IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,

Appellants,

v.

STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS; AND STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS,

Respondents.

Supreme Court Case No.: 83262

District Court Case No.: A-20-821892-J

APPELLANTS' APPENDIX VOLUME II

INDEX TO APPELLANT'S APPENDIX

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Transmittal of Administrative Record on Appeal, filed November 9, 2020[2]	I	00154-00157

[2] The documents contained in the Record on Appeal are indexed individually in alphabetical order. The documents, however, were arranged chronologically in the Record on Appeal which is how they are presented attached hereto.

NEOJ

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an "Order" was entered in the above-captioned matter on June 21, 2021, a true and correct copy of which is attached hereto.

DATED this 22nd day of June, 2021.

///

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Respectfully submitted,

DIVISION OF INDUSTRIAL RELATIONS

By: _____

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
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Las Vegas, NV 89102
Attorneys for Respondent Division of Industrial Relations

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Division of Industrial Relations, and that on this 22nd day of June, 2021, I caused the foregoing document entitled **Notice of Entry of Order** 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 District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-02 and the NEFCR.

_____

An employee of the State of Nevada
Division of Industrial Relations

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **ORDER GRANTING RESPONDENT DIVISION OF INDUSTRIAL RELATIONS' MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW**

The matters before the Court are Respondent Nevada Division of Industrial Relations' ("Division") Motion to Dismiss Petitioners' Petition for Judicial Review, and Respondent State of Nevada Board for the Administration of the Subsequent Injury Account for Self-Insured Employers' ("Board") Joinder thereto. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral arguments of counsel on June 7, 2021, and good cause appearing, hereby rules as follows:

I. FINDINGS

1. Respondent Division moved to dismiss Petitioners' Petition for Judicial Review on two bases: first, Petitioners failed to transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency as required by NRS 233B.131(1)(a), and second, Petitioners failed to timely file their Memorandum of Points and Authorities as required by NRS 233B.133(1).

2. NRS 233B.131(1)(a) provides that "Within 45 days after the service of the petition for judicial review or such time as is allowed by the court: (a) The party who filed the petition for judicial review **shall** transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency." (Emphasis added).

3. NRS 233B.131(1)(b) provides that "Within 45 days after the service of the petition for judicial review or such time as is allowed by the court: (b) The agency that rendered the decision which is the subject of the petition shall transmit to the reviewing court the original or a certified copy of the **remainder** of the record of the proceeding under review." (Emphasis added).

4. Petitioners filed their Petition for Judicial Review on September 24, 2020. Thus, pursuant to the controlling statute, NRS 233B.131(1)(a), Petitioners' deadline to transmit the transcript to the Court was November 9, 2020.

5. It is undisputed that the Petitioners never transmitted the transcript to the Court.

6. It is undisputed that the Petitioners filed their Opening Brief 105 days late and that said Brief lacks citations to the transcript of the administrative proceeding under review.

7. The record of the underlying administrative proceeding is incomplete due to Petitioners' failure to transmit the transcript to the Court.

8. As a result of the incomplete record, and of Petitioners' failure to cite to the transcript in their late-filed Opening Brief, this Court cannot conduct a judicial review based upon the whole record as required by NRS 233B.135.

. . .

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9. On November 9, 2020, the Respondents timely transmitted to the court the remainder of the record pursuant to NRS 233B.131(1)(b).

10. The requirements of NRS 233B.131(1)(a) and (b) are mandatory because the statute employs the word "shall." Thus, the Petitioners' failure to transmit the transcript to the court renders their Petition for Judicial Review subject to dismissal.

11. NRS 233B.131(1)(a) is plain and unambiguous, yet Petitioners failed to comply with their 45-day statutory deadline. Moreover, Petitioners position, in their written Opposition to the Division's Motion to Dismiss, and during the oral argument—that they are not required to transmit the transcript to the court—is contradicted by the plain and unambiguous language of the statute. As of June 7, 2021—the date of the hearing on the Division's Motion to Dismiss—Petitioners were 211 days past their statutory deadline to transmit the transcript to the Court.

12. Good cause for a delay in transmitting the transcript, however, may be shown pursuant to NRS 233B.131 because the statute allows the court to alter the 45-day deadline. Thus, the 45-day deadline is not jurisdictional.

13. Petitioners' argument that Respondents were statutorily required to file the *complete* record of the underlying administrative proceeding is contradicted by the structure and plain and unambiguous language of NRS 233B.131, the controlling statute. Petitioners' position is erroneous as a matter of law. Indeed, the legislative history of the 2015 amendment to NRS 233B.131 shows that the underlying policy for requiring petitioners to transmit the transcript to the court was to decrease the burden on taxpayers.

14. Petitioners have not met their burden to show good cause for their ongoing delay to transmit the transcript to the Court.

15. Mr. Price did not provide the Court with an affidavit or declaration specifying how his medical condition affected his ability to comply with statutory requirements during the intervening 211 days. The Court assumes that he had a serious medical condition but finds the effects of the condition vague.

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16. Moreover, two other attorneys from Mr. Price's law firm are listed on the Court's electronic service list for this case.

17. Petitioners bear the burden to show good cause, but they have not met their burden under the *Scrimer* factors. *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000).

18. Furthermore, Petitioners' extensive unexcused delay is mooted by their position that they are not statutorily required to transmit the transcript to the Court.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Respondent Division's Motion to Dismiss Petitioners' Petition for Judicial Review and the Board's Joinder thereto are GRANTED.

DATED this _____ day of _____, 20___ Dated this 21st day of June, 2021

HON. JUDGE JOE HARDY, JR.

F18 060 65D6 31EC
Joe Hardy
District Court Judge

Respectfully submitted by:
DIVISION OF INDUSTRIAL RELATIONS

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Approved as to form and content by:
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DISTRICT COURT

CLARK COUNTY, NEVADA

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; and CANNON COCHRAN MANAGEMENT SERVICES, INC., Petitioners, v. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	CASE NO.: A-20-821892-J DEPT. NO.: 15 **HEARING REQUESTED**

MOTION FOR RECONSIDERATION OF ORDER GRANTING RESPONDENT DIVISION OF INDUSTRIAL RELATIONS' MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW; AND REQUEST FOR ORDER SHORTENING TIME

COME NOW Petitioners, LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., (hereinafter referred to as the "Petitioners"), by and through their attorneys, DANIEL L. SCHWARTZ, ESQ., KIM D. PRICE,

ESQ. and JOEL P. REEVES, ESQ. of LEWIS BRISBOIS BISGAARD & SMITH LLP, and hereby files the instant Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review.

This Motion and Request for Order Shortening Time is made and based upon the papers and pleading on file herein and any argument of counsel on this matter.

DATED this 7 day of July 2021.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

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AFFIDAVIT IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, JOEL P. REEVES, ESQ., do herby swear under penalty of perjury that the assertion of this affidavit are true, that:

1. Affiant is an attorney authorized and duly licensed to practice law in the State of Nevada and is one of the attorneys of record for Petitioners.

2. This affidavit is made in support of an ex-parte order shortening time for Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review to be heard.

3. Affiant has personal knowledge of all matters set forth herein, except those matters stated on information and belief, and is competent to testify thereto.

4. The above-named Affiant has good cause to request this Court for an Order Shortening time. The subject Order was filed on June 21, 2021. The Notice of Entry was filed on June 22, 2021. As such, any appeal to the Supreme Court will be due on or about July 22, 2021

5. If sent to master calendar, this matter will certainly be set for after Petitioners' date for appeal.

6. That the undersigned truly believes that this Court has been improperly persuaded as to what is required in Petitions for Judicial Review and that Your Honor should reconsider the subject June 21, 2021 Order before Petitioners file an appeal to the Supreme Court.

7. The undersigned fully recognizes that reconsideration is not to be requested absent extreme circumstances. However, the same is warranted in this case and this case should be reconsidered.

8. Affiant respectfully requests that this matter be set for a hearing with oral argument prior to July 22, 2021.

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9. This request for Order Shortening Time is made in good faith and not for the purpose of undue advantage:

Further Affiant sayeth naught.

DATED this 7 day of July 2021.

JOEL D. REEVES, ESQ.

SUBSCRIBED AND SWORN to before me this 7 day of July 2021.

NOTARY PUBLIC in and for said County and State

STEPHANIE JENSEN
Notary Public, State of Nevada
Appointment No. 16-3801-1
My Appt. Expires Nov 20, 2024

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED that the time of hearing of the above-entitled matter be, and the same will be heard, on July 28, 2021 in chambers in Dept. No. 18.

Dated this 13th day of July, 2021

DISTRICT COURT JUDGE

BD8 12D E5A9 DFAF
Joe Hardy
District Court Judge

Respectfully submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP
ATTORNEYS AT LAW

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MOTION FOR RECONSIDERATION

The present appeal stems from the Board for Administration of the Subsequent Injury Account for Self-Insured Employers' (hereinafter referred to as "the Board") August 19, 2020, Findings of Fact, Conclusions of Law, and Determination for Claim Number 12D34C229979.

On September 21, 2020, the handling attorney for the subject case for Petitioners underwent radical prostatectomy for prostate cancer. Follow-up care impeded counsel's ability to practice law full-time for several weeks following the procedure.

On September 24, 2020, Petitioners timely filed the subject Petition for Judicial Review contesting the August 19, 2020 Decision of the Board.

On November 9, 2020, the Record on Appeal was filed. On the front page of the Record it states as follows:

> Pursuant to NRS 233B.131, the STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF INSURED EMPLOYERS (SIA) now files **the entire record of the proceedings under review** by this Court as a result of the Petition for Judicial Review pursuant to NRS 233B.130 filed by LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., Respondents

(emphasis added)

On April 5, 2021, Petitioners filed their Opening Brief. *Petitioners' Brief contained citations to relevant records in the Record on Appeal.*

On May 5, 2021, Respondent Division of Industrial Relations filed a Motion to Dismiss and Strike. Petitioners opposed the same.

On June 7, 2021, Respondent's Motion came on for hearing and this Court granted the same. On June 21, 2021, the Order commemorating this Court's ruling was filed. The Notice of Entry was filed on June 22, 2021.

This Motion for Reconsideration ensues.

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II.

LEGAL ARGUMENT

1. Jurisdiction

NRCP 52(b) provides as follows:

> On a party's motion filed no later than 28 days after service of written notice of entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The time for filing the motion cannot be extended under Rule 6(b). The motion may accompany a motion for a new trial under Rule 59.

NRCP 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after service of written notice of entry of judgment." Finally, NRCP 60(b) provides as follows:

> Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

The timing for filing a motion under NRCP 60(b) is "within a reasonable time--and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later."

This Motion is timely and warranted, as will be explained below.

2. Petitioners Respectfully Request Reconsideration

In the June 21, 2021, this Court held that it was dismissing Petitioners' appeal because Petitioners did not file the complete Record on Appeal and because Petitioners did not timely file their brief. However, the burden is on the agency rendering the subject Decision to file the **complete** record on appeal and the Opening Brief is not due until the complete record has been filed **by the agency**. Further, even if Your Honor considers that Petitioners had a burden to submit a portion of the record,

the only portion allegedly missing was the transcript of the hearing and Petitioners have obtained that and attached it hereto. As for the filing of the brief, if Your Honor still finds that it was submitted late, Petitioners pray that this Court excuse that late filing for good cause.

a. The Complete Record Was Not Filed

This Court's ruling hinges on NRS 233B.131 which provides in pertinent part:

> **NRS 233B.131 Transmittal of record of proceedings to reviewing court by party and agency; shortening of or corrections or additions to record; additional evidence; modification of findings and decision by agency based on additional evidence.**
> 1. Within 45 days after the service of the petition for judicial review or such time as is allowed by the court:
> (a) The party who filed the petition for judicial review shall transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency.
> (b) The agency that rendered the decision which is the subject of the petition **shall** transmit to the reviewing court the original or a certified copy of **the remainder of the record of the proceeding under review.**
> The record may be shortened by stipulation of the parties to the proceedings. A party unreasonably refusing to stipulate to limit the record, as determined by the court, may be assessed by the court any additional costs. The court may require or permit subsequent corrections or additions to the record.

Of note, the statute ***requires*** the agency that rendered the Decision, in this case the Board, to "transmit to the reviewing court the original or a certified copy of **the remainder** of the record of the proceeding under review." (emphasis added) Therefore, if a petitioner files *anything* with the Court relative to the Record on Appeal, it is the Board's obligation to file whatever else was not filed by the petitioner to complete the subject Record on Appeal. If nothing is filed by the petitioner, it is ultimately the obligation of the agency that rendered the decision to transmit ***the entire*** record on appeal.

Further, as the Court's order hinges on the word "transcript," the full statutory citation is that, prior to the agency filing a complete record, a petitioner shall file a copy of "the transcript **of the evidence** resulting in the final decision of the agency." There is no separate mandate that the petitioner file any actual "transcript" of a hearing or anything like that. Further, it cannot be overstated that although the statute does state that the petitioner shall file a transcript of the evidence, if nothing is filed, it is ultimately the agency's obligation to submit the ***entire*** record on appeal.

What's more, NRS 233B.133 which deals with briefing in Petitions for Judicial Review even explicitly states that "[a] petitioner or cross-petitioner who is seeking judicial review must serve and file a memorandum of points and authorities within 40 days **after the agency gives written notice to the parties that the record of the proceeding under review has been filed with the court.**"

The undersigned's office *only* handles workers' compensation appeals. Indeed, the undersigned/affiant is the primary attorney in this office for appeals and is in District Court on a weekly if not daily basis handling workers' compensation appeals and petitioners ***never*** file anything relative to the Record on Appeal in workers' compensation petitions. It is not even just the undersigned's office. All other Petition for Judicial Review that the undersigned and all other attorneys in the undersigned's office have seen, whether it be from a claimant, an administrator, an employer, a seasoned attorney, or a pro se litigant, there have been *zero* petitions where the petitioner actually filed a record on appeal. **It is always the agency that files a complete record**. Consequently, the undersigned has seen *zero* dismissal for any party failing to file a record. It is always the state agency that must file the complete record. And if for some reason any party, say a pro per claimant, attempted to file something, the rendering agency would *still* transmit the entire record.

Under this Court's order, if a pro se litigant had attempted to file the subject appeal and did not submit anything, they would have been tossed out of court because they did not file something which they did not have. Indeed, Petitioners have now been tossed out of court for not filing something they did not have, a transcript of the actual hearing below. This would happen in EVERY SINGLE PETITION if that is the way NRS 233B.131 worked. Under this Court's current order, every single workers' compensation appeal currently pending in the Eighth Judicial District should be dismissed because the petitioners did not file anything relative to the record on appeal. However, that is not what the law requires. The law requires **the agency** to file the **complete** record.

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If Your Honor needed more proof, Petitioners would direct this Court to the first page of the Record on Appeal that was filed in this matter. On November 9, 2020, the Board filed what it purported to be the ***complete*** Record on Appeal with this Honorable Court:

> Pursuant to NRS 233B.131, the STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF INSURED EMPLOYERS (SIA) now files **the entire record of the proceedings under review** by this Court as a result of the Petition for Judicial Review pursuant to NRS 233B.130 filed by LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., Respondents

(emphasis added)

There is even a Certification attached thereto which states as follows:

> I Vanessa Skrinjaric, an employee of the State of Nevada, Division of Industrial Relations, Workers' Compensation Section, **hereby certify that the documents submitted herewith comprise the record of the administrative proceeding**, which is the subject of Case No. Case No. A-20-821892-J in Department XV of the Eight Judicial District Court, in and for Clark County, Nevada, which are attached hereto as Bates ROA 0001-0132

(emphasis added)

Note that there is no caveat. There is no certification that this is the complete record save for a transcript. The Board, i.e. the same party who later moved for dismissal because the record was allegedly not complete, clearly states that it has transmitted "the ***entire record*** of the proceedings under review." And then indeed, they turn around and ask that Petitioners appeal be dismissed because the complete record was not filed? This is a bait and switch of the highest order, especially coming from a state regulatory agency. This is the first Petition for Judicial Review that the undersigned has seen where the state agency failed to include something in the record and then alleged that the appealing party had some burden to supplement what the state agency did not submit. Further, the undersigned would note that, absent an error from the agency, that transcript is contained in every other Transmittal of Record filed by a state agency that the undersigned has ever seen.

And indeed, Petitioners relied on the agency's statement to their detriment as, apparently, this record was not the "entire record" as there was a transcript of the actual hearing that was not included in that Record. (See Dickinson v. Am. Med. Response, 124 Nev. 460, 467, 186 P.3d 878, 883 (2008)

"Equitable estoppel may be invoked against a party who claims a statutory right in administrative workers' compensation proceedings, when the invoking party has reasonably relied on the other party's words or conduct to her detriment.")

Although Petitioners are adamant that NRS 233B.131 *requires* the rendering agency to file the complete record, in the interest of an amicable resolution to this matter or a resolution that does not involve Petitioner's appeal getting dismissed, after hearing about the outcome of the June 7, 2021 hearing on this matter and the June 21, 2021 Order, the undersigned contacted the DIR about said transcript and the DIR pointed counsel to the court reporter that maintained the transcript. Counsel contacted that court reporter, ordered an expedited transcript, and has attached the same to this Motion for Reconsideration. Should Your Honor grant this Motion for Reconsideration, Petitioner will promptly file this transcript as a supplement to the record already filed should Your Honor desire the same.

Again, Petitioners truly believed (apparently to their detriment) that the entire record had been transmitted based on prior experience with Petitions for Judicial Review, the statement on the cover page of the transcript filed with this court, and the relevant law cited above. Given that Petitioners have now obtained said transcript and submitted the same to this Court, Petitioners pray that Your Honor will find that any alleged failure on Petitioner's part to file something with this court was excusable error and that Your Honor reconsider dismissal and allow this case to proceed on the merits.

b. Petitioner's Opening Brief is Technically Not Even Due

Beyond the alleged failure to submit a transcript, Your Honor found that dismissal was appropriate because Petitioner's Opening Brief was late. However, as noted above, NRS 233B.133 states that Petitioner's brief is not due until "40 days after the agency gives written notice to the parties that the record of the proceeding under review has been filed with the court." Here, the agency is contesting that the record has not been filed. As such, Petitioner's brief is not even technically due yet. If it is the agency's certification that the record has been filed which starts the time running to file the briefing and the agency here is contesting that the entire record has not been filed, the time to file a brief has not even begun to run yet. As such, this Court should not dismiss this appeal for any alleged failure to timely file a brief that is not even due.

c. Dismissal for an Alleged Untimely Brief is Too Harsh

If this Court is still of the impression that the subject brief in this matter was untimely, Petitioner must again point out that the handling attorney was dealing with a serious medical condition which hampered his ability to effectively deal with his case load. Petitioners do pray that this Court finds that good cause existed for any late filing of the brief.

And indeed, Petitioners pray that this Court reconsider the extremely harsh sanction of dismissal for failure to timely file a brief. The Supreme Court has addressed this topic In the case of Fitzpatrick v. State, 107 Nev. 486, 488-89, 813 P.2d 1004, 1005-06 (1991), the Court held as follows:

> if the petition for judicial review is timely filed, NRS 233B.133 allows the district court to accept a tardy memorandum of points and authorities in support of the petition. Accordingly, the district court erred when it concluded it was without jurisdiction to consider the merits of Fitzpatrick's claim that he had good cause for filing a tardy memorandum of points and authorities in support of the timely filed petition for judicial review.

Here, the undersigned does pray that Your Honor finds good cause for the late brief given the handling attorney's medical condition.

Further, it should be noted that the subject Order stated that Petitioners' Brief did not contain citations to the Record. However, it most certainly did. Although not every single fact was cited, Petitioner absolutely provided citations to the critical portions of the Record. The other uncited facts were provided as background information to provide the Court with more information.

...

...

...

In short, Petitioners respectfully request that this Court reconsider its Order dismissing this case and allow Petitioners to have their day in court.

Dated this 7 day of July 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By

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DEPARTMENT OF BUSINESS AND INDUSTRY

DIVISION OF INDUSTRIAL RELATIONS

WORKERS' COMPENSATION SECTION

HEARING: SUBSEQUENT INJURY BOARD

FOR THE SELF-INSURED EMPLOYERS

CONTESTED CLAIM

FOR LAS VEGAS METROPOLITAN POLICE DEPARTMENT

September 26, 2018

10:00 a.m.

Reported by: Teri R. Ward, CCR NO. 839

APPEARANCES:

Charles R. Zeh, Esq. Board Counsel
Michele Berrington, Board Member
Jacque Everhart, Board Member
Ceclia Meyers, Board Member (Telephonically)
Amy Wong, Board Member (Telephonically

Kim D. Price, Esq., Counsel
Donald C. Smith, Esq., Sr. Division Counsel
Christopher Eccles, Esq., Division Counsel

Also present: Vanessa Skrinjaric

MS. BERRINGTON: All right. So we're going to move onto item 7, which is action on the recommendation of the Administrator of the Division of Industrial Relations for denial of the following requests for reimbursement from the Subsequent Injury Account For Self-Insured Employers. The following requests for reimbursement, which the Board will hear de novo, is a contested case, which will be adjudicated pursuant to the Nevada Administrative Procedures Act. Do I have to read the statute.

MR. ZEH: Sure.

MS. BERRINGTON: NRS 233B.010. Okay. This is a contested hearing before the Board of the Administration of the Subsequent Injury Account for Self-Insured Employers. The hearing will be conducted according to --

MR. ZEH: You might want to slow it down just a little bit.

MS. BERRINGTON: Sorry, sorry. The hearing will be conducted according to Chapter 233B of the Nevada Revised Statutes. It is also a de novo hearing. This means the parties are starting out here from the beginning. The matter stands as a clean slate before the Board. The Board will

receive the administrator's recommendation, and the applicant will be obliged to present its case from the begin as if the matter had not been considered by the Board before this hearing.

This also means that the parties to the hearing will therefore, be given the opportunity to present witnesses, offer documentary evidence, confront and cross-examine witnesses and to present oral arguments to the Board with the applicant required to prove each of the criterion for reimbursement from the Subsequent Injury Account as prescribed by the Nevada Revised Statute and pertinent sections of the Nevada Administrative Code.

The parties and the Board may be represented by legal counsel throughout these proceedings. A court reporter will record the proceedings and generate a printed transcript of the matter presently before the Board. As this matter is being recorded by a court reporter, all participants in these proceedings are advised that the court reporter cannot take down more than one person talking at the same time and therefore, the parties are admonished to refrain from talking until the other person is finished with his or her

statement.

Also, the parties are admonished to speak up so that the court reporter can hear what is being said, and if the person speaking is reading something into the record, please read slowly so that the court reporter can accurately take down what you are saying so that we have a complete and accurate record of the proceedings before the Board today.

A relaxed version of the Nevada Rules of Evidence will apply. All evidentiary questions will be addressed to the Chairman of the Board and upon deliberation with the remainder of the Board. The chairperson shall make rulings upon admissibility.

After the hearing, a written decision with finding of fact and conclusion of law will be prepared by counsel for the Board in the event of a ruling adverse to the applicant. The written decision will be served upon the parties, and the decision is subject to an appeal to the district court of the state.

We are therefore, ready to begin. After the Board and the parties hear a summary of the case from the Division of Industrial Relations and the Board receives the recommendation from the

Administrator of the Division of Industrial Relations regarding claim acceptance, the applicant self-insured employer shall be allowed to proceed first to present its case to the board for claim acceptance.

The Administrator of the Division of Industrial Relations shall then be heard regarding the Administrator's recommendation. Since the applicant self-insured employer has the burden of proof by a preponderance of the evidence in this matter, the applicant will be given the opportunity for rebuttal.

Additional testimony, discussion and argument may follow. Before we begin, however, does the Board legal counsel have any evidentiary matters to dispose of before we hear from the administrator's liaison to the Board?

MR. ZEH: I do, Madam Chair. I have five items that are potentially eligible for admission into the -- in evidence into the record in this matter. The first being a staff report dated April 18, 2018 with 31 pages of attachments and three pages of disallowance.

The second is the amended staff report dated April 25, 2018. The third is a letter from my

office to the applicant's counsel dated July 11, 2018, advising that the Board had tentatively decided adverse to the applicant on this claim. The fourth is a letter dated August 10, 2018 from counsel for the applicant, Mr. Price, to our office advising that they wanted a hearing to contest the tentative denial of the claim.

The timing of the letter and the timing of my notice to the applicant of the adverse -- or tentative adverse decision is such that the application for this hearing was timely. And then last, Exhibit 5, is a packet of material dated September 24, 2018, consisting of 16 pages, and that's from the applicant, and I believe, you're offering -- the applicant will be offering that into evidence.

So my question, first of all, would be to Mr. Smith on behalf of the State, do you have any objections to the admission of Exhibits 1 through 5 in evidence?

MR. SMITH: Not as to 1 through 4. I have an objection, and I can't tell from your recitation whether or not Exhibit 5 includes the SIA subrogation of offset memorandum --

MR. ZEH: It does.

MR. SMITH: -- dated September 24, '18. I would object to that document as being admitted because number one, it doesn't accurately set forth the facts in this matter.

MR. ZEH: That is the SIA subrogation offset memorandum dated June 22, 20 -- no, that's the date of the -- September 24, 2018.

MR. SMITH: Correct.

MR. ZEH: And that is --

MR. SMITH: What pages, if you know?

MR. ZEH: -- three pages, I think.

MR. SMITH: What pages is it in Exhibit 5? Is it one, two, and three?

MR. ZEH: I haven't numbered the pages, but I can. We'll go off the record for a moment.

MS. BERRINGTON: Yes, we can go off the record for a moment.

(A discussion was held off the record.)

MR. ZEH: The Exhibit 5 consists, as I said, of 15 pages -- or 16 pages of material starting with a memo from Don Bateman dated 9/24 to Jacque Everhart. The second page is a letter from Kim Price to Jacque Everhart dated September 24, 2018, which I take it also is a cover for the rest

of the material. And pages 3, 4 and 5 are the subrogation offset memorandum to which there's an objection.

Page 6 is an impairment committee evaluation dated November 24, 2009 from Rod Perry, DC, Advanced Chiropractic Orthopedics, and that is a document that starts at page 6 and ends at page 14. And page 15 is a letter dated December 28, 2012 from Mr. Slater to Christina Cabrera, and it's a communication regarding the administration of the claim, and then the last page, page 16, is a letter dated January 2, 2013 from Ms. Cabrera to Mr. Slater, and basically, it's a proposal as to how to breakout the settlement of this matter consisting of $325,000 splitting it three ways. $83,325 to the claimant; $83,325 to the attorney for the claimant or injured worker, and $83,325 to CCMSI, the insurer. Actually, not the insurer. The insurance company.

So those are the pages, and those are the pages in order that I received them in in our office, and as I said, there's an objection to pages 3, 4 and 5. Before we get into that, I need to tell you that when we're done with this hearing, everyone needs to destroy or turn into me all copies of

Exhibit 5 because it's loaded with references to the injured worker, and that's something that's to be kept confidential. And I will ask Mr. Price to send me a copy of that -- of Exhibit 5 redacted. But everything else needs to be destroyed because, as I said, it's replete with references to the injured worker.

So we have an objection, and what is the objection again, Mr. Smith, to page 3, 4 and 5 so that we could --

MR. SMITH: Number one, it's just kind of argument. It's not necessarily even based on the facts, as I understand them, the way in which this document was done. It's more in terms of a legal argument. I don't believe it's an appropriate thing to be an exhibit.

MR. ZEH: Mr. Price.

MR. PRICE: Well, I'd like to -- I'm fascinated to explore the factual inaccuracies to find out what's so objectionable about the facts. That was your first objection. I'd like to address that.

MS. BERRINGTON: So --

MR. SMITH: Madam Chair, if you want, I will gradually respond.

MS. BERRINGTON: Well, yes, I would like a response. I just wasn't sure if there was the proper time to do that so --

MR. ZEH: He can respond.

MS. BERRINGTON: Okay, perfect.

MR. SMITH: And specifically, if we look at page 2 in summary of impairment, and we look at the lumbar spine calculation, I believe, that that is done exactly incorrect because there was -- the impairment is found -- at the time of the impairment, the second -- the impairment rating, it is 17 percent whole person then the prior condition for the previous lower back surgery, 10 percent was apportioned out.

So rather than it being 27 percent, as you have suggested and calculated, it is, in fact, only 17 at the highest, and 7 for this claim. That's number one.

Number two, this is the first time I've ever seen any attempt at apportionment of a subrogation recovery done in this manner. It is -- I don't know of any legal support for the argument in the first place. But the factual predicates are wrong in at least one place. And especially with numerous body parts, the amounts would have to be

broken up as to the numerous body parts and then applied to medical indemnity, if that was something the Board would consider. Thank you.

MR. ZEH: So are there any --

MR. PRICE: Do I get to respond?

MR. ZEH: Just let me finish.

MR. PRICE: Okay.

MR. ZEH: Are there any other objections to any other pages in Exhibit 5?

MR. SMITH: No, sir.

MR. ZEH: All right. Mr. Price.

MR. PRICE: You know, I looked through the NRS, I looked through the NAC. Subrogation's just not -- not discussed. And there's certainly nothing in there that authorizes the DIR to charge us with the entire amount of subrogated funds before we're entitled to any SIA recovery. I checked that. I checked caselaw. I checked NRS. I checked NAC. There's no procedure set out in the statutes that we operate under that say that it's incorrect or not appropriate to apportion this subrogation just the very same way a PPD is apportioned. There's nothing that prohibits that from happening. There's nothing that authorizes the DIR to take the approach that they've taken in this.

To that, it would seem like that argument falls on its face because just as there's no statutory authorization for what they're doing, and criticism against me for no statutory authorization for what we're trying to do, kind of balances out.

As to the 17 percent or the 7 percent, this is a matter of looking back at the PPD evaluations, and as a result of the January 6, 2008 date of injury, claimant was found with a 7 percent knee. That's the only injury that was found in that 2008.

Now -- and that was for that day of injury. Now, if we look at the lumbar spine on -- I didn't get the numbering down, I apologize. In Dr. Perry's PPD evaluation, which I believe -- I didn't get the numbering on that, I apologize. But it is the third page.

MR. ZEH: Well, his report is -- starts at page 10 and concludes on page 14 --

MR. PRICE: Thank you.

MR. ZEH: -- which would be page 3, according to his report, if we're looking at the same page. Up at the top.

MR. PRICE: Yes, on page 13, where he

notes that there was --

MR. ZEH: You're on page 4, then?

MR. PRICE: Yes, it is the fourth page of Dr. Perry's report.

MR. ZEH: Page 4.

MR. PRICE: Well, I had it and now I can't find it. Your indulgence.

MR. ZEH: Mr. Price, I'm going to make a recommendation to the Chairman, which might expedite this. My recommendation is on the one hand to affirm the objection, but on the other hand to include this document as a memorandum and as part of the record to the file so that it is part of that, which is in front of the Board.

It's just a matter of whether it comes in as argument, and I think that everything that Mr. Price is looking at now is going to be part of the evidentiary part of the case in any event.

So, I mean, either if the 17 percent and the 27 percent are accurate or not, and that's going to be a function of what is before the Board so --

MS. BERRINGTON: So tell me what you were suggesting again, please.

MR. ZEH: Uphold the objection in terms of -- on the grounds of a evidentiary objection on

the one hand. On the other hand, to include this as a memorandum to the Board as a summary of the position of the applicant, and the applicant will also have the opportunity to prove up all the references to disability, et cetera, that's in the memorandum. Just going to be a part of the trial, as it were.

MS. BERRINGTON: Right. I like that suggestion a lot. Do --

MR. ZEH: They don't have to agree with it. It's what you want to do it with.

MS. BERRINGTON: Correct. So by upholding the objection, it's no -- it doesn't go in the evidentiary, but it becomes part of the memorandum that was submitted to --

MR. ZEH: It's part of the record before the Board.

MS. BERRINGTON: Before the Board so the Board can still consider it, which I think is the fairest thing because if I recall correctly, I think we had asked for something like this to come through, and as part of the evidentiary evidence may not have been the proper way to do it, but as part of the summary for --

MR. ZEH: Right.

MS. BERRINGTON: -- the applicant, I think that that would be fine.

MR. ZEH: This document is more the nature of a summary of the evidence to be brought to the Board so just make it a part of the record.

MS. BERRINGTON: Right. Yeah, I agree with that, and that's exactly what we're going to do at this point is we're going to uphold the objection as placed by Mr. Smith, but we will include this as part of the memorandum and summary for the applicant as part of what we consider before the Board.

MR. ZEH: Then the last thing that I would say is does either party have any additional evidence that they want -- documents or records they want to offer for admission into evidence at this time?

MR. PRICE: I have nothing more.

MR. ZEH: All right. And --

MR. SMITH: Mr. Smith. None for the record here.

MR. ZEH: That's all I have in terms of the evidentiary part of this matter, other than again, to remind everybody that to not have two people talking at the same time, and speak up when you are talking and it might even be advisable to

identify yourself when you're talking, especially those that are on the phone.

MS. BERRINGTON: Perfect. So thank you for that, Mr. Zeh. And with that, we now begin with the Administrator summary and recommendation. So Jacque, if you'd like to proceed, please.

MS. EVERHART: Do I have to read this back into the record?

MR. ZEH: This is the de novo hearing, yes.

MS. EVERHART: Oh, all right. It is the Administrator's recommendation to accept this request pursuant to NRS 616B.557 for the right knee only. The cervical and lumbar spine do not qualify for consideration and were not requested by the insurer.

The total amount requested for reimbursement is $14,008.47. This amount was under by $13,952.14 in medical expenses. There were amounts --

MR. ZEH: You're reading from the amended report, correct?

MS. EVERHART: Yes, um-h'm.

MR. ZEH: I just wanted to make that clear, that's all.

MS. EVERHART: Yes. These were amounts listed on the paid transaction sheets that were not included on the calculator tapes and some amounts that were, however the amounts that were not requested were not crossed out so all amounts had to be considered.

The amount that should have been requested for reimbursement is $27,960.61. This claim had subrogation recovery that was included in the request. The amount of verified costs is negative $69,630.88. Since there was subrogation recovery, the amount to be considered is less than the actual amount spent on the claim.

Disallowances under this claim are considered against all expenses prior to the reduction of the subrogation recovery, therefore, allowing no reimbursement at this time. An explanation of the disallowance is attached to this letter.

This request was received from Kim Price with Lewis Brisbois Bisgaard & Smith LLP on April 10, 2018.

This employee was hired by the Las Vegas Metropolitan Police Department on July 18, 2006. On September 29, 2006, while he was in the academy,

this gentleman injured his right knee. The C-3 Form listed a right knee strain. The C-4 Form, dated September 29, 2006, listed sprain/strain of the right knee.

The insurer submitted several documents to be considered for the requirement of employer knowledge of the pre-existing permanent physical impairment and they are as follows:

Occupational Injury/Illness/Exposure Report from the LVMPD dated October 3, 2006 and signed by a supervisor. This report listed the right knee as the injured body part and was received by the employer on October 3, 2006.

An LVMPD Officer's Report, dated September 29, 2006, that described the nature of the injury to the right knee. This form was received by the employer on October 3, 2006.

An LVMPD Medical Evaluation Form dated October 3, 2006 and received by the employer on October 3, 2006 that noted a meniscal tear to the right knee.

This is the extent of the employer's documents concerning this date of injury. The injured employee sought treatment at UMC and was diagnosed with sprain/strain of the right knee and

x-rays were normal. He was taken off work through October 3, 2006 and then released to modified duty.

The patient saw Dr. Higgins on October 3, 2006. His impression was a bucket handle tear, medial semilunar cartilage and he requested surgery. The patient had partial debridement of the anterior cruciate ligament with partial synovectomy and medial meniscorrhesis on October 4, 2006.

In follow-up reports, Dr. Higgins released the patient to full duty on October 23, 2006 and noted he was still working through the academy and an ACL repair after he was finished would be considered. The patient attended physical therapy and was given a knee brace. As of February 13, 2007, the patient had an ACL deficient knee. He was working in the field and could continue as long as he protected the knee. He was released from care. This is the extent of the medical records for this date of injury. It should be noted the injured employee was not rated.

On January 6, 2018, during a foot pursuit, this employee fell into a hole and twisted his right knee. The C-4 Form indicated right knee strain, and the January 7, 2008 C-4 Form also noted right knee strain. The C-4 Form was received by the

employer on January 14, 2008.

The insurer submitted several documents to be considered for the requirement of employer knowledge of the pre-existing permanent physical impairment and they are as follows:

An LVMPD Occupational Injury/Illness/Exposure Report, dated January 6, 2008 and signed by a supervisor. The form noted right knee pain with meniscus tear in October 2006 and surgery. This form was received by the employer on January 7, 2008.

A February 25, 2008 Application For Leave for the right knee and off work status from February 2, 2008 through February 25, 2008. This was sent to the payroll department from a senior LEST with the employer. The form was also copied to the Risk Management Section for the employee's file. Please note this form coincides with the surgical procedure.

A June 30, 2008 Application For Leave for the right knee and off work status from June 16, 2008 through June 25, 2008. This form was sent to the payroll department from a senior LEST with the employer and also copied to the employee's file. This timeframe also coincides with the surgery date.

A November 24, 2008 PPD evaluation penned by Dr. Perry. The report does not show that it was received by the employer.

And a January 11, 2010 PPD offer letter for 7 percent whole person impairment for 2008 right knee injury. This letter was copied to the employer however, there was no indication it was received by the employer.

History for this injury was taken from the November 24, 2009 PPD evaluation penned by Dr. Perry. The injured employee had three additional surgeries under this claim and treated with Drs. Patti, Miao and Tingey. The last surgery was done on -- in, sorry, December 2008 with follow up under Dr. Tingey. Reporting under the PPD only goes through September 21, 2009, and the patient continued to follow up. He had been released to full duty, and as of October 27, 2009, the patient had reached MMI and was stable and ratable.

Dr. Perry evaluated this injured employee for permanent impairment and found 7 percent whole person impairment, and did not apportion for the prior injury or surgery. Please note that the rater was not furnished with any medical reporting prior to the 2008 date of injury,

and the patient denied any previous injuries to the right knee.

This gentleman continued to work for the LVMPD, and on June 22, 2012, he was involved in a motor vehicle accident and injured his cervical and lumbar spine and right knee. The C-4 Form noted central cord syndrome.

Medical reporting was taken from the November 8, 2012 PPD evaluation penned by Dr. Perry. The patient was taken to the hospital via ambulance, treated and released to follow up with Dr. Tingey for his knee and Dr. Flangas for the spine. MRI of the knee was done and the impression was sprain/strain with a history of ACL reconstruction and microfracture.

On September 5, 2012, the patient was taken to surgery for the right knee, and underwent arthroscopic chondroplasty, medial femoral condyle with compartment synovectomy. He attended physical therapy, and as of October 18, 2012, Dr. Tingey released him to full duty, and he had reached MMI and was stable and ratable.

The injured employee was rated for cervical and lumbar spine as well as the right knee. He was found to have 12 percent whole person

impairment combined for the cervical and lumbar spine and no additional impairment for the right knee.

The claim was successfully subrogated, and the insurer received reimbursement in the amount of $83,325 to be applied to the claim.

Medical reporting supports a substantial increase in the cost of this claim for the right knee due to testing, evaluations and additional surgery. NRS 616B.557(1) has been satisfied.

This gentleman was rated at 7 percent whole person impairment under his 2008 claim for the right knee. NRS 616B.557(3) has been satisfied.

The file contained an LVMPD Medical Evaluation Form, dated October 3, 2006 and received by the employer on October 3, 2006 that noted a meniscal tear to the right knee.

Under the 2008 dated injury, the employer submitted an LVMPD Occupational Injury/Illness/Exposure Report dated January 6, 2008 and signed by a supervisor. The form noted right knee pain with meniscus tear in October 2006 and surgery. This form was received by the employer on January 7, 2008.

There were also two applications for

leave submitted by a senior LEST from the employer to the payroll department for leave time for the February and June 2008 surgery dates. NRS 616B.557(4) has opinion satisfied.

Subsection 5 does not need to be satisfied in order for this claim to be considered for reimbursement since the date of injury is after the October 1, 2007 change in the requirements of the statute.

MS. BERRINGTON: Thank you.

MR. ZEH: Mr. Price.

MS. BERRINGTON: Mr. Price.

MR. PRICE: Based on the application that we submitted, the DIR accepted the claim, and we have no issue with that. The issue comes in with the offset of the entire amount of the subrogation that the employer -- or the CCMSI received for body parts that are not eligible for SIA recovery.

In this matter, the right knee is the only body part that's subject to SIA recovery. What we're being asked to do is offset the entire subrogation instead of just offsetting the portion of the subrogation that's focused on the right knee.

As Mr. Smith pointed out, there's no regulation or statute that addresses what to do in

this situation. And just as there's no authority for the DIR to enforce that we have to satisfy the entire subrogation before we can receive any SIA benefits, there's similarly no authority that says we can't offset the portion of the subrogation that deals only with the SIA eligible body part, which would be the right knee.

Now, as I mentioned, I went through the NRS and the NAC and caselaw. The only time there's any subrogation matter that would arguably be influenced by a decision to accept our theory of this is in the annual report of expenditures for clients, which is required in NAC 616B.686. But in there, the employer has -- the third-party administrator or the employer has to report all subrogations and all reimbursements from the SIA.

So it would wash between the two because what we didn't -- what was not reported for the right knee portion of the subrogation would be reported for the right knee portion of the SIA. So it comes out a wash so that no one's getting any extra credit, no one's getting shorted that way.

Now, if the legislative intent is to encourage people or to encourage employers to hire disabled people, it would seem to me more fair to

apply an offset -- or to affect the subrogation to apply only the offset for the right knee and have to satisfy that prior to SIA recovery than to satisfy the entire subrogation, which includes cervical and lumbar, which aren't eligible for SIA recovery.

So what we propose is out of that subrogation amount, we can calculate out what portion of that subrogated amount is for cervical, what portion is for lumbar, and what portion is for right knee, and just as we prorate a PPD award, depending on the affected body parts, we do the very same thing with this subrogation amount. We take 7 percent for the right knee, apply that to the subrogated amount, whatever that amount proves out to be, that's the amount that we argue we should have to satisfy before we get to the SIA recovery.

That seems imminently more fair than having after -- have to receive moneys for cervical and lumbar, which aren't eligible for SIA up to their full amount before we can ever get any SIA recovery.

Now, Dr. Perry noted that there was 7 percent from his September 29, 2006 injury. The second injury affected the right knee, the lumbar and the cervical. Now, claimant underwent five

right knee surgeries, and they got him back to 0 percent. They got him back to 7 percent, I'm sorry, I misspoke.

They got him back to MMI stable and ratable, he still had 7 percent. Well, that doesn't mean they didn't spend any money on any surgeries. They didn't spend any money on any treatment to rehabilitate him back to that MMI status. By forcing us to offset the entire subrogation amount, we're not getting any credit at all for the moneys that we paid to get the claimant back to MMI 7 percent status that he was prior to the accident.

So if you use the same formula that the DIR uses to prorate PPD awards as you do and you apply that very same formula to the subrogation and you offset those amounts, that seems to satisfy -- well, that seems to satisfy the obligation to encourage employers to hire disabled people. It seems more fair and equitable because that way my client's not getting punished because we haven't received money for body parts which aren't eligible for SIA recovery anyway.

We should only be penalized or only have to offset the amount that is directly attributable to the SIA body part that we're asking recovery for.

Since there's some question as to the figures, I'm not going to go into -- I had it all calculated down to the penny. I'm not going to do that until such time as I have a need to do so because I'm just going to argue that we can figure that out once the Board makes a decision to accept the application and to subrogate -- or to apportion the subrogated amount and give us -- and only offset the amount worth -- that the right knee is worth, not the entire whole body impairment that took place and included the cervical and the lumbar.

Cervical and the lumbar themselves were a hundred percent. Well, were a hundred percent not eligible for SIA recovery because what information we had shows that he had prior spinal surgery. We didn't request that. We didn't pursue that. What we pursued was a body part that we knew was eligible, and that's the right knee.

And again, the most fair and equitable way to address the subrogation is to prorate it, just like we prorate a PPD award and then ask us to offset that amount. Thank you.

MS. BERRINGTON: Thank you, Mr. Price. Mr. Smith.

MR. SMITH: Thank you, Madam Chair.

With all due respect to Mr. Price, I would tend to disagree with him. I believe, the issue is addressed and, in fact, in the NRSs. And if we look at NRS 616C.215(2)(B), and 2 talks in general about legal liability and --

MR. PRICE: Can I have a moment to find that before he launches into his description? I may have that with me. I'd like to read along.

MR. ZEH: Sure.

MS. BERRINGTON: Sure.

MR. PRICE: Or ask Mr. Smith if he can provide me with a copy of it so I can read along.

MR. ZEH: What section were you talking about?

MR. SMITH: 616C.215.

MR. ZEH: Which subsection?

MR. SMITH: I'm sorry, Mr. Price, this is an older version. I didn't bring my current one so --

MR. PRICE: And you're citing to B?

MR. SMITH: C.

MR. PRICE: (3)(C)?

MR. SMITH: 616C.215(2).

MR. PRICE: 2.

MR. SMITH: And underneath that subpart

G. I'll get there.

MR. PRICE: Okay.

MR. SMITH: Tell me when you're ready.

MR. PRICE: I don't have a --

MR. ZEH: Here.

MR. PRICE: I don't seem to have a copy of it that I'd like to look at because all I have is Subsection 3, which similarly addresses it. Thank you. I've prepared.

MR. SMITH: As I was saying before, this is Don C. Smith, for the record from the Division. Once again, subpart 2 in general deals with legal liability if somebody else or a third party. So this is essentially dealing with third party recovery.

When you look at 2B, like in baby, it talks about receiving -- if they've received compensation, then the insurer -- in this case, it would be Metro -- or in the case of claims involving the uninsured employers claims account or a subsequent injury account, which is exactly what we have here, the Administrator -- Administrator being Division of Industrial Relations -- has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured

employee or of the employee's dependents to recover therefor.

So number one, the Division has some standings and some rights. If you now look at subparagraph number 5 under that statute --

MR. PRICE: Okay, um-h'm.

MR. SMITH: -- in cases where the insurer or Administrator is subrogated to the rights of the injured employee -- which we've already discussed in subpart 2 -- the insurer or the Administrator -- once again, the Division -- has a lien upon the total proceeds of any recovery from such person, whether the proceeds and such recovery are by way of judgment, settlement or otherwise.

So with all respect to Mr. Price's opinion, the Division's opinion is that we're -- the Division, the Administrator, is entitled to offset the total amounts.

So if we go through the initial analysis in this claim, the amounts that were not accepted, the subro recovery exceeds the amount that was approved by almost a ratio of 3 to 1 or 4 to 1. So that would be the negative verified cost of 69,000, almost $70,000. So that's the first argument.

I would like to, if we can, go over the

document, which is marked for identification but not an exhibit, which is from pages 3, 4 and 5 of Exhibit No. 5.

MR. ZEH: Before you begin, just to be clear, exhibits 1 through 5 are admitted into evidence with the exception of pages 3, 4 and 5 of Exhibit 5. And those are the -- pages 3, 4 and 5 of Exhibit 5 are a part of the record as a memorandum from the applicant setting forth his position in this matter.

MS. BERRINGTON: That sounds correct, yes.

MR. ZEH: So --

MR. SMITH: And I just for the record wanted to refer to them the way in which they had originally been numbered. If we want to establish another exhibit for it, maybe make it Exhibit No. 6, so it's clearly not admitted and it's pages 3, 4 and 5 previously proposed in Exhibit 5, that might make it clearer for everyone.

MR. ZEH: I think it's clear enough as it is.

MR. SMITH: Okay. If we look at the first page of that subrogation offset -- excuse me, the second page, which is page 4 of the record, I

had discussed this and mentioned it earlier. The lumbar spine in Mr. Price's calculation he has at 10 percent whole impair -- WPI, whole person impairment, for date of incident in '07, and he's got a 17 percent WPI for date of incident 6/22/12.

I believe that that information, in fact, comes from page number 13 of Exhibit No. 5, which is the November 8, '12 PPD report from Dr. Perry. And if you look at it, the first paragraph, large paragraph, on page 13 discusses the lumbar spine. And he originally comes out with a total of 17 percent.

In the next paragraph, he discusses apportioning it out, in which he states 17 percent of whole person impairment is now apportioned by a DRE category for the prior surgical intervention of 10 percent whole person impairment, which is equivalent to 7 percent whole person impairment for the lumbar spine.

So -- and if we look at the last sentence in that same paragraph, 7 percent for the lumbar spine would be combined with 5 percent for the cervical spine for a total of 12 percent impairment.

So if we look at the memorandum, it

would not be 10 for the prior plus 17. It would be 10 plus 7, which for a total of 17, not 27. I'm assuming that's a simple math error.

I can understand how the confusion can occur, but let's then back up and go to -- get out of the weeds and get into the higher elevations in this argument, which is what is the essential purpose of subsequent injury account reimbursement?

It is for additional costs incurred in a second claim, correct? I mean, that's the argument. That's what the recovery is for. The approach suggested by my learned counsel doesn't take that into consideration.

He wants to apportion a subrogation recovery by the insurer based on what essentially is the prior underlying injury. That isn't why we're here in the first place.

Why we're here is to discuss the additional costs and expenditures that the insurer had to incur because of the subsequent injury, this injury. But the analysis is all based on oh, no, no, let's divide up the subrogation recovery based on the 7 percent prior.

So what I suggest is that he's trying to compare apples and oranges. They're two different

events. They're two different things. There's a logic -- there's a mistake in the logic in the first place.

The better approach, if the Board is inclined to discount the total proceeds argument from 616C.215, as previously discussed, would be that line item calculation of what were, in fact, the additional expenditures on this claim for medical, indemnity -- I'm going to break indemnity in two parts so think of it in terms of TTD and the other part being PPD, permanent partial disability, because as we know, the current PPD on this one does not include anything for the right knee.

Once again, if you look at page 13, Exhibit 5, Dr. Perry's PPD report, right knee has full range of motion. There is no ratable impairment on this, and on this is a 0 percent award. There's no discussion about a prior 7. There's no discussion about apportionment. He's saying it's good to go, it's 0.

I'm sorry. So in summary, number one, Counsel's argument logically doesn't make sense. He's trying to seek recovery based on a percentage, which was the prior injury, not the current injury. If that method is going to be approved or considered

in an apportionment kind of thing of the subrogation proceeds, it shouldn't be done by line items as to medical expenses, TTD, PPD and apportioned done that way as to prior claims.

The amounts of the prior claims should be correct as opposed to as discussed here which is the lumbar spine should be at a total of 17 percent, not 27 percent.

Number three, the statute we suggest, 616C.215, gives the Administrator and the subsequent injury accounts the first crack at any subrogation recovery, and that the whole proceeds should be applied. With that being said, thank you.

MS. BERRINGTON: You're welcome. Jacque.

MS. EVERHART: I have to correct you just in one little small area.

MR. SMITH: I hate when she does that.

MS. EVERHART: I'm sorry. If you look at page 13, which is page 4 of Dr. Perry's report, and you go to the second paragraph, it says, 17 percent whole person impairment is now apportioned by a DRE category for the prior surgical intervention of 10 percent whole person impairment, which is equivalent to 7 percent whole person

impairment for the lumbar spine. That 7 percent is combined with the 5 percent for the cervical. So actually, the current claim only has 7 percent.

So this total should be 7 percent, not 17. 10 percent is pre-existing.

MR. SMITH: Right, 7 percent for the lumbar spine is the correct. The cervical is not at issue. That was at 5 percent, which is 5 percent, which is 5 percent.

MS. EVERHART: Right.

MR. SMITH: 7 percent for this claim, 17 whole person impairment, 10 percent apportioned out for prior condition. I thought that's what I had said. If I misstated --

MS. EVERHART: I thought you said 17.

MR. SMITH: Yeah, if I misstated, then I was wrong. And then 0 on the current claim for the right knee.

MS. BERRINGTON: Thank you, Jacque. Mr. Smith, do we go back that way?

MR. SMITH: Yeah.

MS. BERRINGTON: Mr. Price, do you have anything additional?

MR. PRICE: Yeah, couple things. Learned counsel pointed to NRS 616C.215(2)(B), which

talks about legal liability. There's no mention in there of SIA recovery whatsoever. It creates a legal liability, and they've taken care -- that's been addressed. They took care of that.

Also, waves the specter of double recovery. As I mentioned, if that is addressed, we have to do our annual report of claimed expenditures. We have to report how much we received in subrogation and how much we received in SIA.

Now, as to the mistake in logic, well, it's 0 percent for his right knee, considering he was already found with 7 percent because you can't -- when you have a right knee menisectomy, you can never be 0 percent again because you've already had surgery in 2007/2008. So it's not 0. It can't be 0. So he said it's 0 for this incident. So we're still -- we still have a right knee that's 7 percent.

As to the statute -- as to, I believe, it was subsection -- NRS 616C.215(5) that he read to us. I believe, it was 5. Well, there's no mention in there of SIA. There's no mention in there of liability for recovery from the second injury account fund. That's talking about recovery from

judgments and settlements in the lawsuit -- in the underlying lawsuit that created the subrogation to begin with. That has no application to these proceedings here. That's application and proceedings that took place years ago. That's the legal obligation they're talking about. That's the legal liability that it's talking about. Those have already been addressed and taken care of.

As to -- he's saying -- he made a comment in the very closing about who gets first crack at subro recovery. I didn't write fast enough to catch who that was, but again, we're talking -- we're not -- we're talking about subrogation recovery focused on what portion of that second injury, which we paid money for to get him back to MMI to where he's still only 7 percent, thank heavens he's not 12 or 24 or something like that, he's still only at 7 percent. We had to pay money to get him there.

So why isn't it right to apportion the subrogation to take the 7 percent from that subrogation just like we're doing for the knee and say we have to satisfy that rather than have to satisfy the cervical and the lumbar, which we didn't ask for? They're not eligible.

So it seemed like we're taking -- giving a mammoth burden on something that there's no authority for. The statutes that Counsel read don't give authority to do this. And it seems in a most equitable and fair manner intended by the legislature would be to apportion the subrogation, just like this DIR board apportions PPD awards every day, and do the very same thing. There's no double recovery. The legal liability's already addressed and taken care of. It seems that is the most fair and equitable way to approach this. Thank you.

MS. BERRINGTON: Mr. Zeh.

MR. ZEH: Okay. I just have a couple -- maybe a couple questions. Just give me a minute here.

MS. BERRINGTON: Okay. Take your time.

MR. ZEH: Is it still DIR's position that a negative $69,630.88 is to be applied before any potential recovery can take place because the full $83,325 that was recovered by the insured must be --

MS. WONG: I'm sorry, Chuck, this is Amy. I can't really hear you, I'm sorry.

MR. ZEH: I'm sorry. I'm asking DIR if it's still DIR's position that $69,630.88 should be

applied in the future against any request for reimbursement?

MS. BERRINGTON: And you're asking that to Jacque or --

MR. ZEH: Whoever wants to speak for DIR.

MS. BERRINGTON: Okay.

MR. ZEH: I'm trying to find out what is the current position of DIR? Is it that the full $83,325 has got to be exhausted against future claims before any reimbursement can flow to the self-insured employer?

MR. SMITH: I'll answer that. Donald C. Smith, for the record. The answer is yes, but you also need to consider, because the claim is being accepted, there was a large amount of disallowances, which the self-insured employer may now come back in and fill in the gaps. So does it have to be offset against future? Not necessarily. But it sure ought to be offset against this one.

MR. ZEH: So the position is the full amount of the money that's received by a virtue of subrogation must be applied in this case?

MR. SMITH: Yes, sir.

MR. ZEH: And the basis for that is --

statutory authority for that is what, 616B.215 --

MR. SMITH: 61C.215(5). For clarification, and Counsel, I referred to subsection 2 because subsection 5 starts out with the qualifier that in those cases involving subsection 2, which is why I read subsection 2 in the record, then the insurer or the Administrator, i.e., DIR, or in this case because it's subsequent injury account, it has lien against total proceeds --

MR. ZEH: Then --

MR. SMITH: -- of the recovery.

MR. ZEH: -- is it also your position, because I think you had three different positions, if there is to be an apportionment or an allocation, the allocation that's suggested by the applicant is incorrect?

MR. SMITH: Correct. Yes, that is an accurate summary of my argument.

MR. ZEH: And if the apportionment or allocation from the application -- from the applicant is incorrect, what is the correct dollar amount, if you have one?

MR. SMITH: We don't have one. We've never sat down and calculated it because the initial position by the Division is that under these

circumstances, they've been reimbursed more than they're qualified to under the subsequent injury account.

MR. ZEH: And then, if I could ask Jacque, since it's her recommendation $69,630.88, can you show us the calculations as to how you arrive at that figure?

MS. EVERHART: Yeah, it's in the disallowance sheets under -- I think, that's number 2, Exhibit 2.

MR. ZEH: Actually, the disallowance sheets are part of Exhibit 1, but --

MS. EVERHART: Okay.

MR. ZEH: What did you subtract from $83,325 to get a negative 69,630.88?

MS. EVERHART: I didn't subtract anything from 83,000. So the total amount that should have been requested on this claim, based on what was actually submitted in the claim file, was $111,285.61. From that, you subtract the subrogation amount which is --

MR. ZEH: 83,325?

MS. EVERHART: Yep. Um-h'm, sorry. That gives you a subtotal of $27,960.61, and that includes all body parts still. Okay? From that,

the disallowance is totaled $97,591.49. Those disallowances included everything not related to the knee plus disallowances that didn't have supporting documentation.

So $27,960.61 minus $97,591.49 leaves you with a negative $69,630.88. Now, the insurer can come back and request reimbursement for those expenditures that are lacking in information.

MR. ZEH: Right.

MS. EVERHART: They are going to be a very small portion of this dollar amount because there's about $67,000 disallowed for TTD and PPD for the right knee. So of those expenditures, they may qualify for a little bit more reimbursement, depending on if it comes up past this $69,000 mark.

MR. ZEH: You got the $27,960.61 -- how did you get that number again, I'm sorry?

MS. EVERHART: Total amount of the claim minus the subrogation recovery.

MR. ZEH: Um-h'm.

MS. EVERHART: That's what should have been requested. Then you go through and look at the file and see what the disallowances are, then you have to subtract it from that.

MR. ZEH: And the 97,591.49, that

represented -- that represents what number again?

MS. EVERHART: The disallowances.

MR. ZEH: Applied to the 111,285.61?

MS. EVERHART: Applied to the balance after that total minus the subrogation.

MR. ZEH: Okay.

MS. BERRINGTON: Can I try?

MR. ZEH: Um-h'm.

MS. BERRINGTON: Okay. So correct me if I'm wrong, the 111,285.61 is the total amount that was submitted for consideration. So that in theory includes all costs to the claim, not just the knee, correct?

MS. EVERHART: Correct.

MS. BERRINGTON: Okay. So that's the total cost of the claim.

MS. EVERHART: Correct.

MS. BERRINGTON: Then you subtract out the subrogation recovery, which leaves 27,960.61 --

MS. EVERHART: Correct.

MS. BERRINGTON: -- which is referenced in the Administrator's recommendation. Then you subtract out the disallowances, the 97,591.49 from the 27,960 and you get 69,630.88?

MR. SMITH: Upside down.

MS. BERRINGTON: Upside down. Did you follow that?

MR. ZEH: Um-h'm.

MS. BERRINGTON: Okay.

MR. ZEH: Yes.

MS. BERRINGTON: It took me a long time to get that.

MR. ZEH: So what's before the Board is either this number or -- which does not take into account any kind of apportionment or allocation of carving out recovery, which might have been related to other problems besides the right knee or not.

So that's the question that's one for the Board is do you allocate or not? And then secondly, what's the right number? If you're going to decide to allocate, what's the right number?

We have one number from the applicant, and we have no number from the State if we're going to do that kind of apportionment or allocation.

MS. BERRINGTON: Okay.

MR. ZEH: Unless, Jacque has a number, since she just raised her hand. So if she has a number or if I'm incorrect that there is no -- like I said, there is no number from the state, but if that's what I heard Mr. Smith say, we could find out

if the State has a number.

MS. BERRINGTON: Does the State have a number?

MS. EVERHART: I do not have a number; however, since the issue -- one of the issues before the Board is allocating according to Mr. Price's memorandum, the numbers in his memorandum are incorrect. If you look at page 4 of the exhibit, page 2 of his memorandum, the total combined percentages is not 39 percent. According to the AMA guides, it would be 27 percent.

This -- and that's for all body parts. This would then skew all calculations on the following page.

So if you are just looking at the percentage for the current claim, which is what I believe that we should only be looking at, because that is the claim that is in question, those numbers are skewed even further and it's only 18 percent, which then also skews the calculations on the back page, as best I could do them on a phone calculator. So I'm not ready to even tell you what those are. Just something for you to think about while you're contemplating which way you want to go.

MR. SMITH: One of the possibilities --

this is Don Smith, for the record, and I think Jacque's intimating is the Board could always remand it for DIR to recalculate as well.

MS. EVERHART: Yes.

MR. SMITH: In which case, we would potentially have more thorough information, maybe a full and complete indication of what the records, bills and clean up on some of the disallowances from the self-insured employer, which would give us a better more accurate picture of what this thing is ultimately going to be. Thank you.

MR. ZEH: You might want to see if the other Board members have anything to say.

MS. BERRINGTON: I agree. Cecilia, Amy, do you guys have any questions or any comments on this?

MS. MEYER: I don't have any.

MS. BERRINGTON: Who was that?

MR. ZEH: Cecilia.

MS. MEYER: That was Cecilia, sorry.

MS. WONG: This is Amy. I -- I don't think I have any -- just like with Counsel, I'm mulling it all over.

MS. BERRINGTON: This is Michele Berrington. I do have a comment. I think part of

what we were missing when we originally reviewed this was the content of 616C.215(2) and (5). I find that to be very helpful in helping to figure out what we need to do with this case. And it would have -- you know, it's a great thing to know when we're looking at subrogation going forward because I'm not sure any of us knew or thought about that statute when we were reviewing this case initially. That's all I have to say on that.

And then I'm looking to you, Chuck, because I'm not sure what to do now -- or, I'm sorry, Mr. Zeh, because I'm not sure what to do now.

MR. ZEH: Well, I think you have a decision to make here. Is it an all or nothing proposition or is it an apportionment proposition? And if the Board thinks as a matter of law that there is an apportionment issue here, I don't think you have enough information to come up with a realistic number.

And so if it's an all or nothing proposition, you can decide that, and it would be a 0 because there's no apportionment. If you want to go the apportionment route, then I would agree that the best thing to do would be to remand this because the numbers don't make sense yet, and they're -- and

it would also give the applicant a chance to give the DIR more information about some of the disallowances and which would, I think, fortify the dollar amount that ultimately would be more to their benefit. So that's what you have to decide.

MS. BERRINGTON: Okay. So that being said, Amy and Cecilia, I can tell you that given the content of 616C.215, I'm inclined to take the administrative recommendation that stands. I don't know if you guys want to chat about that, have any comment about that or what your thoughts are or if you have any other input on that before we consider a motion from the Board on this.

MS. WONG: This is Amy. I agree. I don't see anything that talks about apportionment. 616C.215(5) talks about the total amount, I believe. I'm reading it right now. I don't see anything about apportioning out. No. The total proceed to be recovered.

MR. ZEH: Another thing you might consider is simply to continue this matter to receive a memorandum from your Board counsel that might help clarify things.

MS. WONG: Chuck, I can't hear you, I'm so sorry.

MR. ZEH: I'm sorry. I'm so used to looking you right in the face that I --

MS. WONG: I know.

MR. ZEH: What I was saying is the other option would be to continue this matter to give Board counsel a chance to provide you with a memorandum now that we've really, I think, far more congealed the issues here before you make up your mind.

MS. BERRINGTON: And if we were to consider that, would this matter continue and then have to go forward with further hearings?

MR. ZEH: It would.

MS. BERRINGTON: Okay. I was just curious on procedural issues. That's all.

MR. ZEH: Yes.

MS. BERRINGTON: Yes.

MR. ZEH: So we would have a court reporter for this.

MS. BERRINGTON: Okay.

MS. WONG: This is Amy. I don't think that I would need anything further.

MR. ZEH: Okay.

MS. BERRINGTON: With that being said, are we in a position to take a motion? I just want

to make sure I'm procedurally correct here.

MR. ZEH: I think, we're -- you can ask if either side has anything further to add.

MS. BERRINGTON: Okay. Does either side have anything further to add in this matter?

MR. PRICE: No, thank you.

MR. SMITH: No, Madam Chairman. Don Smith, for the record.

MS. BERRINGTON: Okay. Then Board members, I think we're in a position to take a motion on this.

MS. WONG: I'll make a motion. I'm just trying to figure out how do I word this because the matter at hand is just approving the way that we ruled in the first place on this claim; is that correct, Chuck?

MR. ZEH: Well, we're starting from scratch. It's a de novo hearing.

MS. WONG: Okay.

MR. ZEH: As I understand it, the recommendation from the DIR remains that there's a negative 69,000, approximately, that has to be overcome before any actual reimbursement back to the self-insured. So that recommendation -- so I think the motion is either to affirm the recommendation or

deny it.

MS. WONG: Okay. So I'll move that we approve the Administrator's recommendation to accept the request, pursuant to NRS 616B.557 for the right knee only in the amount of verified cost of negative 69,630.88 for Las Vegas Metropolitan Police Department.

MS. MEYER: I'll second that motion. Cecilia Meyer.

MS. BERRINGTON: All right. So we have a motion. We have a second. All in favor, please aye.

MS. WONG: Aye.

MS. MEYER: Aye.

MS. BERRINGTON: Aye. Motion's approved.

MS. WONG: Chuck.

MR. ZEH: Yes.

MS. WONG: I think, we may have forgotten to do our disclosures.

MR. ZEH: Yeah, we need to do that.

MS. BERRINGTON: So that's probably on me. I have a hard time remembering disclosures. So, Amy, can we start with you? Did you have any disclosures on this case?

MS. WONG: I do. So CCMSI is the third-party administrator for the City of Henderson, and -- or LBVS does represent the City of Henderson on workers' compensation matters, but that would not and did not affect my decision in this matter.

MR. ZEH: Wait a second. You're really garbled. Can you repeat your disclosure and go a little slower, Amy?

MS. WONG: You got it. CCMSI is the third-party administrator for the City of Henderson and LBVS represents the City of Henderson in some workers' compensation matters, but that would not and did not affect my recommendation in this matter.

MS. MEYER: This is Cecilia Meyer with City of Carson City. CCMSI is the third-party administrator for City of Carson City, but that did not and will not affect my decision in this matter.

MS. BERRINGTON: And I don't have any disclosures. Michele Berrington.

MR. ZEH: So I believe, that concludes the hearing on this matter.

MS. BERRINGTON: Agreed.

MR. ZEH: Unless anybody has anything further to add at this time, and I'm not seeing anybody.

MR. PRICE: Thank you for your time.

MS. WONG: Thank you.

MS. MEYER: Thank you.

MR. ZEH: Yes, I do need a copy.

(The hearing adjourned at 11:32 A.M.)

* * * * *

CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

I, Teri R. Ward, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify:

That I reported the proceedings commencing on Wednesday, September 26, 2018, at 10:00 a.m.;

That I thereafter transcribed my said shorthand notes into typewriting; and that the typewritten transcript of said proceedings is a complete, true and accurate transcription of said shorthand notes.

I further certify that I am not a relative, employee, or independent contractor of counsel of any of the parties; nor a relative, employee, or independent contractor of the parties involved in said action; nor do I have any other relationship with any of the parties or with counsel of any of the parties involved in the action that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this _____ day of _____, 2018.

_____
Teri R. Ward, CCR NO. 839

WORD INDEX

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Metropolitan Police Department, Petitioner(s) vs. State of Nevada Department of Business & Industry, Respondent(s)	CASE NO: A-20-821892-J DEPT. NO. Department 15

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Metropolitan Police Department, Petitioner(s) vs. State of Nevada Department of Business & Industry, Respondent(s)	CASE NO: A-20-821892-J DEPT. NO. Department 15

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal	COURT MINUTES	July 13, 2021

A-20-821892-J Las Vegas Metropolitan Police Department, Petitioner(s)
vs.
State of Nevada Department of Business & Industry, Respondent(s)

July 13, 2021 **Chambers** **Minute Order - Striking the Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review; and Request for Order Shortening Time**

HEARD BY: Hardy, Joe **COURTROOM:** Chambers

COURT CLERK: Kristin Duncan

JOURNAL ENTRIES

- FINDING that said document was erroneously filed, COURT ORDERED the Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review; and Request for Order Shortening Time, filed on July 12, 2021, was hereby STRICKEN.

NOAS
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; and CANNON COCHRAN MANAGEMENT SERVICES, INC., Petitioners, v. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents	CASE NO.: A-20-821892-J DEPT. NO.: 15

NOTICE OF APPEAL

TO: STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondent

TO: DONALD J. BORDELOVE, ESQ., Respondent's Attorney

TO: DIVISION OF INDUSTRIAL RELATIONS, Respondent

TO: CHRISTOPHER A. ECCLES, ESQ, Respondent's Attorney

...

...

NOTICE IS HEREBY GIVEN that Petitioners, LAS VEGAS METROPOLITAN POLICE DEPARTMENT; and CANNON COCHRAN MANAGEMENT SERVICES, INC, (hereinafter referred to as "Petitioners"), in the above-entitled action, hereby appeal to the Supreme Court of the State of Nevada from the attached "Order" entered in this action on or about June 21, 2021 which denied Petitioners' Petition for Judicial Review and the "Notice of Entry of Order" filed on or about June 22, 2021.

DATED this 19 day of July 2021.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

DANIEL L. SCHWARTZ, ESQ.
KIM D. PRICE, ESQ.
JOEL P. REEVES, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
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Las Vegas, Nevada 89102
Attorneys for Petitioners

CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 19 day of July 2021, service of the foregoing **NOTICE OF APPEAL** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

LVMPD
Jeff Roch
Director of Risk Management
400 South MLK Blvd.
Las Vegas, Nevada 89106
Petitioner

CCMSI
Dusty Marshall
Claims Supervisor
PO Box 35350
Las Vegas, Nevada 89133
Petitioner

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Deputy Attorney General
Office of the Attorney General
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Attorneys for Respondent

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Attorney General Aaron Ford
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Industrial Relations (DIR)
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Department of Business and Industry
Director Terry Reynolds
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Stephanie

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

DISTRICT COURT
CLARK COUNTY, NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, NOTICE OF APPEAL

filed in case number: A-20-821892-J

☒ Document does not contain the Social Security number of any person.

- OR -

☐ Document contains the Social Security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

- or -

☐ For the administration of a public program

- or -

☐ For an application for a federal or state grant

- or -

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 7/19/21

_____
(Signature)

DANIEL L. SCHWARTZ, ESQ.
(Print Name)

PETITIONERS
(Attorney for)

ELECTRONICALLY SERVED
6/22/2021 4:29 PM

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Steven D. Grierson
CLERK OF THE COURT

NEOJ

Donald C. Smith, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an "Order" was entered in the above-captioned matter on June 21, 2021, a true and correct copy of which is attached hereto.

DATED this 22nd day of June, 2021.

///

///

Case Number: A-20-821892-J

Respectfully submitted,

DIVISION OF INDUSTRIAL RELATIONS

By: _____

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
3360 W. Sahara Ave., Ste. 250
Las Vegas, NV 89102
Attorneys for Respondent Division of Industrial Relations

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Division of Industrial Relations, and that on this 22ND day of June, 2021, I caused the foregoing document entitled **Notice of Entry of Order** 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 District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-02 and the NEFCR.

_____

An employee of the State of Nevada
Division of Industrial Relations

STATE OF NEVADA
Division of Industrial Relations - Division Counsel
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **ORDER GRANTING RESPONDENT DIVISION OF INDUSTRIAL RELATIONS' MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW**

The matters before the Court are Respondent Nevada Division of Industrial Relations' ("Division") Motion to Dismiss Petitioners' Petition for Judicial Review, and Respondent State of Nevada Board for the Administration of the Subsequent Injury Account for Self-Insured Employers' ("Board") Joinder thereto. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral arguments of counsel on June 7, 2021, and good cause appearing, hereby rules as follows:

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I. FINDINGS

1. Respondent Division moved to dismiss Petitioners' Petition for Judicial Review on two bases: first, Petitioners failed to transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency as required by NRS 233B.131(1)(a), and second, Petitioners failed to timely file their Memorandum of Points and Authorities as required by NRS 233B.133(1).

2. NRS 233B.131(1)(a) provides that "Within 45 days after the service of the petition for judicial review or such time as is allowed by the court: (a) The party who filed the petition for judicial review **shall** transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency." (Emphasis added).

3. NRS 233B.131(1)(b) provides that "Within 45 days after the service of the petition for judicial review or such time as is allowed by the court: (b) The agency that rendered the decision which is the subject of the petition shall transmit to the reviewing court the original or a certified copy of the **remainder** of the record of the proceeding under review." (Emphasis added).

4. Petitioners filed their Petition for Judicial Review on September 24, 2020. Thus, pursuant to the controlling statute, NRS 233B.131(1)(a), Petitioners' deadline to transmit the transcript to the Court was November 9, 2020.

5. It is undisputed that the Petitioners never transmitted the transcript to the Court.

6. It is undisputed that the Petitioners filed their Opening Brief 105 days late and that said Brief lacks citations to the transcript of the administrative proceeding under review.

7. The record of the underlying administrative proceeding is incomplete due to Petitioners' failure to transmit the transcript to the Court.

8. As a result of the incomplete record, and of Petitioners' failure to cite to the transcript in their late-filed Opening Brief, this Court cannot conduct a judicial review based upon the whole record as required by NRS 233B.135.

. . .

9. On November 9, 2020, the Respondents timely transmitted to the court the remainder of the record pursuant to NRS 233B.131(1)(b).

10. The requirements of NRS 233B.131(1)(a) and (b) are mandatory because the statute employs the word "shall." Thus, the Petitioners' failure to transmit the transcript to the court renders their Petition for Judicial Review subject to dismissal.

11. NRS 233B.131(1)(a) is plain and unambiguous, yet Petitioners failed to comply with their 45-day statutory deadline. Moreover, Petitioners position, in their written Opposition to the Division's Motion to Dismiss, and during the oral argument—that they are not required to transmit the transcript to the court—is contradicted by the plain and unambiguous language of the statute. As of June 7, 2021—the date of the hearing on the Division's Motion to Dismiss—Petitioners were 211 days past their statutory deadline to transmit the transcript to the Court.

12. Good cause for a delay in transmitting the transcript, however, may be shown pursuant to NRS 233B.131 because the statute allows the court to alter the 45-day deadline. Thus, the 45-day deadline is not jurisdictional.

13. Petitioners' argument that Respondents were statutorily required to file the *complete* record of the underlying administrative proceeding is contradicted by the structure and plain and unambiguous language of NRS 233B.131, the controlling statute. Petitioners' position is erroneous as a matter of law. Indeed, the legislative history of the 2015 amendment to NRS 233B.131 shows that the underlying policy for requiring petitioners to transmit the transcript to the court was to decrease the burden on taxpayers.

14. Petitioners have not met their burden to show good cause for their ongoing delay to transmit the transcript to the Court.

15. Mr. Price did not provide the Court with an affidavit or declaration specifying how his medical condition affected his ability to comply with statutory requirements during the intervening 211 days. The Court assumes that he had a serious medical condition but finds the effects of the condition vague.

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16. Moreover, two other attorneys from Mr. Price's law firm are listed on the Court's electronic service list for this case.

17. Petitioners bear the burden to show good cause, but they have not met their burden under the *Scrimer* factors. *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000).

18. Furthermore, Petitioners' extensive unexcused delay is mooted by their position that they are not statutorily required to transmit the transcript to the Court.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Respondent Division's Motion to Dismiss Petitioners' Petition for Judicial Review and the Board's Joinder thereto are GRANTED.

DATED this _____ day of _____, 20__ Dated this 21st day of June, 2021

HON. JUDGE JOE HARDY, JR.

F18 060 65D6 31EC
Joe Hardy
District Court Judge

Respectfully submitted by:
DIVISION OF INDUSTRIAL RELATIONS

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
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Approved as to form and content by:
LEWIS BRISBOIS BISGAARD & SMITH

By: _____
Kim D. Price, Esq.
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Las Vegas, NV 89102
Attorneys for Petitioners LVMPD and CCMSI

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Metropolitan Police Department, Petitioner(s) vs. State of Nevada Department of Business & Industry, Respondent(s)	CASE NO: A-20-821892-J DEPT. NO. Department 15

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/21/2021

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Las Vegas Metropolitan Police Department and Cannon Cochran Management Services, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; and CANNON COCHRAN MANAGEMENT SERVICES, INC,, Petitioners, v. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	CASE NO.: A-20-821892-J DEPT. NO.: 15

CASE APPEAL STATEMENT

1. Name of Petitioners filing this case appeal statement:

Las Vegas Metropolitan Police Department and Cannon Cochran Management Services, Inc

2. Identify the Judge issuing the decision, judgment, or order appealed from:

Hon. Joe Hardy, District Court Judge

3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited):

Las Vegas Metropolitan Police Department, Cannon Cochran Management Services, Inc, Division of Industrial Relations, and State Of Nevada Board For The Administration Of The Subsequent Injury Account For Self-Insured Employers

4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited):

Las Vegas Metropolitan Police Department, Cannon Cochran Management Services, Inc, Division of Industrial Relations, and State Of Nevada Board For The Administration Of The Subsequent Injury Account For Self-Insured Employers

5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the party or parties whom they represent:

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KIM D. PRICE, ESQ.
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Attorneys for Respondent
Division of Industrial Relations (DIR)

AARON D. FORD, ESQ.
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State of Nevada Officer of the Attorney General
555 E. Washington Ave., #3900
Las Vegas, Nevada 89101
Attorneys for Respondent
State Of Nevada Board For The Administration Of The Subsequent Injury Account For Self-Insured Employers

6. Indicate whether Petitioners were represented by appointed or retained counsel in the district court:

Petitioners were represented by retained counsel in the District Court.

7. Indicate whether Respondent was represented by appointed or retained counsel in the district court:

Respondent was represented by retained counsel in the District Court.

8. Indicate whether Petitioners are represented by appointed or retained counsel on appeal:

Petitioners are represented by retained counsel on appeal.

9. Indicate whether Respondent is represented by appointed or retained counsel on appeal:

Respondent is represented by retained counsel on appeal.

10. Indicate whether Petitioners were granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave;

Petitioners were not granted leave to proceed in forma pauperis.

11. Indicate whether Respondent was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Respondent was not granted leave to proceed in forma pauperis.

12. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

The Petition for Judicial Review of the Board for Administration of the Subsequent Injury Account for Self-Insured Employers' (hereinafter referred to as "the Board") August 19, 2020, Findings of Fact, Conclusions of Law, and Determination for Claim Number 12D34C229979, was filed on September 24, 2020.

13. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is a workers' compensation case. The present appeal stems from the Board for Administration of the Subsequent Injury Account for Self-Insured Employers' (hereinafter referred to as "the Board") August 19, 2020, Findings of Fact, Conclusions of Law, and Determination for Claim Number 12D34C229979.

On September 21, 2020, the handling attorney for the subject case for Petitioners underwent radical prostatectomy for prostate cancer. Follow-up care impeded counsel's ability to practice law full-time for several weeks following the procedure.

On September 24, 2020, Petitioners timely filed the subject Petition for Judicial Review contesting the August 19, 2020 Decision of the Board.

On November 9, 2020, the Record on Appeal was filed. On the front page of the Record it states as follows:

> **Pursuant to NRS 233B.131, the STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF INSURED EMPLOYERS (SIA) now files the entire record of the proceedings under review by this Court as a result of the Petition for Judicial Review pursuant to NRS 233B.130 filed by LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., Respondents**

(emphasis added)

On April 5, 2021, Petitioners filed their Opening Brief. Petitioners' Brief contained citations to relevant records in the Record on Appeal.

On May 5, 2021, Respondent Division of Industrial Relations filed a Motion to Dismiss and Strike. Petitioners opposed the same.

On June 7, 2021, Respondent's Motion came on for hearing and the District Court granted the same based on the assertion that *Petitioners* had failed to file the entire record on appeal, Petitioners' Opening Brief was late, and Petitioners' Opening Brief did not contain any citations to the Record on Appeal. On June 21, 2021, the Order commemorating this Court's ruling was filed. The Notice of Entry was filed on June 22, 2021.

14. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

No.

15. Indicate whether this appeal involves child custody or visitation:

No.

16. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

No.

DATED this 19 day of July 2021.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

DANIEL L. SCHWARTZ, ESQ.
KIM D. PRICE, ESQ.
JOEL P. REEVES, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
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Attorneys for Petitioners

DISTRICT COURT
CLARK COUNTY, NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, CASE APPEAL STATEMENT filed in case number: A-20-821892-J:

☒ Document does not contain the Social Security number of any person.

- OR -

☐ Document contains the Social Security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

- or -

☐ For the administration of a public program

- or -

☐ For an application for a federal or state grant

- or -

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 7/19/2021

_____
(Signature)

DANIEL L. SCHWARTZ, ESQ.
(Print Name)

PETITIONERS
(Attorney for)

LEWIS BRISBOIS BISGAARD & SMITH LLP
ATTORNEYS AT LAW

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept No.: 15 Hearing Not Requested (Chambers Hearing on July 28, 2021)

RESPONDENT DIVISION OF INDUSTRIAL RELATIONS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION OF ORDER GRANTING THE DIVISION'S MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW

COMES NOW Respondent, Division of Industrial Relations ("Division" or "DIR") by and through its undersigned counsel and hereby files the above-captioned Motion to Dismiss,

or in the alternative, Opposition to Petitioners' Motion for Reconsideration.

Pursuant to Eighth Judicial District Court Rule ("EDCR") 2.20(f) an opposition to a motion that contains a motion related to the same subject matter will be considered a countermotion and will be heard and decided at the same time set for the hearing of the original motion if a hearing was requested, unless the court sets it for hearing at a different time. Here, Petitioners' Motion for Reconsideration requested a hearing, but the Court set the matter for a hearing in chambers. Thus, the Division's Motion to Dismiss the Petitioners' Motion for Reconsideration should also be set for a chambers hearing on July 28, 2021, unless the Court sets it for a different time.

I. THE DIVISION'S MOTION TO DISMISS PETITIONERS' MOTION FOR RECONSIDERATION

A. PRELIMINARY STATEMENT

Up is down and down is up. Petitioners' arguments as so far removed from reality and so lacking in analysis and citations to authorities that they appear to not be made in good faith. Petitioners insist that this Court's ruling is wrong because "...petitioners **never** file anything relative to the Record on Appeal in workers' compensation petitions." Motion for Reconsideration at 9:5-8 (emphasis in original). Petitioners seem to argue that because they never followed the plain and unambiguous mandatory language of NRS 233B.131(1)(a), this Court should not have the gall to make them comply now. If that is how courts applied the law, then the rule of law in our society would be meaningless.

In short, this Court should dismiss Petitioners' Motion for Reconsideration because Petitioners have not demonstrated jurisdiction under NRCP 52(b), 59(e), or 60(b), as will be detailed below.

B. STATEMENT OF FACTS

Petitioners filed their Petition for Judicial Review ("PJR") on September 24, 2020. Thus, pursuant to the plain and unambiguous mandatory language of NRS 233B.131(1)(a), Petitioners had a statutory duty to file the original or certified copy of the transcript with the

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court by November 9, 2020.

Without excuse, Petitioners have still not filed the transcript—they are about 241 days late and counting. Rather than file the transcript and offer a *mea culpa*, Petitioners have tripled-down on their legally erroneous interpretation and insisted that they have no duty to transmit the transcript to this Court because they have never done so. Motion for Reconsideration at 9:5-8.

This Court correctly found that the Petitioners did not meet their burden to show good cause for their delay under the *Scrimer* factors and that their extensive unexcused delay was mooted by their legally erroneous position that they are not statutorily required to transmit the transcript to the Court. Order Granting Division's Motion to Dismiss at 4:3-7.

Nonetheless, in their Motion for Reconsideration, Petitioners filed the affidavit of Mr. Reeves, who did not attend the hearing on the Division's Motion to Dismiss, and who ostensibly did not bother to obtain the transcript of said hearing to point out to the Court exactly where it allegedly was "improperly persuaded." Instead, Mr. Reeves' affidavit merely states: "That the undersigned truly believes that this Court has been improperly persuaded as to what is required in Petitions for Judicial Review..." Affidavit at ¶ 6. Further, the affidavit states: "The undersigned fully recognizes that reconsideration is not to be requested absent extreme circumstances... *Id.* at ¶ 7.

District Court Rules ("DCR") 13(5) provides: "Affidavits shall contain only factual, evidentiary matter, shall conform with the requirements of NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part." Here, Mr. Reeves' affidavit consists of nothing more that mere general conclusions or argument and should be stricken.

Moreover, Petitioners' Motion for Reconsideration should be dismissed because they failed to analyze how this Court has jurisdiction pursuant to NRCP 52(b), 59(e), or 60(b).

///

///

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Division of Industrial Relations - Division Counsel
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C. ARGUMENT

1. Petitioners Have Not Shown That This Court Has Jurisdiction to Reconsider Under NRCP 52(b).

Petitioners seek to invoke this Court's jurisdiction under NRCP 52(b). Motion for Reconsideration at 7:3-7. Under NRCP 52(a)(6), findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous. Petitioners have not specified which of the Court's eighteen findings they believe are clearly erroneous. Nor have they cited relevant case law pertaining to NRCP 52(b). Instead, Petitioners seek to use their ignorance and/or legally erroneous interpretation of NRS 233B.131(1)(a) as a shield from having their PJR rightfully dismissed.

In examining NRCP 52(b), the Nevada Supreme Court has provided:

> The primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and a conclusion of law.
>
> The purpose of 52(b) is to clarify matters for the appellate court's better understanding of the basis of the decision of the trial court. . . . The Rule permits the Court in its discretion to 'amend' findings of fact or to 'make additional findings', thus amplifying and expanding the facts. The Rule does not provide for a reversal of the judgment or for a denial of the facts as found, which is what the plaintiff requests at present." *Matyas v. Feddish,* 4 F.R.D. 385, 386 (M.D. Pa. 1945).
>
> Rule 52(b) merely provides a method for amplifying and expanding the lower court's findings, and is not intended as a vehicle for securing a rehearing on the merits. *Noice v. Jorgensen*, 378 P.2d 834 (Colo. 1963); *Minneapolis- Honeywell Reg. Co. v. Midwestern Inst., Inc.*, 188 F.Supp. 248 (N.D. Ill. 1960).

In re Estate of Hermann, 100 Nev. 1,, 20 n.16, 677 P.2d 594, 606-07 n.16 (1984) (quoting 9 Wright & Miller, Federal Practice and Procedure 722, § 2582).

Here, Petitioners seek not to persuade this Court that its findings are clearly erroneous.

STATE OF NEVADA
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Rather, Petitioners seek special treatment from this Court in that they should not be required to comply with NRS 233B.131(1)(a) in the case at bar because they never have in the past! This Court should not entertain reconsideration. As a matter of fact, to the extent that Petitioners' Motion for Reconsideration raises *new* points or contentions that could have been raised in the hearing on the Division's Motion to Dismiss, those new points or contentions cannot be maintained or considered on rehearing. *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) (citing *Chowdhry v. NLVH, Inc.*, 111 Nev. 560, 562-63, 893 P.2d 385, 387 (1995); *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972)).

2. Petitioners Have Not Shown That This Court Has Jurisdiction to Reconsider Under NRCP 59(e).

In *AA Primo*, the Nevada Supreme Court reversed and remanded a district court order granting the respondent homeowners' motion for summary judgment. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 580, 245 P.3d 1190, 1191-92 (2010). The Court noted that the formal requirements of NRCP 59(e) are minimal, and that beyond minimal requirements, NRCP 59(e) does not impose limits on its scope. *Id.* at 581-82, 245 P.3d at 1192. That said, one of the formal requirements of NRCP 59(e) is that it must state with particularity its grounds. *Id.* (stating that the requirements of NRCP 7(b) must also be satisfied).

Here, Petitioners' Motion for Reconsideration does not state with particularity its grounds. It is merely an obstinate rehashing of failed arguments made at the hearing on the Division's Motion to Dismiss, or perhaps new contentions that cannot be maintained because they could have been raised at said hearing. *Achrem*, 112 Nev. at 742, 917 P.2d at 450.

Moreover, the *AA Primo* Court noted that it may consult federal law in interpreting NRCP 59(e) because it echoes FRCP 59(e). *AA Primo* at 582, 245 P.3d at 1192. The Ninth Circuit Court of Appeals, analyzing FRCP 59(e), has held that, "A motion for reconsideration under Rule 59(e) 'should not be granted absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or it there is an

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intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (internal citation omitted). The *McDowell* Court further noted that, "...reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* at 1255 n.1 (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995)). In *AA Primo*, the Nevada Supreme Court similarly noted that the basic grounds for a Rule 59(e) motion are correcting manifest errors, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in the controlling law. *AA Primo*, 126 Nev. at 582, 245 P.3d at 1193.

Here, the only "highly unusual circumstance" in the Division's view, is the Petitioners' tripling-down on their legally erroneous position that they are not statutorily required to transmit the transcript to this Court. The only manifest error is not in the Court's Order Granting the Division's Motion to Dismiss—the manifest error is Petitioners' insistence that their legal position is right, and the Court is wrong. Not only is NRS 233B.131(1)(a) plain and unambiguous, so too is the legislative history of the 2015 amendment to NRS 233B.131 whereby the legislature received testimony that the underlying policy for requiring petitioners to transmit the transcript to the court was to decrease the burden on taxpayers. Order Granting Division's Motion to Dismiss at 3:6-12.

In sum, Petitioners have not offered newly discovery evidence, nor have they shown that the Court made a manifest error or that the Order will result in manifest injustice. The only relevant change in the law with respect to NRS 233B.131(1)(a) is the 2015 amendment which required petitioners to transmit the transcript. This amendment occurred about six years ago and the Petitioners' failure to comply with the law for the last six years is not a basis for this Court to grant reconsideration.

3. Petitioners Have Not Shown That This Court Has Jurisdiction to Reconsider Under NRCP 60(b).

In *Willard v. Berry-Hinckley Indus.*, the Nevada Supreme Court reversed and remanded a district court's order denying an NRCP 60(b) motion. *Willard v. Berry-Hinckley Indus.*, 469

P.3d 176, 177-78, 2020 LEXIS 53 at **1-2 (2020). The Court held that the district court abused its discretion because it failed to address the *Yochum* factors when deciding the motion. *Id.* (*see Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982).

Here, Petitioners have not specified which of the six subparagraphs of NRCP 60(b) they believe serve as a basis for this Court to grant relief. Petitioners bear the burden to prove that this Court should grant relief. From the Division's perspective, at the very least, Petitioners should have specified which one or more of the six subparagraphs of NRCP 60(b) they believe serve as a basis for this Court to grant relief. Without specificity, the Division (and perhaps the Court) is left wondering which subparagraph(s) the Petitioners believe invoke(s) this Court's jurisdiction under NRCP 60(b).

It seems that we will have to use the process of elimination. Petitioners have not alleged newly discovered evidence under subparagraph two. They have not alleged fraud under subparagraph three. They have not alleged that the judgment is void (subparagraph four), or that the judgment has been satisfied (subparagraph five), or specified why they would fit withing the catch-all provision (subparagraph six). Thus, we are left to ponder subparagraph one: mistake, inadvertence, surprise, or excusable neglect.

When evaluating an NRCP 60(b)(1) motion, four factors indicate whether relief is appropriate: (1) a prompt application to remove the judgment; (2), the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656-57, 428 P.3d 255, 257 (2018) (holding that the district court, Joseph Hardy, Jr., Judge, did not err in denying appellant's pro se NRCP 60(b) motion for relief). Indeed, the Court, in stating the purpose of NRCP 60(b) stated as follows: 'The salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party.' *Id.* (quoting *Nev. Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 742 P.2d 802, 805 (1987).

Here, Petitioners, in addition to not citing or analyzing the *Yochum* factors, also failed to specify what they claim is their excusable neglect or the wrongs of the Division. Moreover,

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the *Rodriguez v. Fiesta Palms* Court noted, "While the district courts should assist pro se litigants as much as reasonably possible, a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements." *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (*see Kahn v. Orme*, 108 Nev. 510, 515, 835 P.2d 790, 793 (1992)).

If a pro se litigant cannot use his alleged ignorance as a shield, then neither can counsel for Petitioners. Yet, it appears that their argument is that they were ignorant of their statutory duty in NRS 233B.131(1)(a), and that their ignorance of a statute that has been effective since 2015 mandates that this Court should not presently apply the plain and unambiguous language of the statute to the Petitioners. This, like Petitioners' other specious argument about their Opening Brief not being due yet (Motion for Reconsideration at 11:19-28), is nonsense. The Division cited cases in its Motion to Dismiss regarding a petitioner's duty to transmit the transcript of the underlying proceeding pursuant to NRS 233B.131(1)(a). *Toman v. Nev. Transp. Auth.*, Case No.: CV18-00461, 2018 Nev. Dist. LEXIS 974, at *2 (Second Judicial Dist. Ct. of Nev. Sept. 17, 2018); *In re DOT*, Case No. A-19-787004-B *et seq.*, 2020 Nev. Dist. LEXIS 1221, at *1 (Eighth Judicial Dist. Ct. of Nev. Aug. 28, 2020); *Schulz Partners, LLC v. State ex re. Bd. of Equalization*, Case No. 53128, 2011 Nev. Unpub. LEXIS 500, at *1 (July 28, 2011) (unpublished disposition).

In sum, Petitioners failed to show that this Court has jurisdiction under NRCP 60(b) because they failed to allege which subparagraph or subparagraphs of NRCP 60(b) apply, and they failed to cite or analyze the *Yochum* factors, and they cannot use their ignorance as a shield against this Court's granting of the Division's Motion to Dismiss.

D. CONCLUSION

Petitioners' counsel, who did not attend the hearing on the Division's Motion to Dismiss, and who did not cite to the transcript of said hearing, has nonetheless signed an affidavit claiming that this court has been improperly persuaded. Mr. Reeves' Affidavit at ¶ 6. That is an extraordinary claim. Did counsel cite or analyze relevant case law? No. Did counsel

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specify which of the Court's eighteen findings were the result of the alleged improper persuasion? No. Did counsel concede that their legal position (that they do not have a duty to file anything under NRS 233B.131) is untenable? No.

Instead, in a display that irony may be dead, they argued that "There is no separate mandate that the petitioner file any actual 'transcript' of a hearing or anything like that." Motion for Reconsideration at 8:25-26. When the applicable statute says: "The party who filed the petition for judicial review **shall** transmit to the reviewing court an original or certified copy of the **transcript** of the evidence resulting in the final decision of the agency" (emphasis added) and counsel brazenly argues that they have no duty to file any actual transcript or anything like that, said argument is not made in good faith.

Accordingly, the Division respectfully requests that this Court dismiss Petitioners' Motion for Reconsideration.

II. THE DIVISION'S OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION

A. PRELIMINARY STATEMENT

Petitioners never filed the transcript of the underlying administrative proceeding. It is now about 241 days late. According to them, they do not have to file any transcript, and further, they claim that their Opening Brief is not even due yet. Motion for Reconsideration at 8:23-28, 11:20-28. The outlandish claim that their Opening Brief is not even due yet, aside from being specious, would also seem to be contrary to NRCP 1 (stating that the purpose of the rules is to secure a just and speedy determination of every action and proceeding). Finally, they argue that dismissal is too harsh. *Id.* at 12:1-18. Petitioners' counsel "does pray that Your Honor finds good cause for the late brief given the handling attorney's medical condition." *Id.* at 12:13-14.

As a matter of fact, Mr. Price did mention to the Board, back on November 10, 2020, that he was thankful for the Board's cooperation while he was dealing with prostate cancer. **Exhibit "1"** attached hereto (Transcript Minutes of the Board's November 10, 2020 meeting)

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at 18:11-18. Indeed, by this date, counsel was apparently ready to proceed with a full hearing on the merits of another claim he submitted to the Board for reimbursement. *Id.* at 18:8. He wanted witnesses sworn in to testify. *Id.* at 19:1-2. When Ms. Skrinjaric, the Division's designee to present the recommendation to the Board, advised that no court reporter was present for this meeting, an indignant Mr. Price stated: "Well, we're going to – well, that's problematic, because **we're going to need a transcript**." *Id.* at 19:3-7 (emphasis added).

Having recognized back in November of 2020 that they were going to need the transcript of an administrative proceeding, why now does Petitioners' counsel come to this Court, seeking extraordinary relief, and claim that Petitioners have no duty to file a transcript? How can they claim to have filed this Motion for Reconsideration in good faith? Reeves' Affidavit at ¶ 9.

B. STATEMENT OF FACTS

A recitation of the relevant facts is provided in section I. B. hereinabove. For brevity, the Division incorporates the facts herein by reference.

C. ARGUMENT

The Division's arguments in favor of its Opposition are basically the same as those stated in section I. C. 1. through 3 hereinabove. For brevity, the Division incorporates those arguments herein by reference.

D. CONCLUSION

Petitioners had the opportunity to argue in their Opposition to the Division's Motion to Dismiss everything that they argued in their Motion for Reconsideration. There are no new facts, no new evidence, no change in controlling law, no demonstration that this Court's Order Granting the Division's Motion to Dismiss was the result of alleged improper persuasion, and no demonstration of manifest injustice.

Instead, Petitioners' counsel has shown an uncanny ability to speciously and repeatedly claim that they have no duty to comply with a plain and unambiguous statute, NRS 233B.131(1)(a). That this argument is not made in good faith is corroborated by counsels' lack of citations to relevant authorities and lack of analysis of their own claims for this extraordinary

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relief.

This Court should deny Petitioners' Motion for Reconsideration. This Court should not allow Petitioners' counsel to use their alleged ignorance of NRS 233B.131 as a shield from complying with its requirements. After all, was Petitioners' counsel ignorant of the requirement to transmit a transcript to this Court when by his own words at an administrative hearing on November 10, 2020, **"...we're going to need a transcript."**? **Exhibit "1"** at 19:3-7 (emphasis added).

III. RELIEF REQUESTED

The Division respectfully requests as follows:

(1) That this Court Strike Mr. Reeves' Affidavit in whole, or strike ¶ 6, the second sentence of ¶ 7, and ¶ 9 pursuant to DCR 13(5); **and**

(2) That this Court grant the Respondent Division's Motion to Dismiss Petitioners' above-captioned Motion for Reconsideration; **or**

(3) That this Court deny Petitioners' above-captioned Motion for Reconsideration.

DATED this 19th day of July, 2021.

DIVISION OF INDUSTRIAL RELATIONS

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
Attorneys for Respondent Division of Industrial Relations

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served: Respondent Division of Industrial Relations' Motion to Dismiss, or in the Alternative, Opposition to Petitioners' Motion for Reconsideration of Order Granting Respondent Division's Motion to Dismiss Petitioners' Petition for Judicial Review

Person(s) Served: Daniel L. Schwartz, Esq. Joel P. Reeves, Esq. Kim D. Price, Esq. Lewis Brisbois Bisgaard & Smith 2300 W. Sahara Ave. Ste. 300, Box 28 Las Vegas, NV 89102 *Counsel for Petitioners LVMPD and CCMSI*	**U.S. Mail** _____**via State Mail room** (regular or certified) circle one _____**deposited directly with U.S. Mail Service** _____**Overnight Mail** _____**Interdepartmental Mail** _____**Messenger Service** _____**Facsimile** fax number: _____ __✓__**Electronic Service**
Person(s) Served: LVMPD c/o Jeff Roch Director of Risk Mgmt. 400 S. Martin Luther King Blvd. Las Vegas, NV 89106 *Petitioner*	**U.S. Mail** _____**via State Mail room** (regular or certified) circle one _____**deposited directly with U.S. Mail Service** _____**Overnight Mail** _____**Interdepartmental Mail** _____**Messenger Service** _____**Facsimile** fax number: _____
Person(s) Served: CCMSI c/o Dusty Marshall Claims Supervisor P.O. Box 35350 Las Vegas, NV 89133 *Petitioner*	**U.S. Mail** _____**via State Mail room** (regular or certified) circle one _____**deposited directly with U.S. Mail Service** _____**Overnight Mail** _____**Interdepartmental Mail** _____**Messenger Service** _____**Facsimile** fax number: _____

Person(s) Served:	U.S. Mail
Donald J. Bordelove, Esq. Deputy Attorney General Office of the Attorney General 555 E. Washington Ave. Ste. 3900 Las Vegas, NV 89101 *Counsel for Respondent Board for the Administration of the Subsequent Injury Account for Self-Insured Employers*	_____ **via State Mail room** (regular or certified) circle one _____ **deposited directly with U.S. Mail Service** _____ **Overnight Mail** _____ **Interdepartmental Mail** _____ **Messenger Service** _____ **Facsimile** fax number: _____ __✓__ **Electronic Service**

DATED this 19th day of July, 2021.

State of Nevada Employee

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EXHIBIT "1"

TRANSCRIPT MINUTES

MEETING OF THE
STATE OF NEVADA
BOARD FOR THE ADMINISTRATION OF THE
SUBSEQUENT INJURY ACCOUNT FOR
SELF-INSURED EMPLOYERS

Tuesday, November 10, 2020
1:00 p.m.

(Due to concerns with COVID-19,
the meeting was conducted via telephone.)

A P P E A R A N C E S

For the Board:

Cecilia Meyer (phone)
Board Chair, Board Member

Suhair Sayegh (phone)
Board Member

Sharolyn Wilson (phone)
Board Member

Donald Bordelove, Esq. (phone)
Deputy Attorney General
Board Counsel

For the Division of Industrial Relations:

Christopher A. Eccles, Esq. (phone)
Counsel for DIR

For the Administrator of the DIR:

Vanessa Skrinjaric (Las Vegas)
Compliance Audit Investigator
Division of Industrial Relations
Workers' Compensation Section

Also Present:

Kim Price, Esq. (phone)
Lewis Brisbois Bisgaard & Smith LLP

Jeff Roach (phone)
LVMPD

Dusty Marshall (phone)
CCMSI

Kasey McCourtney (phone)
CCMSI

I N D E X

not.

BOARD MEMBER MEYER: Suhair.

BOARD MEMBER SAYEGH: I'm sorry. I was just looking at the... I do not at this time.

BOARD MEMBER MEYER: I don't have any questions, either. Does someone want to make a motion on this claim?

MR. PRICE: We'd like to be heard on the claim.

BOARD MEMBER MEYER: I'm so sorry. Go ahead, Mr. Price.

MR. PRICE: Certainly. Before I go, before I say anything more, I have to say, try to express how much I appreciate the Board's willingness to indulge and cooperate with me while I've been dealing with prostate cancer. I know that we had to extend a couple or continue a couple of hearings because I was out of the office. And I just wanted to say how much I appreciated the consideration.

With me today I have Dusty Marshall and Jeff Roach. Dusty is from CCMSI. She's claims supervisor. And Jeff is the risk manager for LVMPD.

I will try to identify, because my voice and Jeff's voice may be similar, I'll try to identify myself when I speak. I think, you should be able to recognize Dusty's voice.

At this time, it might be best to go ahead and swear them in as witnesses, please.

MS. SKRINJARIC: This is Vanessa. We do not have a court reporter present for this meeting.

MR. PRICE: Well, we're going to -- well, that's problematic, because we're going to need a transcript.

MS. SKRINJARIC: Well, there will be a transcript only because that's the Board's current procedure. We do a recording, and then there the court reporter transcribes it. But there is no court reporter present to swear this witness in.

MR. PRICE: Well, how are we going to swear in the witnesses, then?

MR. ECCLES: This is Chris Eccles. I don't think this is the time and place for the actual hearing. I think, this is a time for the Board to make a decision on the Administrator's recommendation. And under NAC 616B.7706, if the Board denies the claim or any expenses related to the claim, then the party who is claiming they are aggrieved by that decision can request a hearing within 30 days.

So at that subsequent hearing, if there is a request for a hearing, that is the time and place whereby Vanessa Skrinjaric will arrange for a court

reporter and for there to be testimony, cross-examination, et cetera, in accordance with the procedural rules of the Board.

MR. PRICE: This is Kim. So what you're submitting is that we don't get to say anything today?

MS. SKRINJARIC: You wouldn't be swearing any witnesses.

MR. PRICE: But if I'm going to have witnesses give testimony, they need to be sworn in. It's the way we've always done it. I've been doing this for six years. Every time there's an SIA Board meeting, we call witnesses, the witnesses are sworn in. Today, for the first time, you're telling me that the initial hearing of an SIA matter, we're not allowed to present evidence or testimony.

MS. SKRINJARIC: Mr. Price, if I may, this is Vanessa Skrinjaric. The general procedure before this Board has always been there is an initial reading of the recommendation. The Board votes to either approve or deny. There then is a determination of the Board, which you can then request a hearing. And then, at that time, a court reporter would be scheduled, and you would then have a full-blown hearing.

MR. PRICE: Well, then, I guess, it's absolutely pointless for me to show up monthly at these

hearings, then, because you're not willing to accept any testimony or take in or review our evidence before you make the decision. So, I guess, you guys should go ahead and make your decision. We'll request a transcript and go forward with an appeal.

MS. MCCOURTNEY: I'm sorry. This is Kasey with CCMSI. I disagree with that. I think that you do have the chance to argue your position in regards to this and for the witnesses to provide their additional information to argue your position for the application, so that the Board has additional information to review and make their decision on.

MR. ECCLES: And, for the record, again, this is Christopher Eccles, DIR counsel. I feel that what was just said is correct. We're just trying to follow the procedures here.

You've got every opportunity to present your side of the case to provide documents to the Board. And I have every opportunity to exercise my rights and cross-examination them and to do any motion that I may want to submit in order to streamline the hearing process.

I'm just following the rule in the NAC 616B.7706. And that's the way that I've understood this has been carried out by this Board for the past years.

MR. PRICE: This is Kim. I don't agree with that forever. Because I've been appearing at these initial SIA hearings for six years. And I've always been given the opportunity to speak my piece, to present evidence, to have you review evidence and our application, and to present witnesses.

So if you're changing the rules today, then I welcome the Board to please go ahead and vote on this matter. And we'll take a transcript. And we'll file the appeal as necessary.

BOARD MEMBER MEYER: I'm not sure how we should proceed at this point.

MR. ECCLES: Maybe -- again, this is Chris Eccles. Maybe Board counsel can jump in here, or someone on the Board can address it. But I've, basically, said, I think, what I need to say. I didn't even know who the applicant's witnesses were or what they're allegedly going to testify to or if they're offering any documents into evidence. We don't have any of that at this point for the Board to even have copies to see this evidence, if there is any, and for me to make any objections to it.

So it's not for --

MR. PRICE: Well, you do have our entire application.

BOARD MEMBER MEYER: Mr. Bordelove, are you present?

MR. BORDELOVE: Yeah. This is Donald Bordelove, Board counsel. I'm not really sure where Mr. Price is coming from. If you can look at the agenda, item 5 clearly states action on recommendation of the Administrator of the Division of Industrial Relations.

Pursuant to the updated regulations, you can request a -- maybe that's where this confusion is coming from. You can request a hearing within 30 days. And that would be to present witnesses.

I believe, it has been Board practice to allow you to make a statement, though, before, before they rule on the recommendation, which you're more than welcome to do. But --

MR. PRICE: Well, the Board's heard --

MR. BORDELOVE: -- if you went ahead -- I'm not finished. If you went ahead and filed a petition for judicial review after this, arguably, by failing to follow that regulation, you would waive your right to any hearing and any presentations of witnesses, and thus the Board's order would be affirmed on petition for judicial review for complying with the standards thereof. But it's your choice to do what you want.

MR. PRICE: Well, if you're going to -- you know, as I said, six years, they've taken testimony from Dusty and Jeff before on the initial hearings. But if you want to --

MR. BORDELOVE: Mr. Price --

MR. PRICE: If that's the way you want to play, that's fine. I have no objection if you if you want to follow the rules. That's fine. It's just you yanked the rug out from under us after six years of doing it this way. There's --

MR. BORDELOVE: You have the right to --

MR. PRICE: If the Board wishes to -- I'm not finished, please. I'm not finished, please. But if you want to, if you're going to maintain this position, then I invite the Board to go ahead and vote on the DIR's recommendation. Let's move on to the next agenda item.

MR. ECCLES: And, again, I'll just state for the record that as long as you request a hearing, you will have the absolute right to present all witnesses, which will be noticed in advance, properly, and you'll have all the ability to present your testimony. And the Board could, of course, change its decision today, presuming whatever decision that is.

But I would advise the Board, if Mr. Price does not want to make a statement, if he does not want to

make a statement on the Administrator's recommendation, which is his choice to do, and we should first find out whether he wants to make a statement or not, but if he doesn't want to make a statement, then I would advise the Board to make a motion on the recommendation.

Mr. Price, would you like to make a statement before the Board votes on that recommendation?

MR. PRICE: Yes, I would.

MR. ECCLES: Please proceed.

MR. PRICE: All right. At this time, I would like to go ahead and invite my witnesses, Dusty and Jeff, to go ahead and leave the hearing. There's really no reason for them to continue online.

MR. ROACH: Thank you. We'll be leaving. Thanks.

MS. MARSHALL: Thank you.

MS. SKRINJARIC: Thank you.

MR. PRICE: Well, our task in front of the Board in submitting an SIA application is to submit documents from which can be reasonably inferred that there is a qualifying impairment and that the written record shows that that existed before the date of the subsequent injury. That's in North Lake Tahoe Fire Protection District case that I know the Board is familiar with.

JOIN
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Attorneys for Respondent
Board for the Administration of the Subsequent Injury Account for Self-Insured Employers

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; and CANNON COCHRAN MANAGEMENT SERVICE, INC., Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondent.	Case No. A-20-821892-J Dept. No. 15

JOINDER TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION OF ORDER GRANTING THE DIVISION'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

COMES NOW Respondent, the Board for Administration of the Subsequent Injury Account for Self-Insured Employers, by and through its counsel, and hereby joins

...

Respondent's, Division of Industrial Relations, Motion to Dismiss, or in the Alternative, Opposition to Petitioners' Motion for Reconsideration.

Dated: July 22, 2021.

AARON D. FORD
Attorney General

By: /s/ Donald J. Bordelove
Donald J. Bordelove (Bar. No. 12561)
Deputy Attorney General
Attorneys for the Board

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on July 22, 2021 I filed the foregoing **JOINDER TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION OF ORDER GRANTING THE DIVISION'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** via this Court's electronic filing system. EFS users will be served electronically via email.

/s/ Michele Caro
An employee of the Office of the Attorney General

DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal	**COURT MINUTES**	**July 28, 2021**

A-20-821892-J Las Vegas Metropolitan Police Department, Petitioner(s)
vs.
State of Nevada Department of Business & Industry, Respondent(s)

July 28, 2021 **3:00 AM** **All Pending Motions**

HEARD BY: Hardy, Joe **COURTROOM:** Chambers

COURT CLERK: Carina Bracamontez-Munguia/cbm

PARTIES PRESENT: None. Minute order only - no hearing held.

JOURNAL ENTRIES

MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS ON ORDER SHORTENING TIME...JOINDER TO MOTION TO DISMISS, OR OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

COURT ORDERED, Petitioner's Motion for Reconsideration is hereby DENIED. Respondent Division of Industrial Relations counsel is to prepare the written order; submit the order to Petitioner's counsel for review and approval, and then submit the order to DC15inbox@clarkcountycourts.us.

CLERK'S NOTE: The above minute order has been electronically served to parties via e-mail and/or Odyssey File & Serve. // cbm 07-28-2021

Electronically Filed
08/16/2021 4:01 PM
CLERK OF THE COURT

ODM

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION**

The Court set this matter for decision on July 28, 2021 on its Chambers calendar. The Court, having reviewed the papers and pleadings on file in this matter and good cause appearing, hereby rules as follows:

I. FINDINGS

1. On June 21, 2021, this Court entered a detailed Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review.

STATE OF NEVADA
Division of Industrial Relations - Division Counsel
3360 West Sahara Ave., Suite 250
Las Vegas, Nevada 89102
(702) 486-9080

2. Said Order specified that Petitioners did not comply with their statutory duty to transmit the transcript of the Board's administrative hearing to this Court pursuant to NRS 233B.131(1)(a). Petitioners did not meet their burden to show good cause for their delay under *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000), and furthermore, Petitioners' extensive unexcused delay to transmit the transcript is mooted by their erroneous legal position that they are not statutorily required to transmit the transcript to the Court.

3. On June 22, 2021, the Division filed its Notice of Entry of Order.

4. On July 13, 2021, Petitioners filed their Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review and Request for Order Shortening Time ("Petitioners' Motion for Reconsideration").

5. Petitioners' Motion for Reconsideration claimed that this Court "has been improperly persuaded as to what is required in Petitions for Judicial Review" (Affidavit in Support of Order Shortening Time at ¶ 6) and insisted that "The law requires **the agency** to file the **complete** record." Petitioners' Motion for Reconsideration at 9:23 (emphasis in original). Indeed, Petitioners continue to argue that, "There is no separate mandate that petitioner file any actual 'transcript' of a haring or anything like that." Petitioners' Motion for Reconsideration at 8:25-26. Petitioners' contentions are unsupported by the plain language of NRS 233B.131(1)(a), the legislative history of the 2015 amendments to said statute, and by case law.

6. Petitioners have not demonstrated that reconsideration is warranted to correct manifest error, or due to newly discovered or previously unavailable evidence, or the need to prevent manifest injustice, or due to a change in the controlling law. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010).

7. Similarly, Petitioners have not analyzed, let alone demonstrated, that reconsideration is warranted under the *Yochum* factors. *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982); *see also Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656-57,

428 P.3d 255, 257 (2018).

8. At the time of this Court's July 28, 2021 chambers hearing on Petitioners' Motion for Reconsideration, Petitioners were about 250 days past their deadline to file the transcript.

9. Petitioners have not demonstrated that reconsideration is warranted.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Petitioners' Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review is hereby DENIED.

DATED this _____ day of _____, 2021.

Dated this 16th day of August, 2021

Joe Hardy

HON. JUDGE JOE HARDY, JR.

5AA 724 23CC CCA9
Joe Hardy
District Court Judge

Respectfully submitted by:
DIVISION OF INDUSTRIAL RELATIONS

/s/ Christopher A. Eccles

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
Division of Industrial Relations
3360 W. Sahara Ave., Ste. 250
Las Vegas, NV 89102
Attorneys for Respondent Division of Industrial Relations

Approved as to form and content by:
LEWIS BRISBOIS BISGAARD & SMITH

By: */s/ Joel P. Reeves*

Kim D. Price, Esq.
Nevada Bar No. 7873
2300 W. Sahara Ave., Ste. 900, Box 28
Las Vegas, NV 89102
Attorneys for Petitioners LVMPD and CCMSI

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From:	Reeves, Joel
To:	Christopher Eccles; Price, Kim; Schwartz, Daniel; Bateman, Dawn; Platt, Hilton
Cc:	Donald J. Bordelove; Samantha OBrien; Michele L. Caro
Subject:	RE: LVMPD, CCMSI v. SIE, DIR - A-20-821892-J - DIR"s Order Denying Pets" Mtn for Reconsideration, 8.11.21, follow up 8.16.21
Date:	Monday, August 16, 2021 1:35:26 PM
Attachments:	Logo_e6253148-26a1-47a9-b861-6ac0ff0bc3c4.png

Hey Chris,

This is fine. You can e-sign for me.

LEWIS BRISBOIS

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From: Christopher Eccles <ceccles@dir.nv.gov>
Sent: Monday, August 16, 2021 1:19 PM
To: Price, Kim <Kim.Price@lewisbrisbois.com>; Reeves, Joel <Joel.Reeves@lewisbrisbois.com>; Schwartz, Daniel <Daniel.Schwartz@lewisbrisbois.com>; Bateman, Dawn <Dawn.Bateman@lewisbrisbois.com>; Platt, Hilton <Hilton.Platt@lewisbrisbois.com>
Cc: Donald J. Bordelove <DBordelove@ag.nv.gov>; Samantha OBrien <samantha.obrien@dir.nv.gov>; Michele L. Caro <MCaro@ag.nv.gov>
Subject: [EXT] RE: LVMPD, CCMSI v. SIE, DIR - A-20-821892-J - DIR's Order Denying Pets' Mtn for Reconsideration, 8.11.21, follow up 8.16.21

Hello All,

I am following up. Please sign and email back to me or advise of proposed edits.

Thank you,

Christopher A. Eccles, Esq.
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Metropolitan Police Department, Petitioner(s) vs. State of Nevada Department of Business & Industry, Respondent(s)	CASE NO: A-20-821892-J DEPT. NO. Department 15

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/16/2021

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Donald Bordelove	dbordelove@ag.nv.gov
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Kim Price	kim.price@lewisbrisbois.com
Samantha O'Brien	samantha.obrien@dir.nv.gov

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Jennifer J. Leonescu, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. **Petitioners,** **vs.** **STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS,** **Respondents.**	Case No.: A-20-821892-J Dept. No.: 15 **NOTICE OF ENTRY OF ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION**

PLEASE TAKE NOTICE that the Order Denying Petitioner's Motion for Reconsideration was entered in the above-captioned matter on August 16, 2021, a true and correct copy of which is attached hereto.

DATED this 17th day of August, 2021.

Respectfully submitted,
DIVISION OF INDUSTRIAL RELATIONS

By: */s/ Christopher A. Eccles*
Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
3360 W. Sahara Ave., Ste. 250
Las Vegas, NV 89102
Attorneys for Respondent Division of Industrial Relations

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Division of Industrial Relations, and that on this 17th day of August, 2021, I caused the foregoing document entitled **Notice of Entry of Order Denying Petitioners' Motion for Reconsideration** 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 District Court e-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-02 and the NEFCR.

/s/ Samantha O'Brien
An employee of the State of Nevada
Division of Industrial Relations

STATE OF NEVADA
Division of Industrial Relations - Division Counsel
3360 West Sahara Ave., Suite 250
Las Vegas, Nevada 89102
(702) 486-9080

Electronically Filed
08/16/2021 4:01 PM
CLERK OF THE COURT

ODM

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Jennifer J. Leonescu, Esq.
Nevada Bar No.: 006036
Christopher A. Eccles, Esq.
Nevada Bar No.: 009798
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION**

The Court set this matter for decision on July 28, 2021 on its Chambers calendar. The Court, having reviewed the papers and pleadings on file in this matter and good cause appearing, hereby rules as follows:

I. FINDINGS

1. On June 21, 2021, this Court entered a detailed Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review.

2. Said Order specified that Petitioners did not comply with their statutory duty to transmit the transcript of the Board's administrative hearing to this Court pursuant to NRS 233B.131(1)(a). Petitioners did not meet their burden to show good cause for their delay under *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000), and furthermore, Petitioners' extensive unexcused delay to transmit the transcript is mooted by their erroneous legal position that they are not statutorily required to transmit the transcript to the Court.

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6. Petitioners have not demonstrated that reconsideration is warranted to correct manifest error, or due to newly discovered or previously unavailable evidence, or the need to prevent manifest injustice, or due to a change in the controlling law. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010).

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428 P.3d 255, 257 (2018).

8. At the time of this Court's July 28, 2021 chambers hearing on Petitioners' Motion for Reconsideration, Petitioners were about 250 days past their deadline to file the transcript.

9. Petitioners have not demonstrated that reconsideration is warranted.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Petitioners' Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review is hereby DENIED.

DATED this _____ day of _____, 2021.

Dated this 16th day of August, 2021

HON. JUDGE JOE HARDY, JR.

5AA 724 23CC CCA9
Joe Hardy
District Court Judge

Respectfully submitted by:
DIVISION OF INDUSTRIAL RELATIONS

/s/ Christopher A. Eccles

Donald C. Smith, Esq.
Jennifer J. Leonescu, Esq.
Christopher A. Eccles, Esq.
Division of Industrial Relations
3360 W. Sahara Ave., Ste. 250
Las Vegas, NV 89102
Attorneys for Respondent Division of Industrial Relations

Approved as to form and content by:
LEWIS BRISBOIS BISGAARD & SMITH

By: */s/ Joel P. Reeves*

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Attorneys for Petitioners LVMPD and CCMSI

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From:	Reeves, Joel
To:	Christopher Eccles; Price, Kim; Schwartz, Daniel; Bateman, Dawn; Platt, Hilton
Cc:	Donald J. Bordelove; Samantha OBrien; Michele L. Caro
Subject:	RE: LVMPD, CCMSI v. SIE, DIR - A-20-821892-J - DIR"s Order Denying Pets" Mtn for Reconsideration, 8.11.21, follow up 8.16.21
Date:	Monday, August 16, 2021 1:35:26 PM
Attachments:	Logo_e6253148-26a1-47a9-b861-6ac0ff0bc3c4.png

Hey Chris,

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From: Christopher Eccles <ceccles@dir.nv.gov>
Sent: Monday, August 16, 2021 1:19 PM
To: Price, Kim <Kim.Price@lewisbrisbois.com>; Reeves, Joel <Joel.Reeves@lewisbrisbois.com>; Schwartz, Daniel <Daniel.Schwartz@lewisbrisbois.com>; Bateman, Dawn <Dawn.Bateman@lewisbrisbois.com>; Platt, Hilton <Hilton.Platt@lewisbrisbois.com>
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Subject: [EXT] RE: LVMPD, CCMSI v. SIE, DIR - A-20-821892-J - DIR's Order Denying Pets' Mtn for Reconsideration, 8.11.21, follow up 8.16.21

Hello All,

I am following up. Please sign and email back to me or advise of proposed edits.

Thank you,

Christopher A. Eccles, Esq.
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Metropolitan Police Department, Petitioner(s) vs. State of Nevada Department of Business & Industry, Respondent(s)	CASE NO: A-20-821892-J DEPT. NO. Department 15

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Service Date: 8/16/2021

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Donald Bordelove	dbordelove@ag.nv.gov
Daniel Schwartz	daniel.schwartz@lewisbrisbois.com
Donald Smith	donaldcsmith@dir.nv.gov
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Hilton Platt	hilton.platt@lewisbrisbois.com

Kim Price	kim.price@lewisbrisbois.com
Samantha O'Brien	samantha.obrien@dir.nv.gov

NO. 83262

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, and CANNON COCHRAN MANAGEMENT SERVICES, INC. Petitioners, vs. STATE OF NEVADA BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS, Respondents.	Case No.: A-20-821892-J Dept. No.: 15 **ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION**

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21-27867
00396

STATE OF NEVADA
Division of Industrial Relations - Division Counsel
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(702) 486-9080

2. Said Order specified that Petitioners did not comply with their statutory duty to transmit the transcript of the Board's administrative hearing to this Court pursuant to NRS 233B.131(1)(a). Petitioners did not meet their burden to show good cause for their delay under *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000), and furthermore, Petitioners' extensive unexcused delay to transmit the transcript is mooted by their erroneous legal position that they are not statutorily required to transmit the transcript to the Court.

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428 P.3d 255, 257 (2018).

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9. Petitioners have not demonstrated that reconsideration is warranted.

II. ORDER

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Petitioners' Motion for Reconsideration of Order Granting Respondent Division of Industrial Relations' Motion to Dismiss Petitioners' Petition for Judicial Review is hereby DENIED.

DATED this _____ day of _____, 2021.

Dated this 16th day of August, 2021

Joe Hardy

HON. JUDGE JOE HARDY, JR.

5AA 724 23CC CCA9
Joe Hardy
District Court Judge

Respectfully submitted by:
DIVISION OF INDUSTRIAL RELATIONS

/s/ Christopher A. Eccles

Donald C. Smith, Esq.
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Approved as to form and content by:
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By: */s/ Joel P. Reeves*

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