

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

EMPLOYERS INSURANCE COMPANY OF
NEVADA,
Appellant,
vs.
DANIEL CASTELAN,
Respondent.

No. 83765

Electronically Filed
Nov 18 2021 12:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District EIGHTH Department XIV
County Clark Judge Adrianna Escobar
District Ct. Case No. A-21-828981-J

2. Attorney filing this docketing statement:

Attorney David Benavidez, Esq. Telephone 7002-565-9730
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Henderson, NV 89015

Client(s) Employers Insurance Company of Nevada

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Jason Mills, Esq. Telephone 702-384-1616
Firm GGRM Law Firm
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Suite 100
Las Vegas, Nevada 89109

Client(s) Daniel Castelan

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Employers Insurance Company of Nevada vs. Daniel Castelan A-21-828981-J
Daniel Castelan vs. Employers Insurance Company of Nevada 1912693.DM

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is an appeal of the District Court's Order Grantin the Petition for Judicial Review of the Appeals Officer's January 14, 2021 Decision and Order that affirmed the Appellant's December 9, 2020 Motion to Reconsider the Appeals Officer's Decision and Order regarding the denial of Temporary Total Disability benefits.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

The doctor released the Respondent to modified work. The Employer offered and the Respondent accepted a temporary light duty job within the doctor's restrictions. The respondent was a no call/no show for work. The Resondent signed termination paperwork admitting he was a no call/no show for work. This action rendered the Respondent ineligible for temporary total disability benefits.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

All physicians had the claimant back to work and the claimant was rated for permanent impairment. The claimant requested an IME. The IME doctor's disability slip was written poorly and the Appeals Officer ordered TTD. Appellant asked the doctor to clarify. He advised the claimant was light duty. The Appeals Officer reconsidered and denied TTD. The District Court reversed noting the Appeals Officer was precluded from reconsidering the doctor's clarification of the disability slip and ordered TTD through the current time even though the same doctor continues to treat. This is an error of law as a disability slip is only good until another one is issued.

14. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from November 3, 2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served November 3, 2021

Was service by:

☒ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed November 8, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☐ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☒ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

As noted above, the District Court Judge erred as a matter of law by finding the Appellant was precluded from asking the treating doctor for clarification of the disability slip after the appeal and requesting reconsideration. The District Court Judge has ordered TTD through the present time in violation of NRS 616C.475 and case law which requires the treating doctor to issue a disability slip following each visit and the disability is only good until the following disability slip. Following the appeal decision, was the claimant taken completely off work, released again with temporary restrictions, permanent restrictions or released to full duty?

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Employers Insurance Company of Nevada

Daniel Castelan

The Department of Administration, Hearings Division, Appeals Office

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Review of agency decision, however the Department of Administration did not appear separately.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☒ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☒ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Employers Insurance Co. of Nevada

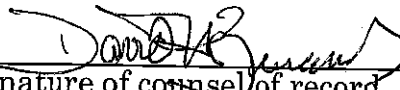
Name of appellant

David Benavidez, Esq.

Name of counsel of record

November 18, 2021

Date



Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 18th day of November, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Jason Mills, Esq.

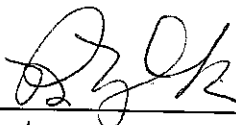
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Dated this 18th day of November, 2021



Signature

Steven D. Grierson

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11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 **DANIEL CASTELAN,**
14 **Petitioner,**

CASE NO: A-21-828981-J

DEPT NO: XXII

15 **v.**

16 **PEPPERMILL, INC., EMPLOYERS**
17 **INSURANCE COMPANY OF**
18 **NEVADA and THE DEPARTMENT**
19 **OF ADMINISTRATION,**
20 **HEARINGS DIVISION, APPEALS**
21 **OFFICE, an Agency of the State of**
22 **Nevada**

23 **Respondents.**

24 **PETITIONER'S OPENING BRIEF**

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I

ISSUE

Whether the Appeals Officer's Decision and Order initially dated December 22, 2020, but later modified by the Appeals Officer, in violation of NAC 616C.372 on January 14, 2021, was improper. The determinations initially giving rise to this dispute are the Insurer's ("Respondent") February 11, 2019, determination regarding the Claimant's ("Petitioner") treatment with Dr. Shah and the Respondent's February 5, 2019 determination regarding the Petitioner's vocational rehabilitation status and entitlement to temporary total disability ("TTD") benefits.

II

STATEMENT OF CASE

The Petitioner sustained an industrial injury on December 31, 2017, while working in the course and scope of his employment with Peppermill Inc. ("Employer"). Specifically, while walking and carrying dishes, Petitioner slipped on standing water and fell, resulting in numerous facial injuries, a head injury and lacerations of the head and hand. (Record on Appeal "ROA" 206-247).

On January 16, 2018, the Respondent notified Petitioner that his claim was accepted for cervical strain, lumbar strain, right knee sprain, right elbow sprain,

1 facial contusion, forehead laceration, closed head injury, and left ring finger
2 laceration. (ROA 268-269).

3
4 Following acceptance of liability for the industrial injury claim, Petitioner
5 received medical treatment at Concentra Medical Centers from January 22, 2018,
6 to approximately March 2, 2018. Petitioner also received medical treatment from
7 Dr. Leo Germin for his head injury and, on December 12, 2018, a Hearing Officer
8 affirmed the Respondent's October 31, 2018, determination denying his request
9 for a follow up appointment with Dr. Germin. Petitioner timely appealed this
10 Decision and Order to the Appeals Officer, resulting in Appeal Number 1908458-
11 DM. (ROA 685-689).

12
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14
15 On October 24, 2018, the Respondent denied Petitioner's request for
16 payment of medical bills for dry eye syndrome treatment. This determination was
17 affirmed by a Hearing Officer, which Petitioner timely appealed, resulting in
18 Appeal Number 1908459-DM. (ROA 679-684).

19
20
21 As a result of the Respondent's determination to deny Petitioner's continued
22 medical treatment with Dr. Germin, Petitioner requested that he be scheduled for
23 an Independent Medical Evaluation pursuant to NRS 616C.145 with Dr. Russell
24 Shah for his head injury. The Respondent failed to timely respond to this request,
25 resulting in a de facto denial of this request, which the Petitioner timely appealed.
26
27 A Hearing Officer affirmed the de facto denial and Petitioner timely appealed this
28



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1 Decision and Order to the Appeals Officer, resulting in Appeal Number 1911529-
2 DM. (ROA 664-669).
3

4 On December 4, 2018, Petitioner was placed on permanent light duty
5 restrictions by Dr. Ronald Kong. These restrictions were based on the FCE
6 performed on November 15, 2018, which indicated that Petitioner "did not appear
7 to be capable of safely performing all of his pre-injury job duties (cleanup for
8 Peppermill, Inc.) without modifications. Specifically, he appears to fall short of
9 requirement for occasional lifting and carrying up to 80 lbs." The FCE report also
10 indicated that Petitioner is capable of working a medium physical demand level.
11 The FCE evaluation failed to consider the head injury. (ROA 354-378).
12

13
14 On February 5, 2019, the Vocational Rehabilitation Counselor notified
15 Petitioner that the Employer offered him a permanent light duty job of
16 hostess/cashier, which required him to "greet and seat guests, distribute guest
17 between food servers, accept payment on guest tickets and give proper change,
18 answer phones and properly direct calls and directing beverage service, bussing
19 and cleaning of tables." The permanent light duty job was approved by Dr. Ronald
20 Kong. The counselor also notified Petitioner that because of the permanent light
21 duty job offer, his vocational rehabilitation process closed February 12, 2019, and
22 his vocational rehabilitation maintenance was terminated. (ROA 389). Petitioner
23 did not accept this light duty position because of his head injury.
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1 Petitioner timely appealed the Vocational Rehabilitation counselor's
2 determination dated February 5, 2019, and the Hearing Officer was bypassed,
3 resulting in Appeal Number 1912693-DM. (ROA 645-652).

5 On December 12, 2018, and December 19, 2018, the Respondent notified
6 Petitioner that his claim was closed for further medical treatment, and he was
7 scheduled for a PPD Evaluation. This determination was affirmed by a Hearing
8 Officer on March 6, 2019, which Petitioner timely appealed, resulting in Appeal
9 Number 1913110-DM. (ROA 639-644).

12 On February 1, 2019, Petitioner underwent a PPD evaluation with Dr.
13 Gobinder Chopra, who indicated that Petitioner had a 0% whole person
14 impairment. On February 11, 2019, the Respondent notified Petitioner that his
15 claim was closed with a 0% whole person impairment. Petitioner timely appealed
16 this determination, and the Hearing Officer was bypassed, resulting in Appeal
17 Number 1913610-DM. (ROA 405-412).

21 On November 6, 2019, the Appeals Officer filed an Interim Order which
22 ordered that Petitioner undergo an Independent Medial Evaluation with Dr.
23 Russell Shah for the Petitioner's head injury. (ROA 176-179).

25 On November 18, 2019, Petitioner underwent the IME with Dr. Shah. Dr.
26 Shah opined that Petitioner's industrially related impressions include a concussion
27 with "post concussive syndrome with continued cognitive impairment, sleep
28



1 impairment and vestibular impairment consisting of memory difficulties, focusing
2 difficulties, insomnia, restlessness and imbalance sensations." Dr. Shah also
3 indicated that Petitioner needed additional medical treatment for his head injury,
4 and he had not reached maximum medical improvement for the concussion and
5 that he "more likely than not has a permanent post traumatic brain injury from the
6 December 31, 2017, trauma." Dr. Shah recommended further medical treatment,
7 including brain exercises, medication, and cognitive behavioral therapy. Dr. Shah
8 also placed Petitioner on temporary disability. (ROA 164-175).

12 On January 17, 2020, Petitioner requested authorization for Dr. Shah's
13 treatment plan. However, the Respondent failed to respond to this request,
14 resulting in a de facto denial. Petitioner appealed this determination to the Hearing
15 Officer, but the matter was subsequently bypassed to the Appeals Officer, resulting
16 in Appeal Number 2017002-DM. (ROA 133-141).

19 All appeal numbers were consolidated with Appeal Number 1908458-DM
20 before Appeals Officer Denise McKay. Esq. (ROA 131-132).

22 On October 22, 2020, the consolidated appeals 1908458-DM, et al. came on
23 for hearing before Appeals Officer Denise McKay, Esq. and a ruling was issued
24 from the bench. (ROA 42-49). Specifically, during her ruling the Appeals Officer
25 stated, "With regard to the light-duty job offer, I don't necessarily agree that Dr.
26 Shah needs to opine on it because Dr. Shah has clearly said this claimant needs
27
28



1 much more testing and treatment, so *it doesn't seem worthwhile to even ask Dr.*
2 *Shah to opine on that.*" (ROA 42, lines 14-18). Further the Appeals Officer stated,
3
4 *"the time is not right for anybody to be determining if this claimant is ready to*
5 *take this valid light-duty job offer."* (ROA 46, lines 15-17). Finally, the Appeals
6
7 Officer stated, "With regard to the entirety of *Dr. Shah's reporting and his*
8 *phrasing about the temporary disability, he's substantially complied with this*
9 *slip requirement.*" (ROA 49, lines 5-8).
10

11 On November 20, 2020, Petitioner's Counsel, Jason D. Mills, Esq. hand
12 delivered the Proposed Decision and Order for the consolidated matters to the
13 Administrative Court and sent the Proposed Decision and Order via fax to
14 Respondent's counsel. (ROA 99-100).
15

16 On December 9, 2020, the Respondent filed its "Motion to Reconsider the
17 Appeals Officer Decision Regarding TTD." (ROA 68-98). In its Motion, the
18 Respondent conceded to having drafted a letter to Dr. Shah after the administrative
19 trial ("Trial") had concluded, stating that "On October 28, 2020, Insurer Counsel
20 drafted a letter to Dr. Shah asking the doctor if he found the claimant disabled from
21 employment. If not did he agree with the permanent job offered by the employer."
22 (ROA 68-69). Based on this newly manufactured evidence, not newly discovered,
23 the Respondent moved the Administrative Court to "reconsider [the] order for
24 TTD." (ROA 69).
25
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1 On December 22, 2020, the Appeals Officer issued Administrative Decision
2 and Order 1908458-DM et al. which found, in relevant part:

3
4 "Regarding appeal number 1912693-DM, under NRS
5 616C.590, the vocational rehabilitation issue is
6 premature at this time because he has not been placed on
7 a permanent light duty restriction based upon his closed
8 head injuries because he is not at maximum medical
9 improvement. Additionally, Dr. Shah's reporting of
10 November 18, 2019 indicates that as of that date,
11 claimant is on temporary total disability status as it
12 pertains to Claimant's industrial closed head injury. As
13 such, the Claimant is entitled to TTD benefits pursuant
14 to NRS 616C.475, plus interest pursuant to NRS
15 616C.335."

16 (ROA 59).

17 "The full nature and duration and whether claimant can
18 return to gainful employment will be determined by Dr.
19 Shah in the future following additional industrial care by
20 Dr. Shah. At that time, depending on the subsequent
21 findings by Dr. Shah, the issue of permanent restrictions
22 and what type, if any, permanent modified duty job
23 Claimant is capable of performing will be determined at
24 that time pursuant to NRS 616C.590. However, the issue
25 is not currently ripe for adjudication given the state of
26 Claimant's temporary total disability status."

27 (ROA 59).

28 Following these Conclusions of Law, the Appeals Officer ordered "that the
determination from the vocational rehabilitation services counselor dated February
5, 2019, is also **REVERSED** and the Insurer is **REMANDED** to provide Claimant





1 TTD benefits from November 18, 2019, to the present, plus interest.” (ROA 59-
2 60).

3
4 On January 14, 2021, the Appeals Officer issued her Order Granting the
5 Respondent’s Motion for Reconsideration, which merely amended the December
6 22, 2020, Order, rather than schedule the rehearing within 30 days of the granted
7 petition, as required by NAC 616C.327. (ROA 51-53). The Appeals Officer
8 amended the December 22, 2020, Order to erroneously deny the Petitioner’s
9 entitlement to TTD benefits.
10
11

12 It is from this amended Order that the Petitioner has filed is Petition for
13 Judicial Review of the Administrative Court on grounds that the Order as amended
14 by the Appeals Officer on January 14, 2021, violates the substantial rights of the
15 Petitioner as it was rendered upon unlawful procedure and is in excess of the
16 statutory authority of the agency, pursuant to NRS 233B.135(3).
17
18

19 III

20 LEGAL ARGUMENT

21 A. The Appropriate Standard for Judicial Review in Contested 22 Workers’ Compensation Claims 23 24

25 In contested workers’ compensation claims, judicial review first requires an
26 identification of whether the issue to be resolved is a factual or legal issue. While
27 questions of law may be reviewed de novo by this Court, a more deferential
28



1 standard must be employed when reviewing the factual findings of an
2 administrative adjudicator.

3
4 NRS 233B.135, which governs judicial review of a final decision of an
5 administrative agency, provides, in pertinent part, the following:

6
7 2. The final decision of the agency shall be deemed
8 reasonable and lawful until reversed or set aside in
9 whole or in part by the court. The burden of proof is on
10 the party attacking or resisting the decision to show that
11 the final decision is invalid pursuant to subsection 3.

12 3. The court shall not substitute its judgment for that of
13 the agency as to the weight of evidence on a question of
14 fact. The court may remand or affirm the final decision
15 or set it aside in whole or in part if substantial rights of
16 the petitioner have been prejudiced because the final
17 decision of the agency is:

18 (a) **In violation of constitutional or statutory**
19 **provisions;**

20 (b) In excess of the statutory authority of the agency;

21 (c) **Made upon unlawful procedure;**

22 (d) Affected by other error of law;

23 (e) Clearly erroneous in view of the reliable, probative
24 and substantial evidence on the whole record; or

25 (f) Arbitrary or capricious or characterized by abuse
26 of discretion.

27 Relating to the standard of review of administrative decisions, our Supreme
28 Court has consistently held that the factual findings made by administrative
adjudicators may not be disturbed on appeal unless they lack the support of
substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); SIIS v.



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1 Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17, 731
2 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990).

3
4 Thus, "the central inquiry is whether substantial evidence in the record
5 supports the agency decision." Brocas v. Mirage Hotel & Casino, 109 Nev. 579,
6 583, 854 P.2d 862, 865 (1993). Substantial evidence is "that quantity and quality
7 of evidence which a reasonable [person] could accept as adequate to support a
8 conclusion." State Employment Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608
9 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's decision lacks
10 substantial evidentiary support, the decision is unsustainable as being arbitrary and
11 capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850,
12 854 (2000). The Court must defer to an agency's findings of fact only as long as
13 they are supported by substantial evidence. Law Offices of Barry Levinson v.
14 Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

15
16
17
18
19 On the other hand, purely legal questions may be determined by the District
20 Court without deference to an agency determination, upon de novo review. SIIS
21 v. Khweiss, 108 Nev. at 126, 825 P.2d at 220 (1992). Furthermore, the
22 construction of a statute is a question of law, subject to de novo review. See State,
23 Dep't of Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d 1274, 1249
24 (1994).
25
26
27
28

1 However, NRS 233B.135(3) clearly identifies multiple scenarios in which
2 the reviewing court may set it aside in whole or in part an administrative decision.
3 That is when a petitioner's substantial rights have been prejudiced as a result of
4 unlawful procedure. NRS 233B.135(3)(c).
5

6 Further, the Supreme Court of Nevada has determined that a reviewing court
7 may set aside an agency decision if substantial rights of the petitioner have been
8 prejudiced because the decision of the agency is in violation of constitution or
9 statutory provisions. Field v. State, Dep't of Motor Vehicles & Pub. Safety, 111
10 Nev. 552, 554, (1995).
11

12 In this instant matter, the Administrative Order as amended by the Appeals
13 Officer on January 14, 2021, contains both violation of regulatory law as well as
14 unlawful procedure, and is clearly prejudicial to the Petitioner's substantial rights.
15
16

17
18 **B. The Appeals Officer's Order failed to Meet the Regulatory**
19 **Requirements of NAC 616C.327.**
20

21 The Administrative Order, as amended by the Appeals Officer on January
22 14, 2021 directly contradicts the plain and unambiguous language found in NAC
23 616C.327. Specifically, NAC 616C.327(2) states:
24

- 25 2. The appeals officer shall grant or deny the petition
26 for rehearing within 15 days after the receipt of the
27 petition. If the petition is granted, the rehearing must be
28 held within 30 days after the petition is granted.





1 The language of NAC 616C.327 is plain and unambiguous, accordingly the
2 Petitioner maintains that there is no need to go beyond this plain meaning. See
3
4 City of N. Las Vegas v. Warburton, 127 Nev. 682, 686, (2011) (“When the text of
5 a statute is plain and unambiguous, [we] should ... not go beyond that meaning.”),
6
7 Silver State Elec. v. State, Dep’t of Tax., 123 Nev. 80, 85, (2007) (“These rules of
8 statutory construction also apply to administrative regulations”). Therefore, it is
9 indisputable that, if a petition for rehearing is granted, or in this instance, a motion
10 for reconsideration, the appeals officer is required to hold the rehearing within 30
11 days after the petition is granted.
12

13 The record in this matter is well established, and the timeline is irrefutable.
14
15 On October 22, 2020, the consolidated appeals came on for hearing before Appeals
16 Officer Denise McKay, who issued her ruling from the bench following testimony,
17 and the presentation of arguments and witnesses. (ROA 3-50). However, the
18 Respondent failed to file its Motion for Reconsideration until December 9, 2020.
19
20 NAC 616C.327(1) requires that a petition for rehearing be filed “within 15 days
21 after the service of a notice of the final decision.” Because the Appeals Officer
22 ruled from the bench on each issue, Petitioner maintains that the notice of final
23 decision was communicated to the parties on October 22, 2020, and this is
24 sufficient to establish “service of a notice of a final decision” which would render
25
26
27
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1 the Motion for Reconsideration untimely, and therefore any amendments made to
2 the final decision based upon this Motion are invalid.

3
4 However, should the Court find that the Petitioner's service of the proposed
5 Decision and Order constitutes "notice of the final decision" then the Motion for
6 Reconsideration was timely. Yet, despite the timeliness of the Motion for
7 Reconsideration, the Appeals Officer has still failed to appropriately adhere to the
8 governing regulations regarding rehearing, and the Petitioner's substantial rights
9 have been prejudiced as a result. For the sake of argument, Petitioner will address
10 the Motion for Reconsideration as a petition for rehearing, given that motions for
11 reconsideration are not recognized under Nevada Workers' Compensation
12 administration, but petitions for rehearing are the regulatorily accepted means for
13 aggrieved parties to seek remedies outside of the appellate process. *See* NAC
14 616C.327.
15
16
17
18

19 Regardless of the caption contained on the motion filed by the Respondent
20 on December 9, 2020, the fact remains that the amendments made to the
21 Administrative Decision post trial, and therefore the Administrative Decision in
22 and of itself, are in violation of regulatory and statutory law. NRS 233B.135(3)(c)
23 provides that a court may remand an agency decision if the Petitioner's substantial
24 rights have been prejudiced because the agency's decision is made upon unlawful
25 procedure or is in violation of statutory procedures. The Supreme Court of Nevada
26
27
28



1 has previously found that an appeals officer's failure to meet relevant statutory
2 requirements is considered "procedurally deficient." Elizondo v. Hood Mach.,
3 Inc., 129 Nev. 780, 785, (2013).

5 In Elizondo, the Supreme Court of Nevada considered whether an
6 administrative order that failed to include "findings of fact and conclusions of law,
7 separately stated" pursuant to NRS 233B.125 was procedurally sufficient. Id. The
8 Court in Elizondo found that because the language of NRS 233B.125 was plain
9 and unambiguous ("a final decision must include findings of fact and conclusions
10 of law, separately stated"), the appeals officer was bound by this mandate. Id. The
11 Court went on to conclude that "the appeals officer's order fails to meet the
12 statutory requirements of NRS 233B.125 and is thus procedurally deficient." Id.

14 Petitioner contends that the facts of Elizondo are similar to the facts of this
15 petition, and the facts before this Court lend themselves to an interpretation under
16 the precedent established by the Supreme Court of Nevada in Elizondo. Petitioner
17 contends that the appeals officer violated plain and unambiguous regulatory law
18 when she failed to hold a rehearing within 30 days after the Respondent's Motion
19 was granted. In fact, no rehearing was scheduled. Rather, the appeals officer
20 simply granted the Respondent's Motion and stripped the Petitioner of his
21 monetary benefits via amended order. The Appeals Officer's abject failure to
22 schedule the rehearing, in direct contradiction of NAC 616C.327 is not only in



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1 clear violation of a regulatory provision but is also highly prejudicial to the
2 Petitioner's substantial rights as it stripped the Petitioner of certain monetary
3 benefits which he is owed through the administration of his industrial injury claim.

4
5 Accordingly, Petitioner maintains that the Administrative Order is in direct
6 violation of relevant regulatory provisions, is highly prejudicial to his substantial
7 rights, and therefore must be found to be procedurally deficient pursuant to NRS
8 233B.135, as clarified in Elizondo v. Hood Mach., Inc., 129 Nev. 780, (2013).
9

10
11 **C. The Respondent Failed to Produce Newly Discovered Evidence or Show**
12 **Good Cause to Justify the Rehearing.**

13
14 The Nevada Industrial Insurance Act does not recognize a process for the
15 adjudication of motions for reconsideration. Rather, in workers' compensation
16 matters, rehearing of a decision is only appropriate if it is "based on good cause or
17 newly discovered evidence." NAC 616C.327(1). However, the Respondent failed
18 to show good cause for rehearing, and failed to produce newly discovered
19 evidence. While it is true that the Respondent attached documents not previously
20 entered into evidence before the Appeals Officer, these documents fall short of the
21 standard to be considered "newly discovered evidence."
22
23
24

25 Though the precedential case law in the state of Nevada is somewhat limited
26 on the question of newly discovered evidence in civil cases, the Ninth Circuit
27 Court of Appeals has found that "*evidence is not newly discovered* if it was in the
28



1 party's possession at the time of summary judgement or *could have been*
2 *discovered with reasonable diligence.*" Wallis v. J.R. Simplot Co., 26 F.3d 885,
3 892 n.6 (9th Cir. 1994) (emphasis added); see also Defs. Of Wildlife v. Bernal,
4 204 F.3d 920, 929 (9th Cir. 2000) (providing that, in moving for a new trial based
5 on newly discovered evidence under FRCP 59(a), the movant must demonstrate
6 "the exercise of due diligence would not have resulted in the evidence being
7 discovered at an earlier stage"). Petitioner maintains that the evidence submitted
8 by the Respondent in support of its Motion for Reconsideration could have been
9 discovered with reasonable diligence during the normal course of discovery, prior
10 to the conclusion of the administrative trial, and therefore must not be considered
11 "newly discovered."

12 Nevada's higher courts have confirmed this interpretation of "newly
13 discovered evidence" in various unpublished opinions, through their reliance on
14 Drespel v. Drespel, 56 Nev. 368, 374, (1935) (recognizing that evidence that was
15 within a party's power to present during a first trial will not constitute newly
16 discovered evidence supporting a grant of a motion for a new trial). The Court in
17 Drespel was presented with the question of whether a new trial should be grand
18 upon the ground of newly discovered evidence following the plaintiff's recovery
19 in a divorce action. Drespel v. Drespel, 56 Nev. 368, (1935). The Court ultimately
20 affirmed the denial of a new trial on grounds that "*reasonable diligence was not*



1 *used* prior to the trial to discover the evidence offered.” *Id.* (emphasis added).

2 Therefore, because there was no evidence that reasonable diligence was used prior
3
4 to the trial to discover the evidence offered in support of the motion for new trial,
5 the evidence offered *failed* to constitute “*newly discovered evidence.*” *Id.*

6
7 Our neighboring jurisdiction, California, has confirmed these parameters for
8 what constitutes “newly discovered evidence” in the context of moving for a new
9 trial. Specifically, in Lubeck v. Lopes, 254 Cal. App. 2d 63, 62 Cal. Rptr. 36 (Ct.
10 App. 1967), the Court stated that “The claim of newly discovered evidence as a
11 ground for new trial is uniformly looked on by the courts with distrust and disfavor
12 because the policy of the law requires a litigant to exhaust every reasonable effort
13 to produce at his trial all existing evidence on his behalf.” *Id.* 67-68. South Santa
14 Clara, etc., Dist. v. Johnson, supra, 231 Cal.App.2d 388, at p. 407, 41 Cal.Rptr.
15 846 (Ct. App. 1964); People v. Loar, 165 Cal.App.2d 765, 777, 333 P.2d 49
16 (1958); Nebelung v. Norman, 14 Cal.2d 647, 655, 96 P.2d 327 (1939). The Court
17 went on to state that production of newly discovered evidence may be permitted
18 “if there is no lack of diligence in failing to produce it at the trial” *Id.* 68. Ulwelling
19 v. Crown Coach Corp., 206 Cal.App.2d 96, 128, 23 Cal.Rptr. 631 (Ct. App. 1962);
20 Philpott v. Mitchell, 219 Cal.App.2d 244, 249, 32 Cal.Rptr. 911 (Ct. App. 1963);
21 Fitzgerald v. Fishburn, 219 Cal.App.2d 152, 154, 33 Cal.Rptr. 148 (Ct. App.
22 1963); Luchs v. Ormsby, 171 Cal.App.2d 377, 390, 340 P.2d 702 (1959); Dayton
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1 v. Landon, 192 Cal.App.2d 739, 746, 13 Cal.Rptr. 703 (Ct. App. 1961); Kyle v.
2 Stone, supra, 234 Cal.App.2d 286, at p. 294, 44 Cal.Rptr. 390 (Ct. App. 1965).

3
4 Petitioner maintains that the persuasive opinions from the California State
5 Courts and the United States Court of Appeals for the Ninth Circuit, in tandem
6 with the definition of what constitutes “newly discovered evidence” provided by
7 the Supreme Court of Nevada in Drespel v. Drespel, 56 Nev. 368, (1935) support
8 his position that, in order for evidence to be considered “newly discovered” the
9 evidence must not have been obtainable prior to trial, despite reasonable diligence.
10
11 Further, Petitioner asserts that the burden rests with the moving party to show that
12 this evidence was not obtainable prior to trial, despite reasonable diligence, in
13 order to prevail on its motion for rehearing based on newly discovered evidence.
14
15

16
17 The Respondent simply cannot show that the documents offered in support
18 of its Motion for Reconsideration satisfy the burden of being considered “newly
19 discovered.” In support of its Motion for Reconsideration, the Respondent
20 supplied only the response of Dr. Shah to a letter crafted by the Respondent’s
21 counsel on October 28, 2020, post-trial. The Respondent conceded in its Motion
22 that it was only after the Appeals Officer issued a ruling ordering the Respondent
23 to pay TTD benefits that Respondent’s counsel prepared the letter to Dr. Shah.
24
25 (ROA 68-69). The Respondent makes no allegation in its Motion that this evidence
26 was unobtainable prior to the administrative trial, and the Petitioner maintains that,
27
28



1 *had Respondent's counsel simply exercised reasonable diligence, this evidence*
2 *could have easily been obtained and submitted to the record prior to the October*
3 *22, 2020, hearing.*

4
5 Rather than exercising reasonable diligence, Respondent simply waited
6 until the date of the administrative trial, waited for the presentation of the
7 Petitioner's arguments and evidence, and then waited until an adverse ruling had
8 been issued against it before making the decision to go on an improper and
9 unwarranted post-trial discovery expedition. This practice is procedurally
10 abysmal. Despite this clear attempt to manipulate the record with post-trial
11 discovery, the Appeals Officer amended her December 22, 2020, Decision and
12 Order based upon this procedurally deficient practice. Because the Amended
13 Administrative Order is procedurally deficient, Petitioner asserts that the Order
14 Granting Respondent's Motion for Reconsideration is improper, and therefore
15 should be stricken.
16
17
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19
20

21 V

22 CONCLUSION

23
24 Accordingly, Petitioner, respectfully requests that Your Honor REVERSE
25 the Administrative Order as amended by the Appeals Officer on January 14, 2021,
26 and ORDER the Administrative Order filed on December 22, 2020 be reinstated,
27
28

1 and the Respondent ordered to pay the Petitioner Temporary Total Disability
2 Benefits from November 18, 2019 to the present, plus interest.

3
4 DATED this 8th day of July, 2021.

5 GGRM LAW FIRM

6
7 By 

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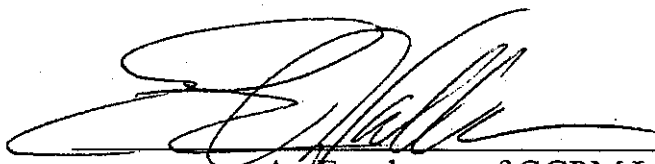
DATED this 10 day of July, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that on the 8th day of July, 2021, I caused the foregoing document entitled Petitioner's Opening Brief to be served upon those persons designated by the parties in the E-service Master List for the above-referenced mater in the Eighth Judicial Court E-filing system in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:



An Employee of GGRM LAW FIRM



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**DISTRICT COURT
CLARK COUNTY, NEVADA**

DANIEL CASTELAN,

Petitioner,

vs.

Case No: A-21-828981-J

PEPPERMILL, INC., EMPLOYERS INSURANCE
COMPANY OF NEVADA and the
DEPARTMENT OF ADMINISTRATION,
HEARINGS DIVISION, APPEALS OFFICE, an
Agency of the State of Nevada,

Dept.No.: XXII

Respondents.

RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE CASE

This is a Petition for Judicial Review of a final decision of the Appeals Officer in a contested workmen's compensation case.

Petitioner Daniel Castelan (Claimant) requests review of an Appeals Officer decision which involves questions of fact relating to temporary total disability (TTD) benefits and permanent light duty. The decision of an Appeals Officer is the final and binding administrative determination under NRS 616C.370.

The Respondents respectfully request this Court deny the petition. There is no error of law. Only a question of fact.

STATEMENT OF THE ISSUE

Is the decision of the Appeals Officer supported by substantial evidence? Did the Appeals Officer abuse her discretion?

STATEMENT OF THE FACTS

On December 31, 2017, the Claimant slipped on a wet floor while employed as a dishwasher for Peppermill Fireside Lounge. (Record on Appeal "ROA" 00450.) The same day, the claimant was examined at Sunrise Hospital and diagnosed with

1 a contusion of the right knee, head injury, laceration of
2 the hand, laceration of the head and lumbar strain. (ROA
3 00451-00464).

4
5 On January 2, 2018, the claimant was examined at
6 Concentra. The assessment was closed head injury, forehead
7 laceration, cervical and lumbar strain, sprains to the right
8 knee and right elbow, facial contusion and laceration of the
9 left ring finger. (ROA 00464-00471).

10
11 On January 3, 2018, Dr. Xiao referred to neurology. ROA
12 00473-00478.

13
14 On January 16, 2018, the Insurer accepted the cervical
15 and lumbar strains, right knee and right elbow sprains,
16 facial contusion, forehead laceration, closed head injury
17 and left ring finger laceration. (ROA 00497-00498).

18
19 On January 17, 2018, the Insurer authorized transfer of
20 care to Dr. Kaplan. (ROA 00499-00500).

21 On February 2, 2018, Neurologist Germin opined the
22 claimant's symptoms are post concussion related and would
23 continue to improve. The doctor ordered a brain MRI,
24 EMG/nerve conduction studies and a referral to opthamology.
25 (ROA 00523-00529).

26
27 A March 5, 2018 MRI of the brain was unremarkable. (ROA
28

1 00539).

2 A March 6, 2018 EMG/nerve conduction study performed by
3 Dr. Germin was normal. (ROA 00539-00542).

4
5 A March 13, 2018 Visual Evoked Response Study performed
6 by Dr. Germin was normal. (ROA 00543-00548).

7 On April 3, 2018, Dr. Germin found the claimant at
8 maximum medical improvement (MMI) without a permanent
9 impairment. (ROA 00552-00557).

10
11 On May 7, 2018, the Insurer closed the claim without a
12 permanent partial disability rating. (ROA 00558).

13 On June 15, 2018, Dr. Kaplan requested cervical and
14 lumbar x-rays, MRIs and referred to physical therapy for the
15 neck and back. (ROA 00559-00560).

16
17 A July 18, 2018 MRI of the cervical spine found minimal
18 to mild degenerative changes, no canal or foraminal
19 narrowing. (ROA 00564).

20
21 A July 18, 2018 MRI of the lumbar spine found no
22 evidence of acute fracture or traumatic misalignment,
23 minimal degenerative changes at L5-S1 and no neural
24 compromise. (ROA 00566).

25
26 On July 20, 2018, Dr. Kaplan found no neurosurgical
27 intervention was required and requested transfer of care to
28

1 physical medicine and rehabilitation. (ROA 00568-00570).

2 On September 24, 2018, physical medicine specialist
3 Kong diagnosed cervical strain, low back pain, concussion
4 without loss of consciousness and posttraumatic headache.
5 (ROA 00574-00577).

7 On October 23, 2018, Dr. Kong found the claimant MMI
8 and recommended a functional capacity evaluation (FCE). (ROA
9 00585-00588).

11 On October 31, 2018, the Insurer scheduled the FCE with
12 Kelly Hawkins Physical Therapy. (ROA 00591).

13 On November 9, 2018, claimant's counsel requested an
14 IME with Neurologist Russell Shah relating to the head. (ROA
15 00597).

17 On November 14, 2018, the FCE was performed by P.T.
18 Robert Wolinsky, who recommended a modified job. (ROA 00598-
19 00614).

21 On December 4, 2018, Dr. Kong found the claimant at MMI
22 with ratable impairment. (ROA 00615-00617).

24 On December 12, 2018, the Insurer closed the claim and
25 advised they would schedule a PPD evaluation for the
26 accepted body parts. (ROA 00618-00619).

27 On December 17, 2018, the Insurer scheduled the
28

1 claimant for the PPD. (ROA 00620).

2 On January 17, 2019, the employer offered the claimant
3 a permanent modified/alternative job. (ROA 00428-00430).

4 On January 21, 2019, Triple Board Certified Neurologist
5 Chopra performed a PPD evaluation. The doctor found 0%
6 impairment for the lumbar and cervical spine, central
7 nervous system, right knee, right elbow, left thumb and the
8 left fourth finger. (ROA 00622-00629).

9 On January 23, 2019, Dr. Kong agreed that the permanent
10 modified job is within the doctor's restrictions. ROA 00439.

11 On February 5, 2019, vocational rehabilitation
12 counselor Cindi Rivera advised the claimant the employer had
13 provided a permanent job within Dr. Kong's restrictions and,
14 as such, the vocational rehabilitation process would end and
15 the case would be closed on February 12, 2019, regardless of
16 whether the claimant accepts the job. (ROA 00440).

17 On February 11, 2019, the Insurer determined the
18 claimant has no ratable PPD for the lumbar, cervical, head,
19 right knee, right elbow and left fingers. (ROA 00630).

20 On February 12, 2019, in an email to the Insurer,
21 claimant's counsel advised the claimant declined the
22 permanent light duty job offer. (ROA 00444).

1 On November 18, 2019, Dr. Shah performed a Neurologic
2 IME for head injury related symptoms and opined the
3 transient neurologic monthly attacks incapacitating the head
4 pains are likely migraines and recommended medication and
5 cognitive behavioral therapy as treatment. The doctor does
6 not mention the permanent light duty offered by the employer
7 and approved by Dr. Kong. Dr. Shah notes Long Term
8 Disability to be determined after treatment is completed.
9 (ROA 0164-00174).

12 On January 16, 2020, Dr. Snyder performed an MRI of the
13 brain and found it unremarkable. (ROA 00154-00156).

15 On January 17, 2020, claimant's counsel requested
16 authorization of a treatment plan per Dr. Shah's IME Report.
17 (ROA 00145).

18 On October 22, 2020, the Appeals Officer ruled from the
19 bench ordering TTD based on the opinion of Dr. Shah. (ROA
20 00054-00061). Counsel for the Insurer objected on the
21 record noting Dr. Shah did not find the claimant disabled
22 from employment. Dr. Shah's notation of Long Term
23 Disability to be determined after treatment is completed is
24 not a disability slip. (ROA 48 lines 14-23)

27 On October 28, 2020, Insurer's Counsel drafted a letter
28

1 to Dr. Shah asking the doctor if he found the claimant
2 disabled from employment. If not, did he agree with the
3 permanent job offered by the employer. (ROA 00099).
4

5 On December 7, 2020, Dr. Shah responded noting he did
6 not find the claimant disabled from employment. "I did not
7 address the work status issue in my report. I put him as a
8 'temporary for the head' body part injuries that I was
9 evaluating him for. Mr. Castelan is able to work with
10 accommodations and restriction with his head related
11 complaints". ROA(00095-00098).
12

13 On December 9, 2020, Counsel for the Insurer filed a
14 Motion to Reconsider the Appeals Officer decision regarding
15 TTD asking the Appeals Officer to reconsider her Decision
16 and Order based upon Dr. Shah's opinion the Claimant was
17 able to work with accommodations and restrictions. (ROA
18 00068-00098).
19
20

21 On January 14, 2021, the Appeals Officer granted the
22 Motion to Reconsider noting the claimant would benefit from
23 working in the light-duty position, the claimant was not
24 entitled to receive TTD payments and decided the claimant
25 should not have been receiving vocational rehabilitation as
26 he was not MMI. (ROA 00051-00053).
27
28

ARGUMENT

I.

**THE APPEALS OFFICER'S DECISION IS SUPPORTED BY SUBSTANTIAL
EVIDENCE. THERE IS NO ERROR OF LAW**

NRS 233B.135 Provides:

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record. In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable,

1 probative and substantial evidence on the whole
2 record; or

3 (f) Arbitrary or capricious or characterized by
4 abuse of discretion.

5 Under Nevada law, the review of the district court is
6 limited by NRS 233B.135 to whether there is substantial
7 evidence to support findings of fact, and the district court
8 may not substitute its judgement for that of an Appeals
9 Officer on matters of weight or credibility or issues of
10 fact. The Nevada Supreme Court will not reweigh the evidence
11 or substitute its judgment on an appeals officer's
12 credibility determination. Elizondo v. Hood Mach., Inc., 312
13 P.3d 479, 129 Nev. Adv. Op. 84 (2013). Apeceche v. White
14 Pine County, 96 Nev. 723, 615 P.2d 975 (1980). Deference is
15 to be given by the district court to conclusions of law made
16 by the Appeals Officer. Jones v. Rosner, 102 Nev. 215, 719
17 P.2d 805 (1986). The reviewing court is limited to the
18 record in determining whether the Appeals Officer acted
19 arbitrarily or capriciously, thus abusing his discretion.
20 State Emp. Sec. Dep't. v. Hilton Hotels, 102 Nev. 606, 607,
21 729 P.2d 497, 498 (1986); NRS 233B.135(3)(e) and (f),
22 Horne v. SIIS, 113 Nev. 532, 936 P.2d 839 (1997).
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The Nevada Supreme Court has stated repeatedly that the

1 reviewing court shall limit its review to a determination as
2 to whether or not administrative decisions are based on
3 substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d
4 324 (1984); SIIS v. Swinney, 103 Nev. 17, 731 P.2d 359
5 (1987); Desert Inn Casino v. Moran, 106 Nev. 334, 792 P.2d
6 400 (1990); Seaman v. McKesson Corp., 109 Nev. 8, 846 P.2d
7 280 (1993); United Exposition, 109 Nev. 421, 851 P.2d 423
8 (1993). The Nevada Supreme Court accepts the definition of
9 substantial evidence in the context of reviewing
10 administrative decisions as evidence which a reasonable mind
11 might accept as adequate to support a conclusion. Schepcoff
12 v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

13 As noted above, the weight of the evidence supports the
14 Appeals Officers findings and conclusions. Substantial and
15 overwhelming evidence supports denial of TTD/vocational
16 rehabilitation benefits.

17 The Appeals Officer based her decision on the totality
18 of evidence.

19 The issues before the Appeals Officer were
20 TTD/permanent light duty/vocational rehabilitation.

21 Counsel requested an IME with Dr. Shah who issued an
22 opinion recommending further treatment. The doctor does not
23
24
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28

1 mention the permanent light duty offered by the employer and
2 approved by Dr. Kong. Dr. Shah notes Long Term Disability
3 to be determined after treatment is completed. As a matter
4 of law, this is not a valid disability slip. See Section 7
5 of NRS 616C.475. Dr. Shah's original report fails to comply
6 by issuing a valid disability slip.
7

8 NRS 616C.475 Amount and duration of compensation;
9 limitations; requirements for certification of disability;
10 offer of light-duty employment.

11 1. Except as otherwise provided in this section, NRS
12 616C.175 and 616C.390, every employee in the employ of
13 an employer, within the provisions of chapters 616A to
14 616D, inclusive, of NRS, who is injured by accident
15 arising out of and in the course of employment, or his
16 or her dependents, is entitled to receive for the
17 period of temporary total disability, 66 2/3 percent of
18 the average monthly wage.

19 2. Except as otherwise provided in NRS 616B.028 and
20 616B.029, an injured employee or his or her dependents
21 are not entitled to accrue or be paid any benefits for
22 a temporary total disability during the time the
23 injured employee is incarcerated. The injured employee
24 or his or her dependents are entitled to receive such
25 benefits when the injured employee is released from
26 incarceration if the injured employee is certified as
27 temporarily totally disabled by a physician or
28 chiropractor.

3. If a claim for the period of temporary total
disability is allowed, the first payment pursuant to
this section must be issued by the insurer within 14
working days after receipt of the initial certification
of disability and regularly thereafter.

4. Any increase in compensation and benefits effected
by the amendment of subsection 1 is not retroactive.

5. Payments for a temporary total disability must
cease when:

1 (a) A physician or chiropractor determines that the
2 employee is physically capable of any gainful
3 employment for which the employee is suited, after
4 giving consideration to the employee's education,
5 training and experience;

6 (b) The employer offers the employee light-duty
7 employment or employment that is modified according to
8 the limitations or restrictions imposed by a physician
9 or chiropractor pursuant to subsection 7; or

10 (c) Except as otherwise provided in NRS 616B.028 and
11 616B.029, the employee is incarcerated.

12 6. Each insurer may, with each check that it issues to
13 an injured employee for a temporary total disability,
14 include a form approved by the Division for the injured
15 employee to request continued compensation for the
16 temporary total disability.

17 **7. A certification of disability issued by a physician
18 or chiropractor must:**

19 (a) **Include the period of disability and a description
20 of any physical limitations or restrictions imposed
21 upon the work of the employee;**

22 (b) **Specify whether the limitations or restrictions are
23 permanent or temporary; and**

24 (c) **Be signed by the treating physician or chiropractor
25 authorized pursuant to NRS 616B.527 or appropriately
26 chosen pursuant to subsection 3 or 4 of NRS 616C.090.**

27 8. If the certification of disability specifies that
28 the physical limitations or restrictions are temporary,
the employer of the employee at the time of the
employee's accident may offer temporary, light-duty
employment to the employee. If the employer makes such
an offer, the employer shall confirm the offer in
writing within 10 days after making the offer. The
making, acceptance or rejection of an offer of
temporary, light-duty employment pursuant to this
subsection does not affect the eligibility of the
employee to receive vocational rehabilitation services,
including compensation, and does not exempt the
employer from complying with NRS 616C.545 to 616C.575,
inclusive, and 616C.590 or the regulations adopted by
the Division governing vocational rehabilitation
services. Any offer of temporary, light-duty employment

made by the employer must specify a position that:

(a) Is substantially similar to the employee's position at the time of his or her injury in relation to the location of the employment and the hours the employee is required to work;

(b) Provides a gross wage that is:

(1) If the position is in the same classification of employment, equal to the gross wage the employee was earning at the time of his or her injury; or

(2) If the position is not in the same classification of employment, substantially similar to the gross wage the employee was earning at the time of his or her injury; and

c) Has the same employment benefits as the position of the employee at the time of his or her injury.

NAC 616C.520 Forms for inclusion with payments of compensation NRS 616A.400, 616C.475)

1. Each insurer shall include with the initial payment of compensation for a temporary total disability a copy of Form D-7, "Explanation of Wage Calculation."

2. Each insurer may provide Form D-6, "Injured Employee's Request for Compensation," to the injured employee with each check for a temporary total disability. The form must be used by the injured employee to request compensation for the temporary total disability if the insurer elects to use it. Failure to submit the form does not preclude the payment of the compensation if there is documentation on file which indicates a continued disability.

(Added to NAC by Div. of Industrial Insurance Regulation, eff. 2-22-88; A by Div. of Industrial Relations, 3-28-94; R104-97, 3-6-98; R098-98, 12-18-98)

On October 22, 2020, the Appeals Officer ruled from the bench ordering TTD based on the opinion of Dr. Shah.

Six days later on October 28, 2020 and before the

1 Appeal Officer decision was drafted, Insurer Counsel drafted
2 a letter to Dr. Shah asking the doctor if he found the
3 claimant disabled from employment. If not, did he agree
4 with the permanent job offered by the employer.
5

6 On December 7, 2020, Dr. Shah responded noting he did
7 not find the claimant disabled from employment. "I did not
8 address the work status issue in my report. I put him as a
9 'temporary disability for the head' body part injuries that
10 I was evaluating him for. Mr. Castelan is able to work with
11 accommodations and restriction with his head related
12 complaints".
13

14
15 This evidence was submitted to the Appeals Officer and
16 she correctly reconsidered her decision denying TTD.

17 The overwhelming weight of physician opinions support
18 the Appeals Officer decision findings and conclusions.
19

20 The totality of the evidence supports to the Appeals
21 Officer order granting reconsideration of her original
22 decision.
23

24 As a matter of law, Respondent properly requested the
25 opinion of Dr. Shah and timely requested reconsideration.

26 NRCP 59(a)(4) provides authority for a new trial where
27 newly discovered material evidence which could not, with
28

1 reasonable diligence, have discovered and produced at the
2 trial.

3 The newly discovered evidence must be sufficiently
4 strong to make it probable that a different result would be
5 obtained in another trial. The new evidence must be of a
6 decisive and conclusive character, or at least such as to
7 render a different result reasonably certain. Whise v.
8 Whise, 36 Nev. 16, 131 P.2d 967 (1913).
9

10 See also NAC 616C.312 (General requirements of
11 motions). NAC 616C.327 noting a written petition for a
12 rehearing based on good cause or newly discovered evidence
13 may be filed with the Appeals Officer within 15 days after
14 the service of a notice of the final decision. See also
15 NRCP 40 Petition for Rehearing.
16

17 There is no error of law by the Appeals Officer. Dr.
18 Shah clarified his ambiguous notation "Long Term Disability
19 to be determined after treatment is completed". Dr. Shah
20 approved the job offer. Agreed the claimant could perform
21 the light duty job offer. See Nevada Indus. Comm'n v.
22 Taylor, 98 Nev. 131, 642 P.2d 598 (1982), where the court,
23 citing NRS 616C.475, concluded the right to temporary total
24 disability benefits ceased when the claimant was released to
25
26
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1 return to employment by the treating physician, and found
2 error by the District Court who relied on the claimant's
3 testimony that he voluntarily ceased working claiming his
4 injury prevented work, absent any determination by competent
5 medical authority verifying disability or until competent
6 medical authority determined the claimant was disabled from
7 employment.
8

9
10 See also State Indus. Ins. Sys. v. Snapp, 100 Nev. 290
11 (1984), where the court concluded a claimant is not entitled
12 to compensation when he made no sincere effort to return to
13 work.
14

15 To date, the claimant has not accepted any light or
16 permanent job offer issued the employer.


17 As noted above, the weight of the evidence supports the
18 Appeals Officers findings and conclusions. Substantial and
19 overwhelming evidence supports denial of TTD/vocational
20 rehabilitation benefits.
21

22 CONCLUSION

23
24 Based on the above noted arguments, the Respondent
25 respectfully requests this Honorable Court deny the petition
26 and affirm the Appeals Officer order.
27

28 ///

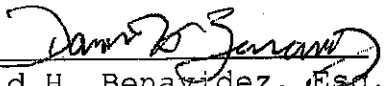
1 DATED this 30th day of July, 2021.

2 By: 
3 David H. Benavidez, Esq.
4 Nevada Bar No. 004919
5 850 S Boulder Hwy #375
6 Henderson, NV 89015

7 **CERTIFICATE OF COMPLIANCE**

8 I hereby certify that I have read this Answer Brief,
9 and to the best of my knowledge, information and belief, it
10 is not frivolous or interposed for any improper purpose. I
11 further certify that this brief complies with all applicable
12 Nevada Rules of Appellate Procedure, in particular NRAP
13 23(e), which requires every assertion in the brief regarding
14 matters in the record to be supported by appropriate
15 references to the record on appeal. I understand that I may
16 be subject to sanctions in the event the accompanying brief
17 is not in conformity with the requirements of the Nevada
18 Rules of Appellate Procedure.
19
20

21 DATED this 30th day of July, 2021.

22 By: 
23 David H. Benavidez, Esq.
24 Nevada Bar No. 004919
25 850 S Boulder Hwy #375
26 Henderson, NV 89015
27
28

CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury, that I am an employee of the Law Office of David H. Benavidez, and on the 30th day of July, 2021, I deposited the foregoing **ANSWER BRIEF** in the United States Mail, with first class postage fully prepaid thereon, sent by electronic delivery, or served using the E-file and Serve System which will send a notice of the electronic service to the parties listed on the service list, addressed as follows:

Jason Mills, Esq.
GGRM Law Firm
2770 S Maryland Pkwy #100
Las Vegas, NV 89109

Peppermill, Inc.
ATTN: Pam Sprau
380 Brinkby Ave. Ste. B
Reno, NV 89509

Employers Ins Co of NV
ATTN: Cary Ferguson
2550 Paseo Verde Pkwy. Ste. 100
Henderson, NV 89074-9004


Rose Mary Keys, Paralegal

THE LAW OFFICE OF DAVID H. BENAVIDEZ
850 S. BOULDER HIGHWAY, #375
HENDERSON, NEVADA 89015
(702) 565-9730
FAX (702) 568-1301

Steven D. Grierson

1 **NEOJ**
2 **JASON D. MILLS, ESQ.**
3 Nevada Bar No. 7447
4 **GGRM LAW FIRM**
5 2770 S. Maryland Parkway, Suite 100
6 Las Vegas, Nevada 89109
7 Phone: (702) 384-1616
8 Facsimile: (702) 384-2990
9 Email: jmills@ggrmlawfirm.com
10 *Attorneys for Petitioner*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 **DANIEL CASTELAN,**
14 **Petitioner,**

CASE NO: A-21-828981-J

DEPT NO: XIV

15 **v.**

16 **PEPPERMILL, INC., EMPLOYERS**
17 **INSURANCE COMPANY OF**
18 **NEVADA and THE DEPARTMENT**
19 **OF ADMINISTRATION,**
20 **HEARINGS DIVISION, APPEALS**
21 **OFFICE, an Agency of the State of**
22 **Nevada**

Respondents.

23 **NOTICE OF ENTRY OF ORDER**

24 **TO: All parties of interest.**

25 **PLEASE TAKE NOTICE** that an Order was entered in the above-entitled
26 case on the 3rd day of November, 2021.
27
28



NEVADA'S PREMIER INJURY
LAW FIRM

1 A true and accurate copy of which is attached.

2 DATED this 3rd day of November, 2021.

3
4 GGRM LAW FIRM

5
6
7 By: /s/ Jason D. Mills, Esq.
8 JASON D. MILLS, ESQ.
9 Nevada Bar No. 7447
10 2770 S. Maryland Parkway
11 Suite 100
12 Las Vegas, Nevada 89109
13 *Attorney for Petitioner*
14
15
16
17
18
19
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28



NEVADA'S PREMIER INJURY
LAW FIRM

1
2
3 **CERTIFICATE OF SERVICE**

4 **ELECTRONIC**

5 Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW
6 FIRM, and that on the 3rd day of November, 2021, I caused the foregoing
7 document entitled NOTICE OF ENTRY OF ORDER to be served upon those
8 persons designated by parties in the E-Service Master List for the above-
9 referenced matter in the Eighth Judicial District Court eFiling System in
10 accordance with the mandatory electronic service requirements of Administrative
11 Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:
12
13
14

15 **BY MAIL**

16 I HEREBY CERTIFY that on the 3rd day of November, 2021, I served the
17 foregoing by placing a copy of the NOTICE OF ENTRY OF ORDER which a true
18 copy thereof was placed in the United States Mail, postage prepaid, addressed to:
19
20

21 David H. Benavidez, Esq.
22 The Law Office of David H. Benavidez
23 850 S. Boulder Highway #375
24 Henderson, Nevada 89015

25 /s/ Ethan Wallace
26 An Employee of GGRM LAW FIRM
27
28



NEVADA'S PREMIER INJURY
LAW FIRM

Heather D. Smith

CLERK OF THE COURT

1 **OGJR**
2 **JASON D. MILLS, ESQ.**
3 Nevada Bar No. 7447
4 **GGRM LAW FIRM**
5 2770 S. Maryland Parkway, Suite 100
6 Las Vegas, Nevada 89109
7 Phone: (702) 384-1616
8 Facsimile: (702) 384-2990
9 Email: jmills@ggrmlawfirm.com
10 *Attorneys for Petitioner*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 DANIEL CASTELAN,

14 Petitioner,

15 v.

16 PEPPERMILL, INC., EMPLOYERS
17 INSURANCE COMPANY OF
18 NEVADA and THE DEPARTMENT
19 OF ADMINISTRATION,
20 HEARINGS DIVISION, APPEALS
21 OFFICE, an Agency of the State of
22 Nevada

23 Respondents.

CASE NO: A-21-828981-J

DEPT NO: XIV

24 **ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

25 This matter came before this Court on October 14, 2021, on the Petition for
26 Judicial Review filed by Petitioner, DANIEL CASTELAN. Petitioner was
27 represented JASON D. MILLS, ESQ. of GGRM LAW FIRM. Respondents,
28





1 PEPPERMILL, INC., and EMPLOYERS INSURANCE COMPANY OF
2 NEVADA were represented by DAVID H. BENAVIDEZ, ESQ. of THE LAW
3 OFFICE OF DAVID H. BENAVIDEZ. No other parties were present or
4 represented.
5

6 After a review and consideration of the record, the Points and Authorities
7 on file herein, and oral arguments of counsel, the Court hereby grants the Petition
8 for Judicial Review, strikes the Appeals Officer's January 14, 2021, Decision and
9 Order, reinstates the Appeals Officer's December 22, 2020, Decision and Order
10 and orders the Respondent to authorize Dr. Shah's treatment plan outlined in his
11 November 18, 2019 IME report, authorize Dr. Shah as the Petitioner's treating
12 physician, and provide the Petitioner TTD benefits from November 18, 2019 to
13 the present, plus interest.
14
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17

18 FINDINGS OF FACT

19 The Petitioner sustained an industrial injury on December 31, 2017, while
20 working in the course and scope of his employment with Peppermill Inc.
21 ("Employer"). Specifically, while walking and carrying dishes, Petitioner slipped
22 on standing water and fell, resulting in numerous facial injuries, a head injury and
23 lacerations of the head and hand. (Record on Appeal "ROA" 206-247).
24
25

26 On January 16, 2018, the Respondent notified Petitioner that his claim was
27 accepted for cervical strain, lumbar strain, right knee sprain, right elbow sprain,
28



1 facial contusion, forehead laceration, closed head injury, and left ring finger
2 laceration. (ROA 268-269).

3
4 Following acceptance of liability for the industrial injury claim, Petitioner
5 received medical treatment at Concentra Medical Centers from January 22, 2018,
6 to approximately March 2, 2018. Petitioner also received medical treatment from
7 Dr. Leo Germin for his head injury and, on December 12, 2018, a Hearing Officer
8 affirmed the Respondent's October 31, 2018, determination denying his request
9 for a follow up appointment with Dr. Germin. Petitioner timely appealed this
10 Decision and Order to the Appeals Officer, resulting in Appeal Number 1908458-
11 DM. (ROA 685-689).

12
13
14
15 On October 24, 2018, the Respondent denied Petitioner's request for
16 payment of medical bills for dry eye syndrome treatment. This determination was
17 affirmed by a Hearing Officer, which Petitioner timely appealed, resulting in
18 Appeal Number 1908459-DM. (ROA 679-684).

19
20
21 As a result of the Respondent's determination to deny Petitioner's continued
22 medical treatment with Dr. Germin, Petitioner requested that he be scheduled for
23 an Independent Medical Evaluation pursuant to NRS 616C.145 with Dr. Russell
24 Shah for his head injury. The Respondent failed to timely respond to this request,
25 resulting in a de facto denial of this request, which the Petitioner timely appealed.
26
27 A Hearing Officer affirmed the de facto denial and Petitioner timely appealed this
28



1 Decision and Order to the Appeals Officer, resulting in Appeal Number 1911529-
2 DM. (ROA 664-669).

3
4 On December 4, 2018, Petitioner was placed on permanent light duty
5 restrictions by Dr. Ronald Kong. These restrictions were based on the FCE
6 performed on November 15, 2018, which indicated that Petitioner "did not appear
7 to be capable of safely performing all of his pre-injury job duties (cleanup for
8 Peppermill, Inc.) without modifications. Specifically, he appears to fall short of
9 requirement for occasional lifting and carrying up to 80 lbs." The FCE report also
10 indicated that Petitioner is capable of working a medium physical demand level.
11 The FCE evaluation failed to consider the head injury. (ROA 354-378).

12
13
14
15 On February 5, 2019, the Vocational Rehabilitation Counselor notified
16 Petitioner that the Employer offered him a permanent light duty job of
17 hostess/cashier, which required him to "greet and seat guests, distribute guest
18 between food servers, accept payment on guest tickets and give proper change,
19 answer phones and properly direct calls and directing beverage service, bussing
20 and cleaning of tables." The permanent light duty job was approved by Dr. Ronald
21 Kong. The counselor also notified Petitioner that because of the permanent light
22 duty job offer, his vocational rehabilitation process closed February 12, 2019, and
23 his vocational rehabilitation maintenance was terminated. (ROA 389). Petitioner
24 did not accept this light duty position because of his head injury.
25
26
27
28



1 Petitioner timely appealed the Vocational Rehabilitation counselor's
2 determination dated February 5, 2019, and the Hearing Officer was bypassed,
3
4 resulting in Appeal Number 1912693-DM. (ROA 645-652).

5 On December 12, 2018, and December 19, 2018, the Respondent notified
6 Petitioner that his claim was closed for further medical treatment, and he was
7 scheduled for a PPD Evaluation. This determination was affirmed by a Hearing
8 Officer on March 6, 2019, which Petitioner timely appealed, resulting in Appeal
9 Number 1913110-DM. (ROA 639-644).

12 On February 1, 2019, Petitioner underwent a PPD evaluation with Dr.
13 Gobinder Chopra, who indicated that Petitioner had a 0% whole person
14 impairment. On February 11, 2019, the Respondent notified Petitioner that his
15 claim was closed with a 0% whole person impairment. Petitioner timely appealed
16 this determination, and the Hearing Officer was bypassed, resulting in Appeal
17 Number 1913610-DM. (ROA 405-412).

21 On November 6, 2019, the Appeals Officer filed an Interim Order which
22 ordered that Petitioner undergo an Independent Medical Evaluation with Dr.
23 Russell Shah for the Petitioner's head injury. (ROA 176-179).

25 On November 18, 2019, Petitioner underwent the IME with Dr. Shah. Dr.
26 Shah opined that Petitioner's industrially related impressions include a concussion
27 with "post concussive syndrome with continued cognitive impairment, sleep
28



1 impairment and vestibular impairment consisting of memory difficulties, focusing
2 difficulties, insomnia, restlessness and imbalance sensations.” Dr. Shah also
3 indicated that Petitioner needed additional medical treatment for his head injury,
4 and he had not reached maximum medical improvement for the concussion and
5 that he “more likely than not has a permanent post traumatic brain injury from the
6 December 31, 2017, trauma.” Dr. Shah recommended further medical treatment,
7 including brain exercises, medication, and cognitive behavioral therapy. Dr. Shah
8 also placed Petitioner on temporary disability. (ROA 164-175).

12 On January 17, 2020, Petitioner requested authorization for Dr. Shah’s
13 treatment plan. However, the Respondent failed to respond to this request,
14 resulting in a de facto denial. Petitioner appealed this determination to the Hearing
15 Officer, but the matter was subsequently bypassed to the Appeals Officer, resulting
16 in Appeal Number 2017002-DM. (ROA 133-141).

19 All appeal numbers were consolidated with Appeal Number 1908458-DM
20 before Appeals Officer Denise McKay. Esq. (ROA 131-132).

22 On October 22, 2020, the consolidated appeals 1908458-DM, et al. came on
23 for hearing before Appeals Officer Denise McKay, Esq. and a ruling was issued
24 from the bench. (ROA 42-49). Specifically, during her ruling the Appeals Officer
25 stated, “With regard to the light-duty job offer, I don’t necessarily agree that Dr.
26 Shah needs to opine on it because Dr. Shah has clearly said this claimant needs
27
28



1 much more testing and treatment, so it doesn't seem worthwhile to even ask Dr.
2 Shah to opine on that." (ROA 42, lines 14-18). Further the Appeals Officer stated,
3
4 "the time is not right for anybody to be determining if this claimant is ready to take
5 this valid light-duty job offer." (ROA 46, lines 15-17). Finally, the Appeals Officer
6
7 stated, "With regard to the entirety of Dr. Shah's reporting and his phrasing about
8 the temporary disability, he's substantially complied with this slip requirement."
9 (ROA 49, lines 5-8).

10
11 On November 20, 2020, Petitioner's Counsel, Jason D. Mills, Esq. hand
12 delivered the Proposed Decision and Order for the consolidated matters to the
13 Administrative Court and sent the Proposed Decision and Order via fax to
14 Respondent's counsel. (ROA 99-100).

15
16 On December 9, 2020, the Respondent filed its "Motion to Reconsider the
17 Appeals Officer Decision Regarding TTD." (ROA 68-98). In its Motion, the
18 Respondent conceded to having drafted a letter to Dr. Shah after the administrative
19 trial ("Trial") had concluded, stating that "On October 28, 2020, Insurer Counsel
20 drafted a letter to Dr. Shah asking the doctor if he found the claimant disabled from
21 employment. If not did he agree with the permanent job offered by the employer."
22 (ROA 68-69). Based on this newly manufactured evidence, not newly discovered,
23 the Respondent moved the Administrative Court to "reconsider [the] order for
24 TTD." (ROA 69).



NEVADA'S PREMIER INJURY
LAW FIRM

1 On December 22, 2020, the Appeals Officer issued Administrative Decision
2 and Order 1908458-DM et al. which found, in relevant part:
3

4 “Regarding appeal number 1912693-DM, under NRS
5 616C.590, the vocational rehabilitation issue is
6 premature at this time because he has not been placed on
7 a permanent light duty restriction based upon his closed
8 head injuries because he is not at maximum medical
9 improvement. Additionally, Dr. Shah’s reporting of
10 November 18, 2019, indicates that as of that date,
11 claimant is on temporary total disability status as it
12 pertains to Claimant’s industrial closed head injury. As
13 such, the Claimant is entitled to TTD benefits pursuant
14 to NRS 616C.475, plus interest pursuant to NRS
15 616C.335.”

16 (ROA 59).

17 “The full nature and duration and whether claimant can
18 return to gainful employment will be determined by Dr.
19 Shah in the future following additional industrial care by
20 Dr. Shah. At that time, depending on the subsequent
21 findings by Dr. Shah, the issue of permanent restrictions
22 and what type, if any, permanent modified duty job
23 Claimant is capable of performing will be determined at
24 that time pursuant to NRS 616C.590. However, the issue
25 is not currently ripe for adjudication given the state of
26 Claimant’s temporary total disability status.”

27 (ROA 59).

28 Following these Conclusions of Law, the Appeals Officer ordered “that the
determination from the vocational rehabilitation services counselor dated February
5, 2019, is also **REVERSED** and the Insurer is **REMANDED** to provide Claimant



NEVADA'S PREMIER INJURY
LAW FIRM

1 TTD benefits from November 18, 2019, to the present, plus interest.” (ROA 59-
2 60).

3
4 On January 14, 2021, the Appeals Officer issued her Order Granting the
5 Respondent’s Motion for Reconsideration, which merely amended the December
6 22, 2020, Order, rather than schedule the rehearing within 30 days of the granted
7 petition, as required by NAC 616C.327. (ROA 51-53). The Appeals Officer
8 amended the December 22, 2020, Order to erroneously deny the Petitioner’s
9 entitlement to TTD benefits. Id.
10

11
12 The Petitioner timely filed his Petition for Judicial Review of the
13 Administrative Court on grounds that the Order as amended by the Appeals Officer
14 on January 14, 2021, violates the substantial rights of the Petitioner as it was
15 rendered upon unlawful procedure and is in excess of the statutory authority of the
16 agency, pursuant to NRS 233B.135(3).
17

18
19 On May 11, 2021, the Department of Administration transmitted the Record
20 on Appeal, and the Petitioner filed his Opening Brief on July 8, 2021. The
21 Respondent filed its Answering Brief on July 30, 2021, and the Petitioner filed his
22 Reply Brief on August 19, 2021. This Petition for Judicial Review came before
23 the Court on October 14, 2021.
24

25
26 The Issue before the Court is whether the Appeals Officer’s Decision and
27 Order initially dated December 22, 2020, but later modified by the Appeals
28



1 Officer, in violation of NAC 616C.372 on January 14, 2021, was improper. The
2 determinations initially giving rise to this dispute are the Insurer's ("Respondent")
3 February 11, 2019, determination regarding the Claimant's ("Petitioner")
4 treatment with Dr. Shah and the Respondent's February 5, 2019, determination
5 regarding the Petitioner's vocational rehabilitation status and entitlement to
6 temporary total disability ("TTD") benefits.
7

8 CONCLUSIONS OF LAW

9
10 In contested workers' compensation claims, judicial review first requires an
11 identification of whether the issue to be resolved is a factual or legal issue. While
12 questions of law may be reviewed de novo by this Court, a more deferential
13 standard must be employed when reviewing the factual findings of an
14 administrative adjudicator.
15

16
17 NRS 233B.135, which governs judicial review of a final decision of an
18 administrative agency, provides, in pertinent part, the following:
19

20
21 2. The final decision of the agency shall be deemed
22 reasonable and lawful until reversed or set aside in
23 whole or in part by the court. The burden of proof is on
24 the party attacking or resisting the decision to show that
the final decision is invalid pursuant to subsection 3.

25
26 3. The court shall not substitute its judgment for that of
27 the agency as to the weight of evidence on a question of
28 fact. The court may remand or affirm the final decision
or set it aside in whole or in part if substantial rights of



1 the petitioner have been prejudiced because the final
2 decision of the agency is:

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

12 Relating to the standard of review of administrative decisions, our Supreme
13 Court has consistently held that the factual findings made by administrative
14 adjudicators may not be disturbed on appeal unless they lack the support of
15 substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); SIIS v.
16 Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17, 731
17 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990).

18 Thus, "the central inquiry is whether substantial evidence in the record
19 supports the agency decision." Brocas v. Mirage Hotel & Casino, 109 Nev. 579,
20 583, 854 P.2d 862, 865 (1993). Substantial evidence is "that quantity and quality
21 of evidence which a reasonable [person] could accept as adequate to support a
22 conclusion." State Employment Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608
23 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's decision lacks
24 substantial evidentiary support, the decision is unsustainable as being arbitrary and
25 capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850,
26
27
28



1 854 (2000). The Court must defer to an agency's findings of fact only as long as
2 they are supported by substantial evidence. Law Offices of Barry Levinson v.
3 Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

4
5 On the other hand, purely legal questions may be determined by the District
6 Court without deference to an agency determination, upon de novo review. SIIS
7 v. Khweiss, 108 Nev. at 126, 825 P.2d at 220 (1992). Furthermore, the construction
8 of a statute is a question of law, subject to de novo review. See State, Dep't of
9 Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d 1274, 1249 (1994).

10
11 However, NRS 233B.135(3) identifies multiple scenarios in which the
12 reviewing court may set it aside in whole or in part an administrative decision.
13 That is when a petitioner's substantial rights have been prejudiced as a result of
14 unlawful procedure. *See* NRS 233B.135(3)(c).

15
16 Further, the Supreme Court of Nevada has determined that a reviewing court
17 may set aside an agency decision if substantial rights of the petitioner have been
18 prejudiced because the decision of the agency is in violation of constitution or
19 statutory provisions. Field v. State, Dep't of Motor Vehicles & Pub. Safety, 111
20 Nev. 552, 554, (1995).

21
22 In this matter, the Administrative Order as amended by the Appeals Officer
23 on January 14, 2021, contains both violation of regulatory law as well as unlawful
24 procedure, and this Court finds that it is clearly prejudicial to the Petitioner's



1 substantial rights. The Administrative Order, as amended by the Appeals Officer
2 on January 14, 2021, directly contradicts the plain and unambiguous language
3 found in NAC 616C.327. Specifically, NAC 616C.327(2) states:

5 2. The appeals officer shall grant or deny the petition
6 for rehearing within 15 days after the receipt of the
7 petition. If the petition is granted, the rehearing must be
8 held within 30 days after the petition is granted.

9 The Court finds that the language of NAC 616C.327 is plain and
10 unambiguous. Accordingly, there is no need to go beyond this plain meaning. *See*
11 City of N. Las Vegas v. Warburton, 127 Nev. 682, 686, (2011) (“When the text of
12 a statute is plain and unambiguous, [we] should ... not go beyond that meaning.”),
13 and Silver State Elec. v. State, Dep’t of Tax., 123 Nev. 80, 85, (2007) (“These
14 rules of statutory construction also apply to administrative regulations”).
15 Therefore, if a petition for rehearing is granted, or in this instance, a motion for
16 reconsideration, the appeals officer is required to hold the rehearing within 30 days
17 after the petition is granted. *See* NAC 616C.327(2).

18 The Court acknowledges that motions for reconsideration are not
19 recognized under Nevada Workers’ Compensation administration, rather petitions
20 for rehearing are the regulatorily accepted means for aggrieved parties to seek
21 remedies outside of the appellate process. *See* NAC 616C.327. But for the
22 purposes of this Order, the Court will treat the Respondent’s motion for
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1 reconsideration as a petition for rehearing, as the title of the respondent's
2 December 9, 2020, document has no bearing on the Court's decision in this case.
3

4 The Court finds that the amendments made to the Administrative Decision
5 post trial, and therefore the Administrative Decision in and of itself, are in violation
6 of regulatory and statutory law. NRS 233B.135(3)(c) provides that a court may
7 remand an agency decision if the Petitioner's substantial rights have been
8 prejudiced because the agency's decision is made upon unlawful procedure or is
9 in violation of statutory procedures. The Supreme Court of Nevada has previously
10 found that an appeals officer's failure to meet relevant statutory requirements is
11 considered "procedurally deficient." Elizondo v. Hood Mach., Inc., 129 Nev. 780,
12 785, (2013).
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17 In Elizondo, the Supreme Court of Nevada considered whether an
18 administrative order that failed to include "findings of fact and conclusions of law,
19 separately stated" pursuant to NRS 233B.125 was procedurally sufficient. Id. The
20 Court in Elizondo found that because the language of NRS 233B.125 was plain
21 and unambiguous ("a final decision must include findings of fact and conclusions
22 of law, separately stated"), the appeals officer was bound by this mandate. Id. The
23 Court went on to conclude that "the appeals officer's order fails to meet the
24 statutory requirements of NRS 233B.125 and is thus procedurally deficient." Id.
25
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1 The Court finds that the facts of Elizondo are similar to the facts of this
2 petition, and the facts before this Court lend themselves to an interpretation under
3 the precedent established by the Supreme Court of Nevada in Elizondo. The
4 appeals officer violated plain and unambiguous regulatory law when she failed to
5 hold a rehearing within 30 days after the Respondent's Motion was granted, as it
6 is evident that no rehearing was scheduled. Rather, the appeals officer simply
7 granted the Respondent's Motion and stripped the Petitioner of his monetary
8 benefits via amended order. The Appeals Officer's failure to schedule the
9 rehearing directly contradicts NAC 616C.327, which constitutes a clear violation
10 of a regulatory provision and is highly prejudicial to the Petitioner's substantial
11 rights.

12 Accordingly, the Administrative Order is in direct violation of relevant
13 regulatory provisions, is highly prejudicial to his substantial rights, and therefore
14 must be found to be procedurally deficient pursuant to NRS 233B.135, as clarified
15 in Elizondo v. Hood Mach., Inc., 129 Nev. 780, (2013).

16 In support of its position, the Respondent argued that the Administrative
17 Order is supported by substantial evidence and contains no error of law.
18 (Respondent's Brief p. 8). For the aforementioned reasons, the Court finds that this
19 argument bears no relevance to judicial review as NRS 233B.135(3) identifies
20 multiple scenarios in which the reviewing court may set it aside in whole or in part
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1 an administrative decision. That is when a petitioner's substantial rights have been
2 prejudiced as a result of unlawful procedure. *See* NRS 233B.135(3)(c).

3
4 Further, the Respondent argued that its motion for reconsideration was
5 proper as it was based on newly discovered evidence. (Respondent's Brief p. 14-
6 15). However, the Court concludes that the response from Dr. Shah fails to meet
7 the burden of "newly discovered evidence."
8

9
10 In workers' compensation matters, rehearing of a decision is only
11 appropriate if it is "based on good cause or newly discovered evidence." *See* NAC
12 616C.327(1). However, the Respondent failed to show good cause for rehearing,
13 and failed to produce newly discovered evidence.
14

15
16 Though the precedential case law in the state of Nevada is limited on the
17 question of newly discovered evidence in civil cases, the Ninth Circuit Court of
18 Appeals has found that "evidence is not newly discovered if it was in the party's
19 possession at the time of summary judgement or could have been discovered with
20 reasonable diligence." Wallis v. J.R. Simplot Co., 26 F.3d 885, 892 n.6 (9th Cir.
21 1994) (emphasis added); *see also* Defs. Of Wildlife v. Bernal, 204 F.3d 920, 929
22 (9th Cir. 2000) (providing that, in moving for a new trial based on newly
23 discovered evidence under FRCP 59(a), the movant must demonstrate "the
24 exercise of due diligence would not have resulted in the evidence being discovered
25 at an earlier stage").
26
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28



1 Nevada's higher courts have confirmed this interpretation of "newly
2 discovered evidence" in various unpublished opinions, through their reliance on
3 Drespel v. Drespel, 56 Nev. 368, 374, (1935) (recognizing that evidence that was
4 within a party's power to present during a first trial will not constitute newly
5 discovered evidence supporting a grant of a motion for a new trial). The Court in
6 Drespel was presented with the question of whether a new trial should be grand
7 upon the ground of newly discovered evidence following the plaintiff's recovery
8 in a divorce action. Drespel v. Drespel, 56 Nev. 368, (1935). The Court ultimately
9 affirmed the denial of a new trial on grounds that "reasonable diligence was not
10 used prior to the trial to discover the evidence offered." Id. (emphasis added).
11 Therefore, because there was no evidence that reasonable diligence was used prior
12 to the trial to discover the evidence offered in support of the motion for new trial,
13 the evidence offered failed to constitute "newly discovered evidence." Id.

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19 Most recently, the Nevada Supreme Court has confirmed that the
20 "reasonable diligence" standard for the effort of a moving party is a low threshold.
21 In Motor Coach Indus., Inc. v. Khiabani by & through Rigaud, 137 Nev. Adv. Op.
22 42, 493 P.3d 1007 (2021) the Appellant, Motor Coach, had moved the lower court
23 for a new trial following the entry of judgement upon jury verdict for the Appellee.
24 The theory put forth by Motor Coach was that news reporting that occurred post
25 trial "brought to light new facts that merited a new trial." Id. 1015. Motor Coach
26
27
28



1 went on to argue that “the revelations in these reports placed Khiabani's continued
2 employment—had he lived—in such doubt that a new trial was warranted.” Id.
3
4 1015–16. However, the both the District Court and the Supreme Court in Khiabani
5 disagreed with this argument, as evidence put forth showed that the Appellee
6 “provided MCI with a release months before trial commenced, authorizing MCI
7 to obtain Khiabani's employment information from the medical school.” Id. 1016.
8
9 The Court went on to find that, because Motor Coach failed to subpoena the
10 Appellee’s employment information, the evidence could have been discovered
11 with reasonable diligence, and therefore this information fails to constitute “newly
12 discovered evidence.”
13

14
15 Similarly, in this case, the Court finds that the evidence submitted by the
16 Respondent in support of its Motion for Reconsideration could have been
17 discovered with reasonable diligence during the normal course of discovery, prior
18 to the conclusion of the administrative trial, and therefore must not be considered
19 “newly discovered.” The Court finds that the Respondent cannot show that the
20 documents offered in support of its Motion for Reconsideration satisfy the burden
21 of being considered “newly discovered.” In support of its Motion for
22 Reconsideration, the Respondent supplied only the response of Dr. Shah to a letter
23 crafted by the Respondent’s counsel on October 28, 2020, post-trial. The
24 Respondent conceded in its Motion and its Brief that it was only after the Appeals
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1 Officer issued a ruling ordering the Respondent to pay TTD benefits that
2 Respondent's counsel prepared the letter to Dr. Shah. (ROA 68-69, Respondent's
3 Brief p. 6-7). The Respondent made no allegation that this evidence was
4 unobtainable prior to the administrative trial, and the Court concludes that, had
5 Respondent's counsel simply exercised reasonable diligence, this evidence could
6 have easily been obtained and submitted to the record prior to the October 22,
7 2020, hearing.

8
9 Rather than exercising reasonable diligence, Respondent simply waited
10 until the date of the administrative trial, waited for the presentation of the
11 Petitioner's arguments and evidence, and then waited until an adverse ruling had
12 been issued against it before making the decision to go on an improper and
13 unwarranted post-trial discovery expedition. Therefore, the Court concludes that
14 the ill-gotten means by which the December 7, 2020, response from Dr. Shah was
15 procured mandate that the response be stricken from the record as a fugitive
16 document and that because this document was obtained improperly, through
17 unauthorized and improper post-trial discovery, this document has no effect upon
18 this industrial injury claim.

19 20 21 22 23 24 25 **ORDER**

26 In summation, THIS COURT FINDS AND HEREBY ORDERS that the
27 January 14, 2021, Decision and Order is in violation of statutory provisions, made
28

1 upon unlawful procedure, and violates the Petitioner's substantial rights. Based on
2 the Court's finding, it is hereby ORDERED the Appeals Officer's January 14,
3 2021, Decision and Order is stricken, Appeals Officer's December 22, 2020,
4 Decision and Order is reinstated, and the Respondent is ordered to authorize Dr.
5 Shah's treatment plan outlined in his November 18, 2019, IME report, authorize
6 Dr. Shah as the Petitioner's treating physician, and provide the Petitioner TTD
7 benefits from November 18, 2019, to the present, plus interest
8
9
10
11

12 DATED this Q. Escobar day of _____, 2021.
13

14
15 By: Q. Escobar
16 ADRIANA ESCOBAR
17 DISTRICT COURT JUDGE

18 Dated this 3rd day of November, 2021

19 Submitted by:
20 GGRM LAW FIRM

21
22 20A 746 3D18 705A
23 Adriana Escobar
24 District Court Judge

25 By: /s/ Jason D. Mills, Esq.
26 JASON D. MILLS, ESQ.
27 Nevada Bar No. 7447
28 2770 S. Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorney for Petitioner



NEVADA'S PREMIER INJURY
LAW FIRM



NEVADA'S PREMIER INJURY
LAW FIRM

1 **CERTIFICATION PURSUANT TO COURT GUIDELINES**

2 Counsel submitting this document certifies as follows (check one):

3
4 _____ The court has waived the requirements set forth in the Guidelines;

5
6 _____ No party appeared at the hearing or filed an objection to the motion;

7
8
9 X I have delivered a copy of this proposed order to all counsel who
10 appeared at the hearing, and each has approved or disapproved the order, or
11 failed to respond as indicated below:

12 [] Approved [X] Disapproved [] Failed to Respond

13
14 _____/s/ David Benavidez

15 DAVID H. BENAVIDEZ ESQ., of THE LAW OFFICE OF DAVID H.
16 BENAVIDEZ, Attorney for Respondents PEPPERMILL, INC., and
17 EMPLOYERS INSURANCE COMPANY OF NEVADA.

Ethan Wallace

From: David Benavidez <davidbenavidez@gmail.com>
Sent: Monday, November 1, 2021 7:19 AM
To: Jason Mills
Cc: Ethan Wallace
Subject: Re: Proposed Order Granting PJR, Castelan v. Peppermill, Inc et al., A-21-828981-J

Disapproved.

On Sun, Oct 31, 2021 at 6:36 PM Jason Mills <jmills@ggrmlawfirm.com> wrote:

Dave;

Do you want me to put your electronic signature attached along with the **"DISAPPROVED"** check box or do you wish me to leave your electronic signature off/blank and simply check **"FAILED TO RESPOND"** on the order I am submitting to the court?

Thank you, sir.



Jason D. Mills, Esq.
Strategic Development Partner

O: 702.384.1616 | F: 702.384.2990 | www.ggrmlawfirm.com
2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109



1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Daniel Castelan, Petitioner(s)

CASE NO: A-21-828981-J

7 vs.

DEPT. NO. Department 14

8 Peppermill Hotel & Casino,
9 Respondent(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 11/3/2021

16 Ethan Wallace

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Steven D. Grierson

1 OBJ

2 DAVID H. BENAVIDEZ, ESQUIRE

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Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DANIEL CASTELAN,

Petitioner,

vs.

Case No: A-21-828981-J

PEPPERMILL, INC., EMPLOYERS INSURANCE
COMPANY OF NEVADA and the
DEPARTMENT OF ADMINISTRATION,
HEARINGS DIVISION, APPEALS OFFICE, an
Agency of the State of Nevada,

Dept.No.: XXII

Respondents.

RESPONDENT'S OBJECTION TO THE PROPOSED
ORDER GRANTING PETITION FOR JUDICIAL REVIEW

The proposed findings and conclusions are not numbered.

Respondent objects to page 6, first paragraph, last sentence

noting "Dr. Shah also placed the Petitioner on temporary

disability". Respondent asks the finding note what Dr. Shah

actually wrote in his report, ie, "Long Term Disability to be

determined after treatment is completed". This is what the

doctor wrote.

1 On page 7 of the proposed order, line 25, Respondent asks
2 the finding include Dr. Shah's response to Respondent's
3 question regarding the claimant's ability to work, ie, "I did
4 not address the work status issue in my report. I
5 put him as a 'temporary disability for the head' body part
6 injuries that I was evaluating him for. Mr. Castelan is able to
7 work with accommodations and restriction with his head related
8 complaints".
9

11 Petitioner objects to the last paragraph of page 8, first
12 line of page 9 ordering TTD "to the present".
13

14 As a matter of law, Dr. Shah's alleged November 19, 2019
15 disability slip is only good until the next disability slip. On
16 the next visit, did Dr. Shah recommend restrictions, release the
17 claimant to full duty or take the claimant off work? Claimant
18 counsel may argue the original appeal decision noted disability
19 through the "current time", but Dr. Shah's November 19, 2019
20 disability slip was the last disability slip in the record at
21 the time of appeal before the Appeals Officer. It made sense at
22 that time to note "through the current time." Since the Appeal
23 Officer decision, the claimant has continued to treat. There
24 are further updated reports either offering restrictions, taking
25 the claimant completely off work or releasing the claimant to
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1 full duty. Removal of "through the current time" is clearly
2 warranted and supported by statute and case law.

3 See NRS 616C.475 Amount and duration of compensation;
4 limitations; requirements for certification of disability; offer
5 of light-duty employment.

6 1. Except as otherwise provided in this section, NRS
7 616C.175 and 616C.390, every employee in the employ of an
8 employer, within the provisions of chapters 616A to 616D,
9 inclusive, of NRS, who is injured by accident arising out
10 of and in the course of employment, or his or her
dependents, is entitled to receive for the period of
temporary total disability, 66 2/3 percent of the average
monthly wage.

11 2. Except as otherwise provided in NRS 616B.028 and
12 616B.029, an injured employee or his or her dependents are
13 not entitled to accrue or be paid any benefits for a
14 temporary total disability during the time the injured
15 employee is incarcerated. The injured employee or his or
16 her dependents are entitled to receive such benefits when
the injured employee is released from incarceration if the
injured employee is certified as temporarily totally
disabled by a physician or chiropractor.

17 3. If a claim for the period of temporary total
18 disability is allowed, the first payment pursuant to this
19 section must be issued by the insurer within 14 working
20 days after receipt of the initial certification of
21 disability and regularly thereafter.

22 4. Any increase in compensation and benefits effected by
23 the amendment of subsection 1 is not retroactive.

24 5. Payments for a temporary total disability must cease
25 when:

26 (a) A physician or chiropractor determines that the
27 employee is physically capable of any gainful employment
28 for which the employee is suited, after giving
consideration to the employee's education, training and
experience;

(b) The employer offers the employee light-duty employment
or employment that is modified according to the limitations
or restrictions imposed by a physician or chiropractor
pursuant to subsection 7; or

(c) Except as otherwise provided in NRS 616B.028 and

1 616B.029, the employee is incarcerated.

2 6. Each insurer may, with each check that it issues to an
3 injured employee for a temporary total disability, include
4 a form approved by the Division for the injured employee to
5 request continued compensation for the temporary total
6 disability.

7 7. A certification of disability issued by a physician or
8 chiropractor must:

9 (a) Include the period of disability and a description of
10 any physical limitations or restrictions imposed upon the
11 work of the employee;

12 (b) Specify whether the limitations or restrictions are
13 permanent or temporary; and

14 (c) Be signed by the treating physician or chiropractor
15 authorized pursuant to NRS 616B.527 or appropriately chosen
16 pursuant to subsection 3 or 4 of NRS 616C.090.

17 8. If the certification of disability specifies that the
18 physical limitations or restrictions are temporary, the
19 employer of the employee at the time of the employee's
20 accident may offer temporary, light-duty employment to the
21 employee. If the employer makes such an offer, the employer
22 shall confirm the offer in writing within 10 days after
23 making the offer. The making, acceptance or rejection of an
24 offer of temporary, light-duty employment pursuant to this
25 subsection does not affect the eligibility of the employee
26 to receive vocational rehabilitation services, including
27 compensation, and does not exempt the employer from
28 complying with NRS 616C.545 to 616C.575, inclusive, and
616C.590 or the regulations adopted by the Division
governing vocational rehabilitation services. Any offer of
temporary, light-duty employment made by the employer must
specify a position that:

(a) Is substantially similar to the employee's position at
the time of his or her injury in relation to the location
of the employment and the hours the employee is required to
work;

(b) Provides a gross wage that is:

(1) If the position is in the same classification of
employment, equal to the gross wage the employee was
earning at the time of his or her injury; or

(2) If the position is not in the same classification
of employment, substantially similar to the gross wage
the employee was earning at the time of his or her
injury; and

1 (c) Has the same employment benefits as the position of
2 the employee at the time of his or her injury.

3 Per subsection 7 of the statute, one can see Dr. Shah's
4 language at the end of his report regarding disability does not
5 comply with the requirements of subsection 7. If fails to
6 include the period of disability and a description of any
7 physical limitations or restrictions imposed upon the work of
8 the employee or specify whether the limitations or restrictions
9 are permanent or temporary. This lead to employer counsel
10 asking the doctor to clarify and the subsequent motion to
11 reconsider which this Court has now determined improper
12 reversing the Appeals Officer decision.

13 Furthermore TTD must be issued to the claimant within
14 within 14 days of a disability slip.

15 Finally, the disability slip is only good until the next
16 disability slip or "until competent medical authority determined
17 to the contrary." See Nevada Indus. Comm'n v. Taylor 98 Nev.
18 131, 642 P.2d 598, March 29, 1982.

19 See also Amazon.com v Dee Dee Magee, 121 Nev 632, 119 P.3d
20 732, September 22, 2001, where the court, citing NRS 616C.475,
21 concluded that TTD must cease when restrictions are recommended
22 by the treating doctor and the employer offers light duty in
23 accord with the restrictions.
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1 Again removal of "through the current time" is clearly
2 warranted and supported by statute and case law.

3 DATED this 3rd day of November, 2021.

4
5 By: David H. Benavidez
6 David H. Benavidez, Esq.
7 Nevada Bar No. 004919
8 850 S Boulder Hwy #375
9 Henderson, NV 89015

10 **CERTIFICATE OF COMPLIANCE**

11 I hereby certify that I have read this OBJECTION, and to
12 the best of my knowledge, information and belief, it is not
13 frivolous or interposed for any improper purpose. I further
14 certify that this objectionf complies with all applicable Nevada
15 Rules of Appellate Procedure, in particular NRAP 23(e), which
16 requires every assertion in the objection regarding matters in
17 the record to be supported by appropriate references to the
18 record on appeal. I understand that I may be subject to
19 sanctions in the event the accompanying objection is not in
20 conformity with the requirements of the Nevada Rules of
21 Appellate Procedure.
22

23
24 DATED this 3rd day of November, 2021.

25 By: David H. Benavidez
26 David H. Benavidez, Esq.
27 Nevada Bar No. 004919
28 850 S Boulder Hwy #375
Henderson, NV 89015

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FAX (702) 568-1301

CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury, that I am an employee of the Law Office of David H. Benavidez, and on the 3rd day of November 2021, I deposited the foregoing **OBJECTION TO THE PROPOSED DECISION** in the United States Mail, with first class postage fully prepaid thereon, sent by electronic delivery, or served using the E-file and Serve System which will send a notice of the electronic service to the parties listed on the service list, addressed as follows:

Jason Mills, Esq.
GGRM Law Firm
2770 S Maryland Pkwy #100
Las Vegas, NV 89109

Peppermill, Inc.
ATTN: Pam Sprau
380 Brinkby Ave. Ste. B
Reno, NV 89509

Employers Ins Co of NV
ATTN: Cary Ferguson
2550 Paseo Verde Pkwy. Ste. 100
Henderson, NV 89074-9004


Rose Mary Keys, Paralegal



1 NOAS

2 DAVID H. BENAVIDEZ, ESQUIRE

3 Nevada Bar No. 004919

4 LAW OFFICE OF DAVID H. BENAVIDEZ

5 850 South Boulder Highway, #375

6 Henderson, Nevada 89015

Davidbenavidez@gmail.com

(702) 565-9730

Attorney for Appellant

DISTRICT COURT
CLARK COUNTY, NEVADA

EMPLOYERS INSURANCE COMPANY OF NEVADA,)

Appellant,)

vs.)

Case No.: A-21-828981-J

Dept No.: XIV

DANIEL CASTELAN, THE DEPARTMENT OF)

ADMINISTRATION, HEARINGS DIVISION,)

APPEALS OFFICE, an agency of the State)

of Nevada)

Respondents.)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that EMPLOYERS INSURANCE COMPANY OF
NEVADA, Appellant in the above-entitled action, hereby appeals
to the Supreme Court of Nevada the Order Denying Petition for
Judicial Review entered in this action on the November 3, 2021.

This appeal is taken on all matters of law and fact in this
case.

///

1 DATED this 8th day of November, 2021.

2 LAW OFFICE OF DAVID H. BENAVIDEZ

3 By: David H. Benavidez

4 David H. Benavidez, Esquire

5 Nevada Bar No. 004919

6 850 S Boulder Hwy #375

7 Henderson, NV 89015

8 Attorney for Appellant

9 **CERTIFICATE OF MAILING**

10 I, the undersigned, declare under penalty of perjury, that I
11 am an employee of the Law Office of David H. Benavidez, and on the
12 8th day of November, 2021, I deposited the foregoing **NOTICE OF**
13 **APPEAL** in the United States Mail, with first class postage fully
14 prepaid thereon or sent via electronic delivery, copies of the
15 attached document addressed as follows:

16 Jason Mills, Esq.
17 GGRM Law Firm
18 2770 S Maryland Pkwy #100
19 Las Vegas, NV 89109

20 Peppermill, Inc.
21 ATTN: Pam Sprau
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24 ATTN: Cary Ferguson
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Henderson, NV 89074-9004

26 Rose Mary Keys
27 Rose Mary Keys, Paralegal
28

THE LAW OFFICE OF DAVID H. BENAVIDEZ
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Steven D. Grierson

1 **ASTA**

2 **DAVID H. BENAVIDEZ, ESQUIRE**

3 Nevada Bar No. 004919

4 **LAW OFFICE OF DAVID H. BENAVIDEZ**

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6 Henderson, Nevada 89015

7 Davidbenavidez@gmail.com

8 (702) 565-9730

9 Attorney for Appellant

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 EMPLOYERS INSURANCE COMPANY OF NEVADA,)

13 Appellant,)

14 vs.)

) Case No.: A-21-828981-J

) Dept No.: XIV

15 DANIEL CASTELAN, THE DEPARTMENT OF)
16 ADMINISTRATION, HEARINGS DIVISION,)
17 APPEALS OFFICE, an agency of the State)
18 of Nevada)

19 Respondents.)

20 **CASE APPEAL STATEMENT**

21 1. Employers Insurance Company of Nevada, Appellant

22 2. District Court Judge Adriana Escobar

23 3. Counsel for Appellant is as follows:

24 David H. Benavidez, Esquire

25 LAW OFFICE OF DAVID H. BENAVIDEZ

26 850 S. Boulder Highway, #375

27 Henderson, Nevada 89015

28 4. Counsel for Respondent Daniel Castelan is as follows:

Jason Mills, Esq.
GGRM Law Firm
2770 S Maryland Pkwy #100
Las Vegas, NV 89109

5. All attorneys identified in the above response are licensed to practice law in Nevada.

6. Appellant retained counsel in the district court.

7. Appellant is represented by retained counsel on appeal.

8. Appellant was not granted leave to proceed in forma pauperis.

9. The Petition for Judicial Review was filed on February 5, 2021.

10. The Respondent appealed the Appeals Officer's January 14, 2021 order granting the Appellant's Motion to Reconsider noting the claimant would benefit from working in the light-duty position offered by the employer. The District Court Judge granted the Petition for Judicial Review.

11. The case has not previously been the subject of an appeal to or original writ proceeding in the Supreme Court.

12. The appeal does not involve child custody or visitation.

13. The appeal involves the possibility of settlement.

THE LAW OFFICE OF DAVID H. BENAVIDEZ
850 S. BOULDER HIGHWAY, #375
HENDERSON, NEVADA 89015
(702) 565-9730
FAX (702) 568-1301

1 DATED this 8th day of November, 2021.

3 By: David H. Benavidez
4 David H. Benavidez, Esquire
5 Nevada Bar No. 004919
6 LAW OFFICE OF DAVID H. BENAVIDEZ
7 850 S Boulder Hwy #375
8 Henderson, NV 89015
9 (702) 565-9730

8 **CERTIFICATE OF MAILING**

10 I, the undersigned, declare under penalty of perjury that I
11 am an employee of the Law Office of David H. Benavidez, and on
12 the 8th day of November, 2021, I deposited the foregoing **CASE**
13 **APPEAL STATEMENT** in the United States Mail, with first class
14 postage fully prepaid thereon or sent via electronic delivery,
15 addressed as follows:
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