and (2).

For the reasons stated herein, it is respectfully submitted that the entire Court should consider the Decision, en banc.

///

AFFIRMATION: Pursuant to NRS 239B.030

The undersigned does hereby certify that the preceding document, filed in Supreme Court case number 82608, does not contain the personal information of any person.

DATED this 11 day of October, 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 WordPerfect 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 3853 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 Rules of Appellate Procedure.

DATED this 11 day of October, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 18, 2022, I filed the foregoing ***APPELLANT'S PETITION FOR EN BANC RECONSIDERATION PURSUANT TO NRAP 40A*** through the Supreme Court of Nevada's electronic filing system. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

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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.
MCDONALD CARANO LLP
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RENO, NEVADA 89505

DATED this 11 day of October, 2022.

JHMAYNE MERKOW