IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CCMSI, Appellant, vs. ROBERT HOLLAND Respondent.	CASE NO.: 82843

RESPONDENT'S ANSWERING BRIEF

DANIEL L. SCHWARTZ, ESQ.
L. MICHAEL FRIEND, ESQ,
LEWS BRISBOIS BIGAARD & SMITH
2300 West Sahara Avenue
Suite 900, Box 28
Las Vegas, Nevada 89102
Attorneys for Appellant
LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CCMSI

LISA M. ANDERSON, ESQ.
GGRM LAW FIRM
2770 South Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorney for Respondent
ROBERT HOLLAND

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS

I

STATEMENT OF THE ISSUE

This is a workers' compensation appeal. At issue before the Court is whether the District Court's Order Granting Petition for Judicial Review REVERSING the Appeals Officer's Decision and Order that had affirmed Appellant's determination denying liability for the May 26, 2019 claim for the occupationally related heart disease is supported by substantial evidence in the record and is devoid of legal error.

II

STATEMENT OF THE CASE

Respondent filed a claim for workers' compensation benefits for occupationally related heart disease. On July 23, 2019, Appellant notified Respondent that liability was denied for his workers' compensation claim. Respondent timely appealed Appellant's claim denial determination. On July 27, 2020, the Appeals Officer affirmed Appellant's claim denial on the grounds that Respondent failed to correct predisposing conditions that were within his ability to correct when so ordered in writing to correct. Respondent timely filed a Petition for Judicial Review to the District Court. On April 5, 2021, the District Court granted Respondent's Petition for Judicial Review by reversing the Appeals Officer's Decision and Order. In doing so, the District Court found that, pursuant

to NRS 233B.135, the Appeals Officer's decision was not supported by substantial evidence. Specifically, the District Court concluded that there was insufficient documentation in the record that correcting the predisposing conditions was within Respondent's ability as contemplated by NRS 617.457(11). Appellant timely appealed the Order Granting Petition for Judicial Review to the Nevada Supreme Court. Appellant also filed a Motion for Stay, which was denied.

III

STATEMENT OF THE FACTS

On or about May 26, 2019, Respondent reported the onset of a disabling occupational disease of the heart that was contracted while in the course and scope of his employment as a police officer with Appellant. Respondent had been employed with Appellant for approximately twenty-five (25) years (since September 11, 1987) before retiring (December 29, 2012) and subsequently filing this claim in 2019.

Respondent timely notified Appellant of the disabling occupational disease of the heart and sought medical care from Summerlin Hospital Medical Center.

On May 29, 2019, Respondent was admitted to Summerlin Hospital Medical Center, where he remained hospitalized until being discharged on June 4, 2019. Dr. Dost Wattoo diagnosed three (3) vessel coronary artery disease with stinting following two (2) heart attacks. Dr. Wattoo completed a C-4 form and confirmed

that Respondent's disabling heart disease condition was directly related to his employment. Dr. Wattoo reported that Respondent was totally disabled from May 27, 2019 through June 17, 2019. Dr. Wattoo confirmed that further medical treatment was necessary. (Appellant's Appendix pages 167-194)(hereinafter "APP page ____")

On July 20, 2019, Appellant's unnamed medical director suggested that Respondent's May 26, 2019 claim for occupational heart disease was not compensable pursuant to NRS 617.440 or NRS 617.457. The medical director suggested that corrective action was given at the time of his annual physical examinations to "stop his testosterone therapy as it can contribute to heart disease." (APP page 195)

On July 23, 2019, Appellant notified Respondent that liability was denied for the May 26, 2019 claim for occupational heart disease. Appellant advised Respondent that he did not meet the requirements for a claim for heart disease, occupational disease, or industrial injury. Appellant also advised that it was not shown that Respondent's condition arose out of the course and scope of his employment. (APP pages 196-199)

Respondent timely appealed Appellant's July 23, 2019 determination to the Hearing Officer.

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On September 17, 2019, the Hearing Officer (2001960-JK) affirmed Appellant's July 23, 2019 determination denying liability for the May 26, 2019 claim for occupational heart disease. The Hearing Officer concluded that Respondent failed to correct predisposing conditions. (APP pages 200-201)

Respondent timely appealed the Hearing Officer's September 17, 2019 Decision and Order to the Appeals Officer.

On March 6, 2020, the Appeals Officer issued an Order for Briefing Schedule to the parties. (APP pages 40-41)

On April 7, 2020, Respondent filed his Closing Brief. Respondent argued that he had been diagnosed with a disabling disease of the heart and had attained the minimum length of employment requirement to qualify for the conclusive presumption for claim compensability under NRS 617.457. Respondent also argued that he was never advised during any of his annual physical to discontinue testosterone therapy nor was testosterone therapy ever identified as a predisposing condition or a corrective measure. Lastly, Respondent argued that his annual physical from 2008 and to his 2012 retirement proved that he took the necessary steps to correct his predisposing conditions. (APP pages 33-39)

On May 4, 2020, Appellant filed its Written Closing Argument. Appellant argued that Respondent "continuously" failed on multiple occasions to correct predisposing conditions. (APP pages 23-32)

On May 21, 2020, Respondent filed his Reply Brief. Respondent replied to Appellant's argument that he repeatedly and continuously failed to correct predisposing conditions by pointing out that Respondent's cholesterol and triglyceride levels steadily declined to a normal range. In fact, the 2012 annual physical confirmed that the only predisposing condition identified was abnormal hearing even though his triglycerides were slightly elevated. Since Respondent's predisposing conditions had been correct to the point where the physician conducting the 2012 annual physician no longer identified cholesterol or triglycerides as needing correction, Respondent reiterated that he qualified for the conclusive presumption for claim compensability under NRS 617.457. (APP pages 17-22)

On July 27, 2020, the Appeals Officer affirmed the Hearing Officer's September 17, 2019 Decision and Order affirming Appellant's July 23, 2019 claim denial determination. The Appeals Officer concluded that Respondent was precluded from the conclusive presumption because he failed to correct predisposing conditions. The Appeals Officer based its conclusion on laboratory results that his triglycerides were elevated during the 2011 and 2012 annual physicals, as well as while hospitalized in 2019 due to the cardiac event that is the subject of these proceedings. The Appeals Officer also cited a statement from the discharging physician in 2019 that testosterone might precipitate his heart disease.

(APP pages 3-12)

It is from the Appeals Officer's Decision and Order dated July 27, 2020 that Respondent appealed.

Upon reviewing the record and considering the briefs, the District Court granted Respondent's Petition for Judicial Review. The District Court found that, pursuant to NRS 233B.135, the Appeals Officer's decision was not supported by substantial evidence in the record. The District Court concluded that there was no documentation in the record that correcting the predisposing conditions was within Respondent's ability as contemplated by NRS 617.457(11). Thus, Appellant failed to meet its burden to prove that Respondent did not take corrective action to lower his cholesterol and triglycerides. Further, the District Court found that the written corrective recommendations by the annual physical examiners were much too general in nature and insufficient to effect change. The record did not contain sufficient documentation that correcting the predisposing conditions were within Respondent's ability to correct as contemplated by NRS 617.457(11). It was also identified that Respondent was given a clean bill of health during the relevant period of 2008 to 2012. Finally, the District Court concluded that no medications had been prescribed or recommended for the elevated levels and that Respondent engaged in diet and exercise to correct his elevated levels, suggesting that he may have been incapable of correcting the predisposing conditions through

diet and exercise alone. (APP pages 421-426)

Appellant filed a Notice of Appeal to the Nevada Supreme Court on April 27, 2021. (APP pages 466-469). Appellant filed a Motion for Stay on April 16, 2021. (APP pages 427-446) On June 7, 2021, the District Court denied Appellant's Motion for Stay. (APP pages 477-482)

IV

ARGUMENT

A. Standard of Review

In contested workers' compensation claims, judicial review first requires an identification of whether the issue to be resolved is a factual or legal issue. While questions of law may be reviewed de novo by this Court, a more deferential standard must be employed when reviewing the factual findings of an administrative adjudicator. NRS 233B.135, which governs judicial review of a final decision of an administrative agency, provides, in pertinent part, the following:

> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision

of the agency is:
(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

Relating to the standard of review of administrative decisions, this Court has consistently held that the factual findings made by administrative adjudicators may not be disturbed on appeal unless they lack the support of substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); SIIS v. Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990). Thus, "the central inquiry is whether substantial evidence in the record supports the agency decision." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 583, 854 P.2d 862, 865 (1993). Substantial evidence is that "quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion." Employment Security Dept. v. Cline, 109 Nev. 74, 847 P.2d 736 (1993); State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary and capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850, 854 (2000). The Court must defer to an

agency's findings of fact only as long as the findings are supported by substantial evidence. Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

In addition, this Court has held that its "role in reviewing an administrative decision is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." Clements v. Airport Auth., 111 Nev. 717, 722, 896 P.2d 458, 461(1995). Thus, in reviewing the Appeals Officer's Decision and Order, a reviewing court should refrain from retrying the case and is confined to reviewing the record on appeal to determine whether substantial evidence exists to support the Appeals Officer's decision.

While a reviewing court defers to an agency's findings of fact as long as those findings are supported by substantial evidence, purely legal questions may be determined without deference to an agency determination, upon de novo review. SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218 (1992). See NRS 233B.135(3)(f). Furthermore, the construction of a statute is considered a question of law, subject to de novo review. See State Dep't of Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d 1274, 1249 (1994).

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In the present case, the record did not support the Appeals Officer's decision affirming claim denial and is an incorrect interpretation and application of Nevada law. Accordingly, the District Court properly reversed the administrative decision made by the Appeals Officer.

B. The Appeals Officer's Decision and Order Lacked Support in the Form of Substantial Evidence and was Arbitrary and Capricious and Thus an Abuse of Discretion that Warranted Reversal by the District Court

In the underlying Decision and Order for the present appeal regarding claim denial, the Appeals Officer improperly applied NRS 617.457(11) when concluding that Respondent surrendered his right to the conclusive presumption for claim compensability due to his failure to correct predisposing conditions that were not within his ability to correct. Appellant failed to present any evidence, let alone substantial evidence, that the correction of predisposing conditions was within Respondent's ability to correct.

Appellant argues that it will prevail upon the merits of the appeal because the District Court's decision reweighed the evidence and added new requirements to claims filed under NRS 617.457. The parties do no dispute that Respondent satisfied the criteria under NRS 617.457(1) for claim compensability. At issue is whether Respondent failed to correct predisposing conditions that were within his ability to correct when ordered in writing to correct, as outlined in NRS 617.457(11). The District Court's Order Granting Petition for Judicial Review

concluded that the Appeals Officer's Decision and Order was not supported by substantial evidence in the record.

The Nevada Supreme Court in Manwill v. Clark County, 162 P.3d 876, 123 Nev. 28 (2007) held a claimant has no burden to disprove the failure to correct predisposing conditions did not lead to Claimant's heart disease under NRS 617.457(11), or that no predisposing conditions exist, to receive the benefits under NRS 617.457. *See*, 123 Nev. 238, 242-44 (2007). The predisposing conditions section under NRS 617.457 has existed since 1973. NRS 617.457(11); *see*, 1973 Nev. Stat. ch. 504, § 1, at 769. In 1989, the Nevada legislature set the current conclusive presumption found in NRS 617.457(1). 1989 Nev. Stat. ch. 480, § 2, at 1021. Since that time, the Nevada legislature has only expanded the ability for claims under NRS 617.457 to be accepted. *Compare* NRS 617.457(1989) *with* NRS 617.457(2017); *see also*, Manwill, 123 Nev. 238; Gallagher v. City of Las Vegas, 114 Nev. 595, 601, 959 P.2d 519, 522 (1998).

The Manwill Court knew the existence of, and failure to correct, predisposing conditions would exclude a claimant from benefits under NRS 617.457. Manwill, 123 Nev. 238, 242-43. However, the Court found an injured worker has absolutely no burden to show they do not have any predisposition conditions and/or had the ability to correct them but failed to do so. *See*, *Id.* at 244. If such a burden and requirement existed, then the Nevada Supreme Court would

have listed it as such, but instead merely requires Petitioner to "show only two things: heart disease and five years' qualifying employment before disablement." *Id.* at 242-44. The injured worker in Manwill did not have to show the correction of a predisposing condition within their ability to correct nor did he have to show no predisposing conditions existed. *Id.*

As such, it is the opposing party's burden to meet the requirements under NRS 617.457(11) to exclude a claimant from receiving the benefits under NRS 617.457, which states:

NRS 617.457(11) provides:

> Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to a physical examination required pursuant to subsection 4 or 5 excludes the employee from the benefits of this section if the correction is within the ability of the employee.

The plain and ordinary language of the statute shows the opposing party is required to prove five elements: 1) the claimant has a predisposing condition(s); 2) the predisposing condition(s) lead to heart disease; 3) the claimant was ordered, in writing, by the examining physician to correct the predisposing condition(s); 4) the written order was given subsequent to a physical examination required pursuant to subsection 4 or 5; and 5) the ordered correction is within the ability of the employee to perform. NRS 617.457(11).

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The Nevada Supreme Court provided a more in-depth interpretation NRS 617.457(11) in Emplrs. Ins. Co. of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d. 1024 (2006). In Daniels, the Supreme Court applied the conclusive presumption of NRS 617.457, holding that the employer had the burden to defend a claim for industrial disease using NRS 617.457(11), stating "An employer can defend a claim by showing that the employee failed to correct a predisposing condition". *Id* at 1029. Nevada's higher courts have heard subsequent matters on predisposing conditions, including most recently City of Las Vegas v. Burns, No. 76099-COA 2019 WL 6003344 (Nev. Ct. App. Nov. 13, 2019). Ultimately the holdings in these matters reflect interpretation of NRS 617.457(11) based on the plain and ordinary language of the statute, giving each and every word full force and effect. The higher courts have held that if an injured worker's efforts were insufficient to satisfy a correction of any potentially predisposing conditions, the burden of proof rests with the opposing party to show that the corrections were within the injured worker's ability. Further, the language of the court's holding in Burns reflects that the corrections must fall within the ability of the specific injured worker; Burns was expected to perform corrections within Burns' ability, not a firefighter's ability.

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Here, Respondent maintains that his annual physical examinations show a consistent effort, however unsuccessful it may have proven, to control predisposing conditions. The Appeals Officer ruled under Conclusion of Law 12 that Respondent "offered no evidence" to prove that he took steps to correct the predisposing conditions that were within his ability to correct. Any attempt by the Appeals Officer or Appellant to force Respondent to prove his actions on the correction of predisposing conditions would constitute a shift of the burden on predisposing conditions to Respondent, under the standards of Daniels and Burns. Under Daniels and Burns, Respondent bears no burden to show by evidence the attempts to resolve his predisposing conditions under the order of his annual physicals. Instead, it is Appellant who must prove up their own argument and must adduce evidence that Respondent did not follow orders to correct predisposing conditions, and that those orders were within Respondent's ability to correct.

Respondent's annual physicals leading up to his retirement simply do not support the Appeals Officer's assertion that Petitioner failed to correct predisposing conditions that were within his ability to correct. Normal cholesterol is 200. Normal triglycerides are 150. Optimal LDL is under 100 while near optimal/above optimal is between 100 and 129. The acceptable range for HDL is 40-60. These figures are contained in the blood work portion of his annual

physicals. (APP page 320)

	2008	2009	2010	2011	2012
Cholesterol	188	223	189	186	186
Triglycerides	175	177	130	159	181
LDL	125	153	128	117	120
HDL	28	35	35	37	30

Respondent's 2008 annual physical showed mildly elevated triglycerides (175). Respondent was notified in writing that his triglycerides were elevated, and a low-fat diet was encouraged. (APP page 203)

Respondent's 2009 annual physical showed a slight increase of the previous year's triglyceride level at 177. However, the only "corrective action" identified by the attending physician was to use "hearing protection" for his hearing loss. There was no recommendation for correct action for his triglycerides in 2009. (APP page 226)

Then in 2010, Respondent's triglyceride level was 130, below the "normal" designated number of 150. (APP page 256) Despite not being advised after his 2009 annual physical to take correct action to lower his triglycerides, Respondent, on his own, continued to diligently adhere to lifestyle changes to lower his triglycerides, which proved very successful in 2010.

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During the 2011 annual physical, Respondent was notified that his triglycerides were mildly elevated at 159. Petitioner was encouraged to adopt a low-fat diet. (APP pages 276- 277)

Finally, Respondent's 2012 annual physical revealed a slight increase in his triglyceride level to 181. Respondent was again encouraged to adopt a low-fat diet and increase cardiovascular activity. (APP page 304-305) Respondent's 2012 annual physical coversheet signed by the attending physician confirms that the only predisposing condition indicated with an 'X" was abnormal hearing. (APP page 302)

Based upon the annual physicals from 2008 to his 2012 retirement, Respondent took appropriate measures, whenever instructed to do so in writing, to correct any predisposing conditions that required corrective action that led to his occupationally related heart diseases. Respondent made lifestyle changes involving diet and exercise to lower his triglycerides. As part of his occupation, Respondent remained in top physical condition. His weight remained consistent without any weight reduction recommendations. Respondent engaged in a healthy lifestyle without physician involvement nor a need for prescribed medication. Moreover, when Respondent was diagnosed with hypertension, he immediately went on and complied with a medication regimen.

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These physicals verify minimally elevated triglyceride levels that fluctuated slightly during this period. This period fails to show negligent behavior that should eliminate the conclusive presumption for clam compensability. NRS 617.457(11) does not require absolute correction of predisposing conditions, but instead placed a qualifier on the issue by including the phrase that it must be within Respondent's "ability to correct." While not entirely successful, Respondent's failure to consistently attain normal levels of triglycerides demonstrates that it was not entirely within his ability to correct his triglycerides. Clearly, Respondent's annual physicals do not support the Appeals Officer's conclusion as substantial evidence of a failure to correct predisposing conditions.

Additionally, the District Court did not add new requirements to NRS 617.457(11). Instead, the District Court identified specific examples of what might have qualified as substantial evidence. Since Appellant failed to produce a scintilla of evidence that the correction of Respondent's predisposing conditions was within his ability to correct, the District Court merely identified examples. As evidence, Appellant relies on Respondent's annual physicals that reveal a fluctuation in predisposing conditions. The fact that Respondent was unable to totally correct the predisposing condition is evidence itself that it was not within his ability to correct the predisposing conditions. The bottom line is that Appellant failed to produce any evidence whatsoever that it was within Respondent's ability to correct the

predisposing conditions, and, therefore, the Appeals Officer's Decision and Order is not supported by substantial evidence in the record.

The Appeals Officer also ruled that Respondent's triglycerides were elevated at the time of the claim for workers' compensation benefits was filed in 2019. While it is accurate that Respondent's triglycerides were elevated at the time of the cardiac event and claim filing, this does not qualify statutorily as a rebuttable argument to the conclusive presumption for claim compensability under NRS 617.457(11). The blood panel referenced by the Appeals Officer and Appellant was approximately seven (7) years after his retirement. There is no laboratory documentation for Respondent's triglycerides between his 2012 retirement physical and his 2019 cardiac event. Just the same, there is no written statements of corrective action for this period either. NRS 617.457(11) requires failure to comply with written corrective action. In light of no written corrective action after 2012, the 2019 triglyceride level detected at the time of the cardiac event that led to the filing of this claim does not satisfy the requirements set forth under NRS 6517.457(11) to rebut the conclusive presumption for claim compensability attained by Petitioner.

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V

CONCLUSION

Based on the foregoing law and argument, Respondent respectfully requests that this Honorable Court's AFFIRM the Order Granting Petition for Judicial Review of the District Court that reversed the administrative decision of the Appeals Officer that upheld Appellant's claim denial determination because Appellant failed to satisfy its responsibility under NRS 617.457(11). Thus, the decision of the Appeals Officer is not supported by substantial evidence and was properly reversed.

DATED this 16th day of December, 2021.

GGRM LAW FIRM

By _____

LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
2770 South Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorneys for Respondent
ROBERT HOLLAND

DISCLOSURE STATEMENT

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 judges of this court may evaluate possible disqualification or recusal.

There is no corporation as defined in Rule 26.1(a) involved in this matter.

The law firm of GGRM Law Firm and its partners and associates are the only attorneys for the Respondent.

DATED this 16th day of December, 2021.

GGRM LAW FIRM

By _____
LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
2770 South Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorneys for Respondent
ROBERT HOLLAND

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Respondent's Answering 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 in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I hereby certify that this brief complied 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). This brief has been prepared in proportionally spaced typeface using Word in Times New Roman 14-point font and contains 4825 words.

I further certify that this brief complies with the page- or type-volume limitation of NRAP 32(a)(7) in that it does not exceed thirty (30) pages.

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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 16th day of December, 2021.

GGRM LAW FIRM

By _____

LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
2770 South Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorneys for Respondent
ROBERT HOLLAND

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 2021, I served the foregoing Appellant's Opening Brief, upon the following person(s), by depositing a copy of same in a sealed envelope in the United States Mail, postage pre-paid, to the following and that I also caused the foregoing document entitled RESPONDENT'S ANSWERING BRIEF to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

Daniel L. Schwartz, Esq.
L. Michael Friend, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
2300 West Sahara Avenue
Suite 900, Box 28
Las Vegas, Nevada 89102

An Employee of GGRM LAW FIRM