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' ANSWER TO APPELLANT'S PETITION FOR EN BANC RECONSIDERATION PURSUANT TO NRAP 40A

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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: November 17, 2022.

McDONALD CARANO LLP

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Pursuant to the Court's November 3, 2022 Amended Order Directing Answer to Petition for En Banc Reconsideration, respondents City of Reno ("City") and Cannon Cochran Management Services, Inc. ("CCMSI," and with the City, "Respondents") answer the appellant's Petition for En Banc Reconsideration Pursuant to NRAP 40A ("Petition") filed by appellant Kimberly Kline ("Kline").

INTRODUCTION

Kline's Petition seeking en banc reconsideration is premised solely on an issue that is ***not on appeal*** and case law and arguments that ***were not raised on appeal***. It is only by adopting Kline's new characterization of the issue on appeal – *i.e.*, whether claim closure allows for a carve out as to permanent partial disability ("PPD") benefits – that Kline argues, unpersuasively, that there is an impact on this Court's prior decisions in *Perez* and *Gilbert* and that a substantial precedential or policy issue is involved that would lead to overuse of judicial resources. While the case law Kline claims will be seriously undermined stands for different propositions than asserted by Kline, in any event, Kline failed to appeal the claim closure letter dated April 4, 2018, failed to challenge the Appeals Officer Decision's finding that the claim closed on May 8, 2018, and failed to raise claim closure on appeal and therefore waived the issue of claim closure on appeal.

With Kline's Petition failing to identify any prior Court decision or substantial precedential, constitutional or public policy specific to the issue ***actually on appeal***

– *i.e.,* whether the Appeals Officer correctly apportioned the 25% PPD award by 75% for non-industrial conditions, thereby reducing it to a 6% PPD award for the industrial injury - there is no basis for reconsideration under NRAP 40A.

In other words, Kline appears to have given up on her original challenge to the apportionment of the PPD award as being contrary to the law and evidence that she raised with the district court, as well as her newer challenge that S.B. 289 and its amendments to NRS 616C.490 and NAC 616C.490 warrant a different result as to apportionment as raised with this Court in briefing. Kline now seeks en banc reconsideration solely on an issue she conceded was not raised on appeal or until her Petition for Rehearing considered by the Panel. (Pet. for Rehearing at 3:24-28.)

To grant reconsideration of the Panel's Order of Affirmance and Order Denying Rehearing where Kline has not identified any impact on prior decisions warranting consideration of uniformity, or any substantial precedential, constitutional, or public policy issue ***as to the apportionment of the PPD award from 25% to 6% based on the then in place apportionment statute NRS 616C.490 and regulation NAC 616C.490***, would be contrary to the grounds for en banc reconsideration set forth in NRAP 40A.

Finally, notwithstanding the failure to appeal claim closure, Kline's claim has a date of injury of June 25, 2015 and the claim closed on May 8, 2018. At this time, few, if any, old claims like Kline's remain open. Claims close once an injured worker

is stable, at maximum medical improvement, and a PPD evaluation is conducted. As such, this is an one off case that will have little to no impact on future claims, decisions, or public policy. Rather, any claims that were open at or near the time of enactment of S.B. 289 or opened subsequent to its enactment, would be subject to the changes to the apportionment laws effective May 31, 2021. This case involves the prior version of NRS 616C.490 and NAC 616C.490 and therefore there is little to no precedential value from this case given that it only applies to claims that closed prior to May 31, 2021 and had an apportionment issue.

For these reasons, Respondents respectfully request that the Court deny the Petition and affirm both the Order of Affirmance entered by the Panel on August 11, 2022, and Order Denying Rehearing entered by the Panel on September 27, 2022.

ARGUMENT

A. Standard for En Banc Reconsideration

En banc reconsideration of a decision of a panel of the Supreme Court is disfavored. NRAP 40A(a). En banc reconsideration of a panel decision will only occur when reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or the proceeding involves a substantial precedential, constitutional or public policy issue. *Id.* A petition "shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific

citations to those cases." NRAP 40A(c). "If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." *Id.* Kline's Petition does not satisfy the requirements of NRAP 40A.

B. Kline's Petition Fails to Satisfy the Standard for Granting En Banc Reconsideration.

1. Reconsideration is Not Necessary to Maintain or Secure Uniformity With Prior Court Decisions.

Kline's Petition asserts that reconsideration is necessary for uniformity of decisions under *SIIS v. Perez*, 116 Nev. 296 (2000) and *Flamingo Hilton v. Gilbert*, 122 Nev. 1279 (2006). (Pet. at 8-9.) Yet, Kline concedes "the Decision does not state that the specific outcome in *Perez* and *Gilbert* have been explicitly overruled . . . ." Neither *Perez* nor *Gilbert* were raised on appeal so of course, as conceded by Kline, they are not addressed in the Panel's Order of Affirmance or any other decision issued during the course of this appeal. (*See* Order of Affirmance.) With neither case discussed on appeal, and neither case the subject of a decision on appeal, Kline's assertions that reconsideration is necessary or these cases will be seriously undermined is misplaced and incorrect.

Again, neither case was raised by Kline on appeal and cannot be raised for the first time on appeal. (*See generally* Record on Appeal ("ROA"); Appellant's

Opening Brief ("AOB"), and Appellant's Reply Brief ("ARB"). Notwithstanding, when Kline did raise *Gilbert* for the first time in her Petition for Rehearing, which was improper under NRAP 40(c)(1), the *Gilbert* case was addressed in the briefing by the parties and considered by the Panel and ultimately rehearing was denied. (Pet. for Rehearing at 3; Answer to Pet. for Rehearing at 4-5.) Nothing has changed since the Order Denying Rehearing was entered on September 27, 2022. (Order Denying Rehearing.)

Finally, even if Kline could get around the fact that these cases were not the subject of this appeal and not addressed in briefing or decisions during the course of the appeal, in any event the cases are inapposite to the issue presented in this appeal which involves the question of whether the Appeals Officer Decision appropriately apportioned Kline's permanent partial disability ("PPD") award under the then applicable version of NAC 616C.490 and NRS 616C.490(9).[1]

[1] Kline's Opening Brief for her Petition for Judicial Review sets forth the issues on appeal as, "1.Whether the Appeals Officer's Decision and Order which reversed the Hearing Officer's Decision dated July 19, 2018 and affirming the underlying determinations dated May 24, 2018 and June 13, 2018 as the result of reversible error of law? 2. Whether the Appeals Officer committed reversible error by not following Nevada law? 3. Whether the Appeals Officer's Decision and Order finding that the Petitioner's PPD award must be apportioned 75% as pre-existing is not supported by the substantial evidence and results in an abuse of discretion?") (I AA 144.) Kline's Opening Brief in her appeal to the Nevada Supreme Court reiterates the issue on appeal is whether the apportionment of the PPD award from 25% down to 6% was a clear error of law/abuse of discretion and adds in whether S.B. 289 Section 1, which modified NRS 616C.40 and removes NAC 616C.490, applies to open claims. (AOB at 1-2.)

Perez involved the question of whether Perez should be deemed to have a permanent total disability based on the "odd-lot" doctrine. *Perez*, 116 Nev. at 297-299, 994 P.2d at 723-725. The holding in *Perez* was that "we do not construe the requirement in NRS 616C.390(4) for medical testimony to be a jurisdictional requirement for reopening a claim" and "[f]urthermore, we conclude that the letter to Ms. Martinez from Perez's attorney qualifies as an application for reopening the claim." *Id.*at 229-300, 994 P.2d at 725. As such, "[w]e conclude that the appeals officer had jurisdiction to review this de facto denial, and that the appeals officer's findings were supported by substantial evidence." *Id.* at 300, 116 Nev. at 725. While there is a reference to claim closure with the acceptance of a PPD lump sum award in *dicta*, that was not the issue in this case; rather, the issue was whether "the appeals officer had no jurisdiction to consider the claim for permanent total disability because Perez failed to seek re-opening via the formalities required by NRS616C.495(2) and that Perez's letter seeking re-opening was deficient because it made no reference to any medical evidence." *Id.* at 298, 994 P.2d at 723-24.

Next, the issue in *Gilbert* is stated by the Court as "[i]n this appeal, we determine whether a workers' compensation claimant's administrative appeal—from the closure of his claim without continued maintenance care—is barred by his failure to designate, in his appeal form, the first notice informing him of the claim's closure, rather than a subsequent notice." *Gilbert,* 122 Nev. at 1280, 148 P.3d at

739. The holding in *Gilbert* is "[a]s Gilbert timely administratively challenged the closure of his claim, and as substantial evidence supports the appeals officer's determination that Gilbert had demonstrated a need for continued medication, we affirm the district court's order denying judicial review." *Id*. at 1284, 148 P.3d at 741.

The instant appeal involves ***whether apportionment under NAC 616C.490 and NRS 616C.490 was proper***, ***not claim closure***. The Order of Affirmance confirms Kline "failed to challenge the claim closure date below, she waived any such argument regarding a different claim closure date." (Order of Affirmance at 3.) Further, 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.) Thus, contrary to Kline's assertions that the letters Kline did appeal "put into question whether the claim was closed," claim closure was only addressed in the April 4, 2018 letter, and the letters on appeal

only involved the PPD award ***and not claim closure***. This case is not like *Gilbert* where multiple claim closure letters were appealed.

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 en banc reconsideration.

Simply put, Kline's Petition impermissibly seeks to change the subject of the appeal from a challenge to the apportionment of a PPD award to a challenge of whether claim closure was proper. But the April 4, 2018, claim closure determination was never appealed and Kline never raised a challenge to the claim closure date set forth in the Appeals Officer Decision before the courts below. This is recognized in the Order of Affirmance and conceded in Kline's Petition for Rehearing. (Order of Affirmance at 3; Pet. for Rehearing at 3:24-28.)

As such, Kline's assertions that uniformity of the prior decisions in *Perez* and *Gilbert* is called into question here is plain wrong. Kline's basis for this assertion is specific to the issue of claim closure, ***not apportionment***, ***and claim closure is not***

on appeal. The claim closure letter was not appealed within the statutory timeframe for an appeal, and Kline failed to challenge claim closure below and waived the argument. With no case law on the issue of apportionment identified by Kline in her Petition, there is no issue as to uniformity of prior decisions or statutes as to the issue on appeal of apportionment of a PPD award.

2. This Proceeding Does not Involve a Substantial Precedential, Constitutional, or Public Policy Issue.

Kline also asserts that the Order of Affirmance issued by the Panel "involve[s] a substantial precedential and public policy issue, with a potential impact beyond the litigants involved herein, on an issue of first impression." (Pet. at 2.) The only discussion in support of this proposition is "[i]f the 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." (emphasis added).

As discussed herein, Kline did not appeal the claim closure letter, the claim closure letter is not on appeal, and the issue of claim closure was waived and not raised on appeal until Kline's Petition for Rehearing. (*See supra,* Part B.1.) As such, the Order of Affirmance by the Panel, and underlying Appeals Officer Decision on appeal, ***have no impact on claim closure.*** For this reason, with claim closure not at

issue, the concerns raised as to public policy, additional litigation and use of judicial resources is misplaced.[2]

Further, while Kline does not address the issue of apportionment at all in the Petition, it must be noted that Kline's claim is for an injury that occurred on June 25, 2015. (III AA 659.) Kline's claim closed on the date of her PPD evaluation with Dr. Jempsa on May 8, 2018. (I AA 195.) The change in law under S.B. 289 became effective on May 31, 2021 and applies to claims open as of the date. (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.") With the Order of Affirmance and underlying decisions addressing the prior versions of NRS 616C.490 and NAC 616C.490, there is no precedential issue involved as this old law applicable to Kline's older claim has since been amended and the new law applies to claims going forward.[3]

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[2] Even if claim closure was at issue, that would not have any impact on judicial resources as injured workers already appeal every determination letter issued and, as demonstrated by *Gilbert*, Gilbert appealed all three letters addressing claim closure. Claim closure is almost always appealed therefore the courts already deal the volume of cases generated from claim closure notices.

[3] While the Order of Affirmance indicated it declined to address retroactive application of NRS 616C.490, the Panel did consider 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 Panel confirmed that the statutory amendments do not apply retroactively to closed claims. The Panel 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 of Affirmance at 3-4.) As such, the Court addressed

C. The Claim Closed for All Purposes and There is No Such Thing as a Carve Out for a PPD Benefit.

Kline's Petition reiterates her many different arguments for why and how the claim did not close. It is Respondents' position that the Order of Affirmance got this issue right and claim closure was never raised on appeal by Kline, was not challenged, and was waived by Kline and cannot be revisited now. (Order of Affirmance at 3-4; *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).) Nor can the amendments under S.B. 289 apply to this closed claim as argued by Respondents. (Order of Affirmance at 4; RAB at 31-37.)

Further, while Kline for the first time in her Petition for Rehearing raised the argument that claim closure carves out an exception for a PPD benefit in accordance with *Gilbert* and stays open for that limited purpose, that argument was presented, considered, and denied. (Pet. for Rehearing at 2-5; Answer to Pet. for Rehearing at 8-10; Order Denying Rehearing.) To reiterate, there is no such thing as an exception to claim closure for a PPD benefit. 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,

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and decided the merits of whether S.B. 289 applies prospectively or retroactively with respect to Kline's claim.

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(2). 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 or until the PPD award was accepted in lump sum form.

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 argument is contrary to the applicable law on PPD awards.

D. The Court Has Not Overlooked NRS 616C.495(2) or NRS 616C.235.

Finally, Kline asserts that the Panel overlooked NRS 616C.495(2) and NRS 616C.235. This is not correct. NRS 616C.235 deals with claim closure and the Panel found that the claim closed as May 8, 2018 as set forth in the Appeals Officer

Decision and there was no challenged to claim closure, which would be under NRS 616C.235. (Order of Affirmance at 3.) Nor was NRS 616C.495(2) overlooked, rather, as explained above, a PPD award does not have to be accepted to close the claim. Rather, closure occurs when noticed as set forth in NRS 616C.235 which was done here in the April 4, 2018 determination letter that was not appealed by Kline.

CONCLUSION

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

Dated: November 17, 2022. McDONALD CARANO LLP

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer to Petition for En Banc Reconsideration complies with the formatting requirements of NRAP 32(a)(4), typeface requirements of 32(a)(5) and type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I certify that this Answer complies with the type volume limitation of NRAP 40A(d) as it contains 4,411 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this Answer, 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 petition 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 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 petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 17, 2022. McDONALD CARANO LLP

By: */s/ Lisa Wiltshire Alstead*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano LLP; that on November 17, 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:

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Dated: November 17, 2022.

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