**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| EMPLOYERS INSURANCE COMPANY OF NEVADA,<br><br>Appellant,<br><br>v.<br><br>DANIEL CASTELAN,<br><br>Respondent. | CASE NO: 83765 |

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Dec 16 2021 11:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

# RESPONSE TO EMERGENCY MOTION FOR STAY

David H. Benavidez, Esq.
Nevada Bar No. 4919
LAW OFFICE OF DAVID H. BENAVIDEZ
850 S. Boulder Highway
#375
Henderson, Nevada 89015
Attorney for Appellant

Jason D. Mills, Esq.
Nevada Bar No. 7447
GGRM LAW FIRM
2770 S. Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
Attorney for Respondent

NEVADA'S PREMIER INJURY LAW FIRM



Docket 83765 Document 2021-35846

COMES NOW, Respondent, DANIEL CASTELAN (hereinafter "Respondent"), by and through his attorney, JASON D. MILLS, ESQ., of GGRM LAW FIRM, and files this Response to Emergency Motion for Stay per NRAP 27(e) and NRAP 8 filed by the Appellant, EMPLOYERS INSURANCE COMPANY OF NEVADA, (hereinafter "Appellant"), by and through its attorney of record, DAVID H. BENAVIDEZ, ESQ., of THE LAW OFFICE OF DAVID H. BENAVIDEZ.

This Opposition is made and based upon the Points and Authorities attached hereto as well as all other pleadings and papers submitted with the motion.

## POINTS AND AUTHORITIES

### ISSUE

The issue raised by Appellant is whether the District Court Judge erred when the Court issued the Order Granting the Respondent's Petition for Judicial Review, which ordered that the January 14, 2021, Administrative Decision and Order be stricken, and ordered that the December 22, 2020, Administrative Decision and Order be reinstated.

### STATEMENT OF CASE

The Respondent 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, Respondent

slipped on standing water and fell, resulting in numerous facial injuries, a head injury and lacerations of the head and hand.

On October 22, 2020, the consolidated appeals 1908458-DM, et al. came on for hearing before Appeals Officer Denise McKay, Esq. and a ruling was issued from the bench. (See Attached Exhibit pages 1-8).

On December 9, 2020, the Appellant filed its "Motion to Reconsider the Appeals Officer Decision Regarding TTD." (Attached pp. 10-40). In its Motion, the Appellant conceded to having drafted a letter to Dr. Shah after the administrative trial ("Trial") had concluded. (Attached pp. 10-11). Based on this newly manufactured evidence, the Appellant moved the Administrative Court to "reconsider [the] order for TTD." (Attached p. 11). On December 22, 2020, the Appeals Officer issued Administrative Decision and Order 1908458-DM et al. (Attached pp. 41-48). 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 TTD benefits from November 18, 2019, to the present, plus interest." (Attached pp. 46-47).

On January 14, 2021, the Appeals Officer issued her Order Granting the Appellant's Motion for Reconsideration, which merely amended the December 22, 2020, Order, rather than schedule the rehearing within 30 days of the granted petition, as required by NAC 616C.327. (Attached pp. 49-51).



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It is from this amended Order that the Respondent filed his Petition for Judicial Review of the Administrative Court.

On November 3, 2021, the Court filed the Order Granting Petition for Judicial Review for A-21-828981-J (Attached pp. 52-74), which concluded that "Based on the Court's finding, it is hereby ORDERED the Appeals Officer's January 14, 2021, Decision and Order is stricken, Appeals Officer's December 22, 2020, Decision and Order is reinstated…"

## LEGAL DISCUSSION

### I. THE APPLICATION FOR STAY PENDING APPEAL IS UNWARRANTED

An order for stay is not a right to be exercised, but a matter of judicial discretion to be used by the Court, when appropriate, upon application of a party. Contrary to the Appellant's statements in its Motion, the appellate courts of the State of Nevada generally consider four factors when deciding whether to issue a stay. These four factors are:

> (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;
> (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;
> (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and
> (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

*See*, Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 116 Nev. 650, 657 (2000); Kress v. Corey, 65 Nev. 1 (1948); NRAP 8(c). Rather than relying on the



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factors actually considered by this Court, the Appellant cites to a Ninth Circuit, United States Court of Appeals case which arose from the Central District of California.

Regardless of the inaccuracies in the Appellant's claimed authority, a stay is unwarranted as the Appellant has failed to establish any of these factors.

**A. APPELLANT WILL NOT SUFFER IRREPARABLE HARM.**

Appellant has the burden of demonstrating that it will suffer irreparable harm if the stay order is not issued. Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 116 Nev. 650, 657 (2000); Kress v. Corey, 65 Nev. 1 (1948). Appellant argues in its Motion that if the stay is not granted, it will be irreparably harmed because of the payment of TTD benefits. This argument, however, is without merit since there are no Nevada Supreme Court cases, and therefore no binding authorities, that indicate irreparable harm results from the sole payment of money. To the contrary, the Nevada Supreme Court, in DIIR v. Circus Circus Enterprises, held that "...the object of workers' (sic) compensation social legislation is to provide the disabled worker with benefits during the period of his disability so that the worker and his dependents may survive the catastrophe which the temporary cessation of necessary income occasions." 101 Nev. 405, 408, (1985).

The court also indicated that "...it is clearly the injured worker and not the employer who is more likely to be irreparably harmed when immediate payment



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of benefits is contrasted with delayed payment pending the outcome of the hearing on the merits." Id.

**B. APPELLANT HAS NOT MADE A STRONG SHOWING THAT IT WILL PREVAIL ON THE MERITS.**

In order to show that it will prevail on the merits, Appellant has the burden of demonstrating that the underlying decision was factually or legally incorrect and that the judge acted arbitrarily or capriciously. NRS 233B.135(2); Campbell v. Nevada Tax Com'n, 853 P.2d 717 (Nev. 1993). In the instant case, Appellant has failed to meet its burden of demonstrating that the underlying decision was factually or legally incorrect. Appellant has also failed to show that the judge acted arbitrarily or capriciously. Thus, the District Court appropriately granted the Petition for Judicial Review and reinstated the December 22, 2020, Decision and Order.

In the Motion, the Appellant confusingly argues that "The District Courts finding and conclusion the disability slip is good though [sic] the present time is clearly an error of law and not supported by statute or case law." (*See* Motion p. 9, lines 14-16). However, these words are nowhere to be found in the Order from the District Court. In the Order Granting Petition for Judicial Review, the District Court found that the amended Administrative Order "is in direct violation of relevant regulatory provisions, is highly prejudicial to his substantial rights, and

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therefore must be found to be procedurally deficient pursuant to NRS 233B.135…" (Attached p. 66, lines 17-21).

The District Court did not address the Appellant's arguments that the amended Administrative Order was supported by substantial evidence and contained no errors of law, and actually concluded that those arguments bore no relevance to judicial review. The District Court granted the Petition for Judicial Review because the underlying Administrative Order (as amended post trial) was based on a fugitive document that led to the entire amended Order relying upon unlawful and highly prejudicial procedure.

The Appellant is now seeking to argue a new angle for its appeal to this Court, and argue that, as a matter of law, the Respondent is not entitled to TTD benefits. However, this argument remains stale as the time for such debate has long since passed. (*See* NAC 616C.306(3) which requires objections to proposed orders to be filed within five days of receipt).

The proper time to contest the Appeals Officer's finding that the Respondent is entitled to Temporary Total Disability benefits was within the five day period of having been served by the Respondent's counsel with the proposed findings of fact and conclusions of law. Rather than following proper procedure, as has been the trend of this case, the Appellant elected not to object to the proposed findings

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of fact and conclusions of law, pursuant to NAC 616C.306, and instead sought post-trial discovery, which led to the fugitive document from Dr. Shah.

In this case, the District Court appropriately found that the Administrative Order, as amended post trial, is in direct violation of relevant regulatory provisions (*see* NAC 616C.327), is highly prejudicial to the Respondent's substantial rights, and therefore is procedurally deficient. Accordingly, the Appellant's simply cannot show a strong likelihood of prevailing on the merits of this appeal, and the Motion to Stay should be denied.

**C. THE ISSUANCE OF A STAY ORDER WILL SUBSTANTIALLY HARM AN INTERESTED PARTY.**

In determining whether or not to issue a stay, the Court must consider whether the issuance of a stay order will substantially harm an interested party. Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 116 Nev. 650, 657 (2000); Kress v. Corey, 65 Nev. 1 (1948). In this matter, the issuance of a stay is unwarranted because it would substantially harm Respondent, an interested party, by further delaying the payment of industrial injury benefits, for a legitimate and compensable industrial injury. Moreover, the continued delay of benefits is contrary to the policy expressed by the Nevada Supreme Court.

**D. THE OBJECT OF THE APPEAL WILL NOT BE DEFEATED IF THE STAY IS DENIED.**

In determining whether to issue a stay, the Court will consider whether the object of the appeal will be defeated if the stay is denied. Hansen v. Eighth Jud.



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Dist. Ct. ex rel. Cty. of Clark, 116 Nev. 650, 657 (2000); Kress v. Corey, 65 Nev. 1 (1948). A stay in this matter is unwarranted since there is no possibility of the object of the appeal being defeated if the stay is denied. The subject of this appeal surrounds the finding of the District Court that the Administrative Order, as amended post-trial, is procedurally deficient as it (1) failed to abide by relevant regulatory provisions regarding rehearing and (2) the amended order relies on a fugitive document that was obtained post discovery, and post-trial, and therefore is highly prejudicial. There is simply nothing to suggest that the merits of the Appellant's contention of the District Court's Order will be defeated if the stay is denied, and an order denying this Motion does not defeat the object of the appeal.

## CONCLUSION

Based on the foregoing, the Respondent respectfully requests that this Court deny the Motion for Stay filed by the Appellant.

Dated this 16th day of December, 2021.

GGRM LAW FIRM

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

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## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2021, I served the foregoing Response to Emergency Motion for Stay, upon the following person(s), by depositing a copy of the same in a sealed envelope in the United States Mail, postage pre-paid, to the following and that I also caused the foregoing document entitled Response to Emergency Motion for Stay to be served upon those persons designated by the parties in the E-service master list for the above referenced matter in the Supreme Court of Nevada E-filing System.

David H. Benavidez, Esq.
850 S. Boulder Highway, #375
Henderson, Nevada 89015

/s/ Ethan Wallace
An Employee of GGRM LAW FIRM

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1 This man did not have a brain--a damaged brain before this
2 accident and now he has one and they need to treat it and
3 take care of it, and I ask that you reverse that claim
4 closure indicating the PPD was premature because he's not
5 MMI, and indicate that, that Dr. Shah needs to opine on
6 whether or not that permanent light duty job position is
7 within his restrictions due to his cognitive brain injury
8 in addition to just the physical limitations. And with
9 that, Your Honor, I rest.
10 APPEALS OFFICER: Okay. I'm ready to partially
11 rule. I believe that claimant has met his burden by a
12 preponderance of the evidence to warrant reversal of claim
13 closure and reversal of the denial of Dr. Shah's treatment
14 plan. With regard to the light-duty job offer, I don't
15 necessarily agree that Dr. Shah needs to opine on it
16 because Dr. Shah has clearly said this claimant needs much
17 more testing and treatment, so it doesn't seem worthwhile
18 to even ask Dr. Shah to opine on that. I don't
19 procedurally know the best way to rule with regard to that
20 light-duty job offer. If we're looking at the actual cases
21 like that are before me that are on appeal, the denial of
22 the request to follow up with Dr. Germin is moot, is that
23 right?
24 JASON MILLS: Yes, yes. That issue is
25 moot.

1 APPEALS OFFICER: The denial of payment of bill
2 for dry eye. Is that moot?
3 JASON MILLS: Yes, Judge. That's moot.
4 APPEALS OFFICER: The denial of the 145 IME is
5 moot.
6 JASON MILLS: Yes, Judge. That is moot.
7 APPEALS OFFICER: The denial of the voc rehab,
8 that's moot?
9 JASON MILLS: Well, no. That's--my
10 question is my, my entire point that I had put forward to
11 you is how can he address the voc rehab if he's still MMI
12 and we don't know the extent of his cognitive injuries?
13 So, that's why I think that that question needs to be
14 addressed once the treatment has gone forward. What can he
15 and cannot he do due to his cognitive brain damage injury?
16 APPEALS OFFICER: Right. So, he needs--
17 JASON MILLS: That--so, that--the question
18 still remains whether or not he is or he is not entitled to
19 voc rehab.
20 APPEALS OFFICER: Okay. So, that needs to
21 [interposing]
22 JASON MILLS: [Unintelligible] can't know
23 that--
24 APPEALS OFFICER: That needs to be--

1 JASON MILLS: --given the fact that he
2 still needs more treatment on a--from a cognitive
3 standpoint. So, can he do this job?
4 APPEALS OFFICER: Right. And I agree
5 [interposing]
6 JASON MILLS: [Unintelligible] can he do
7 it--
8 APPEALS OFFICER: Mr. Mills, I agree.
9 [Interposing]
10 JASON MILLS: A braindead [ph] standpoint?
11 Who knows? And that's not been addressed by anyone.
12 APPEALS OFFICER: Mr. Mills, [interposing] Mr.
13 Mills.
14 JASON MILLS: That's why he's asking for at
15 some point that that issue be readdressed down the road
16 because the initial addressing of that issue did not bring
17 into account his brain injury.
18 APPEALS OFFICER: Mr. Mills. Can you hear me?
19 JASON MILLS: Yes, ma'am.
20 APPEALS OFFICER: Okay. So, that needs to be
21 reversed. The denial needs to be reversed with
22 instructions for insurer to make a new determination when
23 this claimant is declared MMI.
24 JASON MILLS: Correct.

1 APPEALS OFFICER: With regard to claim closure,
2 that needs to be reversed. With regard to the 0 percent
3 PPD that needs to be reassessed when this claimant is MMI.
4 And with regard to denial of request for authorization of
5 Dr. Shah's plan, that needs to be reversed. And again, my
6 basis for this I'm finding that claimant met his burden by
7 a preponderance of the evidence basically because of Dr.
8 Shah's reporting. I believe that Dr. Shah's report pushes
9 claimant over that 51 percent burden. So, for all the
10 reasons that Mr. Mills explained and based on my
11 impressions of the claimant in his testimony which seemed
12 genuine and credible. So, with that, does that give you
13 enough findings of fact and conclusions of law to draft the
14 D&O, Mr. Mills?
15 JASON MILLS: Yes, it does, Your Honor, and
16 I will provide a copy to Mr. Benavidez when I provide it to
17 the court, sir, if he's got any suggestion or objections
18 [unintelligible].
19 APPEALS OFFICER: Okay. Alright. Thank you
20 both.
21 DAVID BENAVIDEZ: I, I just--I just need
22 clarification. So, you're reversing the denial of PPD, the
23 denial of, of compensation benefits?
24 APPEALS OFFICER: Well, okay. So, appeal
25 ending in 693, I can grab it here but it's gonna take me a

1 second. What is the actual thing being appealed from?
2 Denial of voc rehab testing or denial of voc rehab
3 benefits?
4 DAVID BENAVIDEZ: I think [interposing]
5 JASON MILLS: A determination of vocational
6 rehabilitation of being denied of February 5th, 2019.
7 Because again, I think that what that means is if it's
8 unknown whether or not he's entitled to those vocational
9 rehabilitation benefits simply because don't know the
10 extent of his cognitive impairment as it pertains to his
11 ability to do such jobs or retrain at all. That's why I
12 appealed that underlying denial of voc rehab.
13 APPEALS OFFICER: Okay. And, and, and I--
14 generally, I agree with that position. Basically, this
15 claimant's not--it's not--it's--the time is not right for
16 anybody to be determining if this claimant is ready to take
17 this valid light-duty job offer. He's not MMI and I want
18 his vocational rehab eligibility determined again later.
19 So, I believe I need to reverse that now.
20 JASON MILLS: A-a-agreed, Judge.
21 DAVID BENAVIDEZ: So, the quest--so, the
22 question is I, I understand that. But the question is, are
23 you--are you ordering the retroactive compensation or are
24 you just ordering a reassessment when the time's--when the
25 time's available?

1 APPEALS OFFICER: I--

2 DAVID BENAVIDEZ: Because they, they, they

3 basically--they basically cut out his benefits, right,

4 Jason? They, they cut out his, his compensation benefits

5 because they had all these physicians all in a row here

6 saying he's MMI, he had a physician, the treating physician

7 at the time reviewed the job description and he said yes,

8 he can do that. And then the claimant [interposing]--

9 JASON MILLS: I--yes--I, I concur with

10 that. I, I don't--I concur that's the case. But I believe

11 once he's seen Dr. Shah who's indicated temporary total

12 disability forward since he needs additional treatment and

13 the voc rehab isn't there I think that's where an

14 entitlement should begin.

15 APPEALS OFFICER: Well, I agree [interposing]

16 that we were presented with a question [interposing]

17 DAVID BENAVIDEZ: Let's say at the time of Dr.

18 Shah's exam that's when--that's when the compensation will

19 be reinstated.

20 JASON MILLS: I, I believe that is legally

21 the, the correct answer even though I'd like more for my

22 client. But I think that's technically correct, yes.

23 APPEALS OFFICER: Right. So, as long as you're

24 not asking for retro I am in agreement. If you're asking

25 for retro then we would need to send it back.

1 JASON MILLS: [Unintelligible]. From the
2 same period of when he saw Dr. Shah.
3 APPEALS OFFICER: Okay. Then that's--
4 DAVID BENAVIDEZ: Back in 2019 then.
5 DAVID BENAVIDEZ: From his reporting then we
6 give him permanent--so, when we gave him total disability,
7 yes. So, not, not dating back to the date of the offer
8 which is before that.
9 APPEALS OFFICER: No. Dating back to date of
10 Shah's report which is what, 11/18/19.
11 DAVID BENAVIDEZ: The issues on
12 [unintelligible]
13 APPEALS OFFICER: 11/18/19.
14 DAVID BENAVIDEZ: Okay. [Unintelligible]
15 That's my problem with Dr. Shah's report, Your Honor,
16 because I don't know if that's a disability slip.
17 APPEALS OFFICER: I understand [interposing]
18 DAVID BENAVIDEZ: I, I don't know if that's a
19 disability slip. As a matter of fact, in all the time I've
20 done Workers' Compensation I, I, I wouldn't consider that a
21 disability because I know Jason's saying it is but it
22 doesn't actually take him off work. It says will reassess
23 once, you know, he does [interposing].

1 JASON MILLS: He says in, in his disability
2 [unintelligible] it's temporary disability. He doesn't say
3 we'll reassess that. He's saying--
4 APPEALS OFFICER: I think--here's my--here's my
5 position. Here's my ruling. With regard to the entirety
6 of Dr. Shah's reporting and his phrasing about the
7 temporary disability, he's substantially complied with this
8 slip requirement. And Mr. Mills, that's fine if you want
9 to write that in the D&O and if Mr. Benavidez wants to--
10 MALE SPEAKER: That's--
11 APPEALS OFFICER: --take that up.
12 MALE SPEAKER: [Unintelligible]
13 APPEALS OFFICER: Okay. All right.
14 JASON MILLS: But I'll draft that, send it
15 by Mr. Benavidez, and, and Your Honor.
16 APPEALS OFFICER: Okay. Thank you both.
17 DAVID BENAVIDEZ: Thank you.
18 JASON MILLS: Thanks, Judge. Thank you,
19 Mr. Benavidez.
20 APPEALS OFFICER: Okay. Bye-bye.
21 [END OF PROCEEDINGS]
22
23

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HEARINGS L.

# Jason D. Mills & Associates, Ltd.

Attorneys at Law


**Jason D. Mills, Esq.***

* Admitted in Nevada & Washington State

**2200 S. Rancho Dr., Ste 140**
**Las Vegas, NV 89102**
**(702) 822-4444 – office**
**(702) 822-4440 – fax**


November 20, 2020

**HAND DELIVERED**

**Corrected Letter**

Denise McKay, Esq.
Department of Administration
2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

Re: Claimant: **Daniel Castelan**
Appeal Nos.: 1908458-DM, et al.

Dear Appeals Officer McKay:

Attached for your review is the proposed Decision and Order in the above-referenced matter. In the event that modifications to the document become necessary, I will amend the Interim Order at your direction.

Please withhold signing this Decision and Order for a period of five (5) days to allow opposing counsel the opportunity to review it.

Thank you for your time and attention to this matter. If you have any questions or comments regarding this letter, please feel free to contact me.

Very truly yours,

Jason D. Mills, Esq.
JASON D. MILLS & ASSOCIATES, LTD.

JDM:vs
Enclosure
cc: David Benavidez, Esq. via fax – 702-568-1301

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HEARINGS DIVISION

**BEFORE THE APPEALS OFFICER**

| | |
|---|---|
| In the Matter of the Contested Industrial Insurance Claim of DANIEL CASTELAN, Claimant. | Claim No: 2017345360<br><br>Appeal No: 1911258-DM<br>1908459-DM<br>1911259-DM<br>1913610-DM<br>1913110-DM<br>2017002-DM |

**EMPLOYERS INSURANCE COMPANY OF NEVADA'S MOTION TO RECONSIDER THE APPEALS OFFICER DECISION REGARDING TTD**

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

Employers Insurance Company of Nevada (Insurer), by and through its counsel David H. Benavidez, submits the following opposition to the proposed decision and requests reconsideration regarding TTD.

One issue before the Appeals Officer was TTD/Permanent light duty.

Counsel requested an IME with Dr. Shah who issued an opinion recommending further treatment. The doctor does not mention the permanent light duty offered by the employer and approved by Dr. Kong. Dr. Shah notes Long Term Disability to be determined after treatment is completed.

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

On October 28, 2020, Insurer Counsel drafted a letter to Dr. Shah asking the doctor if he found the claimant disabled from

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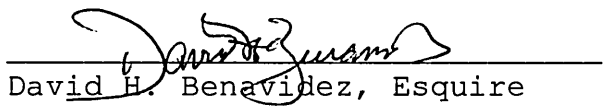
employment. If not, did he agree with the permanent job offered by the employer.

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

He approved the permanent light duty job.

Good cause exists to reconsider your order for TTD.

Dated this 9th day of December, 2020.



David H. Benavidez, Esquire

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

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

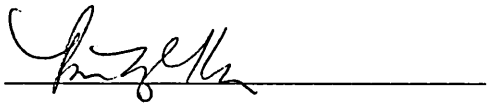
**CERTIFICATE OF MAILING**

I, the undersigned, declare under penalty of perjury, that I am an employee of the Law Office of David H. Benavidez, and on the 9th day of December, 2020, I deposited the foregoing MOTION TO RECONSIDER in the United States Mail, with first class postage fully prepaid thereon, sent via electronic delivery or placed in the appropriate address at the Department of Administration Hearing Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada 89102, to the following:

Jason Mills, Esq.
Jason Dr. Mills & Associates LTD
1201 S Maryland Pkwy
Las Vegas, NV 89104-1727

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



Assistant

**BEFORE THE APPEALS OFFICER**

| | |
|---|---|
| In the Matter of the Contested Industrial Insurance Claim of DANIEL CASTELAN, Claimant. | Claim No: 2017345360<br><br>Appeal No: 1911258-DM<br>1908459-DM<br>1911259-DM<br>1913610-DM<br>1913110-DM<br>2017002-DM |

**ORDER GRANTING MOTION TO RECONSIDER THE APPEALS OFFICER DECISION REGARDING TTD**

Having cause good appearing, the Appeals Officer grants the motion to reconsider.

Dated this ____ day of _____, 2020.

APPEALS OFFICER

_____

DENISE MCKAY, ESQ.

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

**BEFORE THE APPEALS OFFICER**

| | |
|---|---|
| In the Matter of the Contested Industrial Insurance Claim of DANIEL CASTELAN, Claimant. | Claim No: 2017345360<br><br>Appeal No: 1911258-DM<br>1908459-DM<br>1911259-DM<br>1913610-DM<br>1913110-DM<br>2017002-DM |

**ORDER DENYING MOTION TO RECONSIDER THE APPEALS OFFICER DECISION REGARDING TTD**

Having good cause not appearing, the Appeals Officer denies the motion to reconsider.

Dated this ____ day of _____, 2020.

APPEALS OFFICER

_____

DENISE MCKAY, ESQ.

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

**CERTIFICATE OF MAILING**

The undersigned, an employee of the State of Nevada, Hearing Division, Department of Administration, does hereby certify that on the ___ day of _____,2020, a true and correct copy of the foregoing **ORDER** was duly mailed, postage prepaid OR placed in the appropriate address runner file at the Department of Administration Hearing Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada 89102, to the following:

David H. Benavidez, Esquire
850 S. Boulder Highway, #375
Henderson, Nevada 89015

Daniel Castelan
4200 El Jardin Ave.
Las Vegas, NV 89102

Jason Mills, Esq.
Jason Dr. Mills & Associates LTD
2200 S. Rancho Dr. Ste. 140
Las Vegas, NV 89102

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

_____
An Employee of the State of Nevada
Department of Administration

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

**LAW OFFICE OF DAVID H. BENAVIDEZ**
**850 S. Boulder Highway, #375**
**Henderson, Nevada 89015**
**Office (702) 565-9730**
**Fax (702) 568-1301**

October 28, 2020

**US Mail and Fax (702)641-4600**
Radar Medical Group, LLP
ATTN: Russell J. Shah, M.D.
10624 South Eastern Ave, Ste. A-425
Henderson, NV 89052

Claimant: Daniel Castelan
Employer: Peppermill, Inc.
Date of Birth.: September 30, 1989
Claim No.: 2017345360
Appeal No.: 1908458/1908459/1911259/1912693/
1913610/1913610/1913110-DM

Dear Dr. Shah,

I represent Employers Insurance Company of Nevada in the workers compensation claim of Daniel Castelan. On October 26, 2020, I sent you a letter regarding your November 18, 2019 Independent Medical Evaluation, which I am enclosing with this letter. Please consider the attached employer statement when answering our letter.

Sincerely,

David H. Benavidez, Esquire

Enclosures

cc: Jason Mills, Esq..
EICON

DHB:rmk

To Whom It May Concern,

October 26, 2020

In regards to Daniel Castelan:

Daniel began work at the Peppermill on December 21, 2017 as a dishwasher. He was very slow and seemed to struggle performing his duties. Daniel worked ten days and showed no improvement either in speed or interest in his performance.

Thank you,

Peggy Orth GM

Peppermill Restaurant

**LAW OFFICE OF DAVID H. BENAVIDEZ**
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**Henderson, Nevada 89015**
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October 26, 2020

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1913610/1913610/1913110-DM

Dear Dr. Shah,

I represent Employers Insurance Company of Nevada in the workers compensation claim of Daniel Castelan. On November 18, 2019, you conducted an Independent Medical Evaluation. In your report, you noted "long term disability status to be determined after treatment is completed." I am enclosing your November 18, 2019 report. Please review your report and answer the following question:

On November 18, 2019 did you take Mr. Castelan off work. Yes____ No_____

I am enclosing a permanent light duty job offer from the employer that was approved by Dr. Kong, the claimant's treating physician. Do you agree the claimant can work the permanent light duty job? Yes____ No_____

_____ _____
Russell J. Shah, M.D. Date

Please bill your time directly to : Employers Ins Co of NV
Attn: Cary Ferguson
2550 Paseo Verde Pkwy. Ste. 100
Henderson, NV 89074-9004

Sincerely,

David H. Benavidez, Esquire

Enclosures

cc: Jason Mills, Esq..
EICON

DHB:rmk

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

# RADAR MEDICAL GROUP, LLP

Mailing address: 10624 South Eastern Avenue, Suite A-425, Henderson, NV 89052
Phone (702) 644-0500 Fax (702) 641-4600

**Russell J. Shah MD**
Neurology /Neurophysiology

## IME - NEUROLOGY

Cary Ferguson
Claims Adjustor
Employers Insurance Company of Nevada
PO BOX 32036
Lakeland, FL 33802-2036

| | |
|---|---|
| **PATIENT NAME:** | CASTELAN, DANIEL |
| **DOB:** | 09-30-1989 |
| **Gender:** | M |
| **Date of Injury:** | 12-31-2017 |
| **Claim Number** | 2017345360 |
| **Insurer:** | Employers Insurance Company of Nevada |
| **Employer:** | Peppermill, Inc |
| **Date of Evaluation:** | 11-18-2019 |

Dear Cary Ferguson:

Mr. DANIEL CASTELAN was seen on 11-18-2019 for a neurologic IME to determine if the head injury complaints are related to the work injury sustained on 12-31-2017.

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

| Chief Complaint: |
|---|
| COMPLAINT |
| Visual blurriness, imbalance |
| Memory problems, focusing difficulties |
| FATIGUE |
| LOWER BACK PAIN |
| HEADACHES |
| NECK PAIN |

**History:**

Date of Injury: 12/31/2017

Mr. Castelan is a 30 yr old right handed male whom presents today stating he was referred over due to a work injury he had on 12/31/2017 around 10 PM. Pt states he used to work for the Peppermill Fire lounge as a dish washer. Pt states he slipped on a slippery floor while walking with porcelain dishes in his hands. Patient states he fell face first and hit his forehead on the plates landing on the floor with the face on the floor. Patient had to get stiches on the mid front of his forehead. He was confused, could not get up but tried. He felt cold in the face. He was very confused. He blacked out but never lost consciousness on the ground. He states he felt very sick right after and noticed blood coming down his face. He did not feel well and was confused. He was in pain and had a image of the head at Sunrise. He was not operated onto his brain. He was discharged and was in pain. He was unwell for a period of time. He did not see anyone till about 1-9-2018. He was given topiramate for the headaches and imbalance and had a allergy to the topiramate and was placed on Aleve. Initially, he recalls that there was a feeling in the mouth that the teeth were pointing from both side inwards. He feels even today the teeth feel "flimsy".

**PRESENT COMPLAINTS:**

1) He has not improved and feels the same symptoms as he did for the last year and a half with no improvement. He actually feels he is worsening in that he has more sharp pains in the bitemporal parietal region with sharp pricks to the head. He has tried cool showers and sleep to help the neck pain and the head pains. He is on Aleve all the time and no SE are noted.
2) He is forgetful and has memory problems with remembering and is writing items down. He is not remembering what to do. He does not feel depressed and has no suicidal thoughts, ideation, anger, spontaneous crying nor emotional outbursts. He is having problems with falling asleep and restlessness but does not feel anxious. He is not getting better with the memory but unsure if he is worsening. He believes he was put on seizure medications but did not have any seizures episodes but has episodic head pains that are incapacitating 3 times a month that are very intense with imbalance and has to sleep them off. He eventually gets better and there is no incontinence nor tongue biting. He has visual blurriness with these head pains in both eyes.
3) He has continued right eye abnormal vision poorly characterized and can not focus and things in the

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

vision are off. He has lost complete right eye vision once about a year ago for 5 -10 minutes with a head pain and there has been perhaps 1-2 additional very brief episodes in the last 12 months involving the right eye. He was given eye drops and has seen an ophthalmologist. He was not recommended for surgery and has a optometrist to see him early in 2020. The right eye vision is not normal since the face trauma. He did not have a right eye problem prior. There is no pain in the right eye nor behind the right eye pain. No jaw pain, no chewing pain , no light nor noise sensitivity nor smell sensitivity is noted. No ringing is noted. He is able to head okay. He has noted his appetite is okay. He does not feel depressed. He has weight that is steady but did have appetite decrease after the 12/31/2017 for some time.

4) The biggest problem he has is the memory is with forgetfulnes. He has some loss of time staring off /spacing episodes but not with any tongue biting, incontinence nor staking.

5) He has noted neck pain that continues but alleviated with Aleve which he uses almost daily at this point

6) He has upper back pain and he is noting that with no lifting, bending and taking it easy on his low back, he is able not to have any significant pain.

7) The teeth are still are normal in feeling at this point and has seen a dentist. Today, he notes that the teeth feel to him "flimsy". He is not undergoing any dental treatment at this time.

8) He has head pains in the occipital bilateral regions that are associated with upper neck/lower skull pain and he notes Aleve helps these symptoms.

9) He has continued scar where the stiches were in the forehead

**Record Review:**

Patient brought in records of Sunrise Hospital, MRI brain images from 3/5/2018; X-rays images cervical spine dated 7/10/2018; Cervical MRI spine imaging dated 7/18/2018. Lumbar MRI imaging was reviewed today.

Brain MRI imaging notable for diffuse mild hyper intensities demonstrated in the frontal subcortical regions best seen on axial cuts on my read. Report SDMI was unremarkable3/2018.

153 pages of records reviewed sent prior to the patient by Employes were reviewed. The records included Kelly Hawkins Functional Capacity, C-3 report, Dr. Germin consult,testing and follow ups, Dr. Terri Akers chiropractic treatment, Dr. Ronald Kong treatment records, Sunrise records including imaging reports, Concentra records reviewed with the patient today.

Past Medical History:

| MEDICAL CONDITION | DATE CONDITION STARTED |
|---|---|
| NONE STATED | |

Was in good health prior to the accident and not experiencing any head nor spinal issues and has no major medical conditions such as diabetes nor hypertension.

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

**Surgical History:**

| SURGERY | DATE OF SURGERY |
|---|---|
| NONE STATED | |

**Medications:**

| DATE | NAME | DOSAGE | SIG | DISCONTINUE DATE |
|---|---|---|---|---|
| 11-18-2019 | MVT CENTRUM | | | |
| 11-18-2019 | ALEVE | | | |

**Allergy:**

| NO KNOWN ALLERGY | ALLERGEN | SIDE EFFECT |
|---|---|---|
| ☐ | TOPAMAX | RASH, RED SPOTS |

**Family History:**

| FAMILY MEMBER | CONDITION | COMMENTS |
|---|---|---|
| GRANDFATHER | KIDNEY CANCER | |
| MOTHER | DIABETES | |

**Social History:**

| | |
|---|---|
| MARITAL | NO |
| CHILDREN | NO |
| EMPLOYER | NO |
| TOBACCO | NO |
| ETOH | NO |
| CONTROLLED SUBSTANCES | NO |
| MEDICAL MARIJUANA | NO |
| MAIN LANGUAGE | ENGLISH |
| EDUCATION | UKNOWN |

## REVIEW OF SYSTEMS

Constitutional Negative unless documented in the HPI and/or Present complaints. **Normal appetite, was with decrease appetite after the face trauma but now improved,** normal steady weight, no

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

malaise, no generalized weakness, no diaphoresis, no unexplained weight loss

ENMT: Negative unless documented in the HPI and/or Present complaints. No sore throat, no painful swallowing, no change of speech, no slurred speech, no tongue numbness, no perioral numbness

Musculo: Negative unless documented in the HPI and/or Present complaints. No joint pain, no swollen joints

Cardiac: Negative unless documented in the HPI and/or Present complaints. No palpitations, no chest pain, no shortness of breath during activities is present. No syncope

Respiratory: Negative unless documented in the HPI and/or Present complaints. No asthma, no bronchitis, no fever, no chills, no coughing and no shortness of breath is present.

GI: Negative unless documented in the HPI and/or Present complaints. No nausea, no vomiting, no diarrhea and no constipation is present. No blood in the stool

GU: Negative unless documented in the HPI and/or Present complaints. No bowel urgency, no bladder urgency, no bowel incontinence, no bladder incontinence, no painful urination, and no blood in the urine

Visual: Negative unless documented in the HPI and/or Present complaints. No double vision, + blurred vision with head pain, positive right eye loss of vision with head pain about a year ago and now has still right visual disturbance poorly characterized and not normal, and has no eye pain is present.

Neurologic: Negative unless documented in the HPI and/or Present complaints. + headache, + neck pain, no mid back pain, + low back pain, no weakness in the arms, no weakness in the hands, no weakness in the legs, no weakness on walking, no numbness or tingling in the arms, no numbness or tingling in the legs.

Psychiatric: Negative unless documented in the HPI and/or Present complaints. No depression, no anxiety, + restlessness, + sleep onset difficulties, no active or recent suicidal ideation, thought, attempt or plan.

Dermatologic: Negative unless documented in the HPI and/or Present complaints. No rash, no itching, no reports of abnormal moles, positive rash, itching and allergic reaction to the topiramate medication given but okay after discontinuation of the topiramate + mild scar where stitches were in the mid forehead

**EXAMINATION**

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

Vital Signs:

| TEMP | PULSE | RESP | HT | WT | BMI | BP SYST | BP DIAST | COMMENT | SPO2 |
|---|---|---|---|---|---|---|---|---|---|
| 98.5 | 73 | | 65 | 187.2 | 31 | 128 | 72 | RESP IN NORMAL RANGE | |

**General:**

The patient is awake, alert appropriate and non-toxic appearing
The patient appears to be in no distress. Oriented to name, place, date, time of the day was abnormal with him stating it was 4 PM (was 5:30 PM); street name, city name, state name, historical dates, day of the week, season and okay 3 step commands, participation, no neglect, no prefrence of the vision nor body prefrence, no staring off, no spacing out, no lip smacking, no automatism, conversant, well developed, well nourished, no psychomotor retardation, masked facies and appropriately concerned about his medical well being.
The patient has a clear sensorium.
The patient is a fair historian
The patient has no visual gaze preference and has fair eye contact
The patient has no obvious visual or body neglect
The patient is with no obvious bradykinesia, tearing, emotional lability, pressured speech, distractibility, inappropriate gestures, inappropriate behaviors, inappropriate posture and/or movements.
The patient demonstrates no significant anxiousness behavior
The patient does not appears to be hyperexcitability and calmly sitting the chair
The patient on general exam demonstrated no light sensitivity
The patient on general exam demonstrated no noise sensitivity
No inappropriate laughing/behaviors were observed
Vocal prosody: Normal

**Cardiac:**

There is no murmur.
There is no carotid bruit.
Pulses are palpable, regular rhythm
No edema is noted
VA is grossly intact

No nasal breathing irregularities, no sinus tenderness, no sinus discharge

**Musculoskeletal:**

There is bilateral cervical paraspinal muscle tenderness.
There is no cervical spinal processes tenderness.
There is bilateral tightness and/or muscle spasm of the cervical paraspinal region
There is no florid muscle spasm of the cervical paraspinal area

Tenderness to neither trapezius muscles was present.
Tenderness overlying the shoulder blades was not present.

**Name:** CASTELAN, DANIEL
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Tenderness to neither shoulder areas was present.
A negative Tinel's sign at both wrists.
A negative Tinel's sign at both medial elbow grooves.
A negative Phalen's sign at both wrists.

No anterior chest 1st. rib tenderness
There is no upper between shoulder blades thoracic paraspinal muscle tenderness.
There is no mid thoracic paraspinal muscle tenderness
There is no lower thoracic paraspinal muscle tenderness
There is no thoracic spinal processes tenderness.
There is right lower tightness and/or muscle spasm of the thoracic paraspinal muscles
There is no florid muscle spasm of the thoracic paraspinal muscles.
There is no lumbar paraspinal muscle tenderness.
There is no lumbar sacral spinous processes tenderness.
There is right tightness and/or spasm of the lumbar paraspinal muscles
There is no florid muscle spasm of the lumbar paraspinal muscles

---

Scoliosis: Grossly normal
Spinal curvature: Grossly normal

**Cervical range:** Cervical range of motion was limited mild on extension with pain

Negative axial compression maneuver
No posterior occipital nerve tenderness
No Adson's.
No Lhermitte's.
No Spurling's.

No Battle's sign
No ear discharge
No ear vesicles
Normal TM
No raccoon eyes

No TMJ tenderness.
No TMJ click.
No temporal artery tenderness.
No cervical dystonia

**Lumbar range:** Lumbar range of motion was normal.
Pain on extension: None

**Shoulder range:** Shoulder range of motion was normal on the right side

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

Shoulder range of motion was normal on the left side

**Cranial Nerves:** PEARLA
EOMI with normal conjugate eye movements and normal tracking
Dizziness on tracking: None
Light sensitivity: None
Visual field full with no visual field cut
No preference body and/or visual
No neglect body and/or visual

Weber/Rinne was normal
Split on the forehead tuning fork: None

The fundi margins demonstrated sharp disc margins.
The pupils were reactive symmetrically.
No nystagmus.
Anicteric
Tongue protrudes forward
Uvula raises midline
No dysarthria
Shoulder shrug was performed.
Hearing was intact.
The smile is symmetric.

**Motor :** **Upper:**

Normal power of 5 was noted in all major muscles of the upper proximal.
Normal power of 5 was noted in the muscles of the upper distal.
Tone in the upper extremities was normal.
Reflexes were 2 throughout upper
Absent upper spasticity
Absent Hoffman signs are present.
The abductor pollicis brevis was with full power.
Grip was normal.
No drift.
Rapid alternating movements of the upper were normal.

**Lower:**

Normal power of 5 was noted in the muscles proximal lowers.
Normal power of 5 was noted in the muscles distal lowers
Heel walk was normal.

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

Toe walk was normal.
Rapid alternating movements of the lowers were normal.
Tone in the lower extremities was normal
No ankle clonus
Absent Babinski
Absent spasticity lowers
Reflexes 2

No muscle fasciculations are noted.

**Sensory:** Normal sensory examination of the upper

Normal sensory examination of the lower

**Coordination:** Unremarkable coordination exam of trunk

Unremarkable coordination exam of the upper extremity

Unremarkable coordination exam of the lower extremity.

**Gait:** Non wide based gait which is symmetric.
Able to hold a Tandem stance and Tandem walk
No limp is noted

The patient has fair gait initiation abilities
The patient has fair turn-around capabilities
The patient has fair arm swing momentum
The patient has fair ability to stop as well as retropulsion testing reflexes.

Romberg was performed and demonstrated with no sway.

Fair agility, maneuverability is noted on overall gait testing.

**Extrapyramidal:** No abnormal movements such as twitching, stiffening, tonic, clonic activity myoclonic activity is observed. No rigidity is present. No tremor is noted.

**Exaggeration:** None

**Emotional Overlay:** None

**IMPRESSION from 12/31/2017 Trauma- INDUSTRIAL RELATED**

1. Face trauma

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

2. Concussion

3. Facial bleed - midline lower forehead just above nasal region with mild dermatologic scar

4. Cephalgia with biparietal /temporal head sharp pains

5. Post concussive syndrome with continued cognitive impairment, sleep impairment and vestibular impairment consisting of memory difficulties, focusing difficulties, insomnia, restlessness and imbalance sensations.

6. Transient neurologic episodes of intense head pains about 3 X/month that are likely migraines and had an apparent drug interaction with the topiramate currently being treated with Aleve medications

7. Bilateral occipital pains that are arising from the skull pain of the posterior upper cervical frequently occurring being treated with Aleve medication and/or cold showers and /or sleep combination

**DISCUSSION**

DANIEL CASTELAN was seen for an Neurologic IME for head injury related symptoms. The question was if they were related to the 12/31/2017 industrial injury.

During the course of treatment, the records indicated that the primary treating physicians had tried topiramate for the head pain migraine type symptoms. Unfortunately, the patient had a side effect and apparently no other medication was tried. The patient was made MMI in late 2018 by the primary treating physician.

In addition, there are transient neurologic events characterized by incapacitating episodes that are unlikely to be seizures. They are likely migraine events that are occurring about 3 times a month. The treating Neurologist did complete a EEG study in 2018 with no clear epileptic events. The MRI brain showed no clear epileptic structural abnormality that is likely to cause a seizure. There are bifrontal subcortical white matter changes best seen on the axial cuts on the images. . The report was read by SDMI as unremarkable. The 3 Tesla MRI brain appears to be having some motion which can obscure findings.

I was ask only to evaluate the head injury complaints and will not address the cervical/neck complaints nor the low back /lumbar complaints today.

There are three types of head pain complaints that the patient is now experiencing. The three transient neurologic monthly attacks of incapacitating head pains are likely migraines, and are not seizures at this point. The patient would be a candidate depending on risk and/or benefits to have additional treatment such as potential Botox, preventative headaches medications therapies (please not allergic reaction to topiramate) and or CRGP monthly subcutaneous injections if the other first line medications are ineffective.

A muscle relaxant may also be of benefit at this time given the different types of head pains that are being described.

**Name:** CASTELAN, DANIEL
**DOE:** 11-18-2019

at this time

**TREATMENT THAT WILL BE NEEDED TO REACH MAXIMAL MEDICAL IMPROVEMENT**

1) See above discussion
2) Medication therapy for three types of head pains including and not limited to likely migraines presenting as transient neurologic events
3) Brain exercises
4) Cognitive behavioral therapy with app's and/or psychologist to improve the sleep
5) Biofeedback therapy with neuropsychology to improve with thinking, processing, focusing, memory and cognition
6) Medication therapy if more conservative treatment failures to be considered such as donepezil or other medications
7) Aqua therapy /conditioning and may or may not including balance therapy to improve his imbalance sensation with the cephalgia

**LONG TERM DISABILITY STATUS**

To be determined after treatment is completed. Unable to determine as unclear if the treatment above will resolve fully the post concussive syndrome

Thank you very much for allowing me to participate in the care of your patient. Please feel free top contact me if you have any questions. Thank you once again.

Sincerely,

Russell J Shah

Russell J Shah MD

cc: Jason D. Mills & Associates , Ltd.

cc: Law Offices of David H. Benavidez

# RADAR MEDICAL GROUP, LLP

UNIVERSITY URGENT CARE

**Russell J. Shah, MD Ltd.**
Neurology and Neurophysiology

**Dipti R. Shah, MD Ltd.**
Internal Medicine/Nephrology

2628 W. Charleston Blvd., Las Vegas, NV 89102
Phone: (702)644-0500 Fax: (702)258-0566

## FACSIMILE

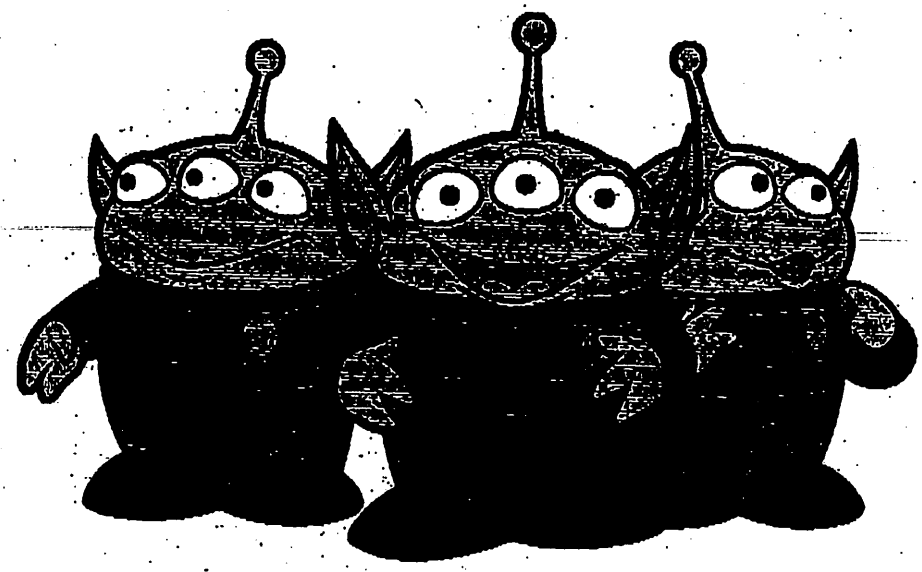
To: employers ins of NV; Jason mills. David benavidez E: 866-461-2934. J: 702-822-4440 D: 702-568-1301 From: Claudia

Fax: Pages: 13 (including cover)

Phone: Date: 11.19.2019.

Re: Daniel Castellan DOB 9.30.1989 (IME)

☒ URGENT ☐ FOR REVIEW ☐ PER YOUR REQUEST ☐ PER CONVERSATION



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**This Description is for a Permanent Modified/Alternative Job Offer.**

## DESCRIPTION OF EMPLOYEE'S JOB DUTIES

Instructions: This form is intended to describe the employee's job duties. The treating doctor will review the completed form to determine whether the employee is able to perform the duties of this job. This is an important document and should accurately show the requirements of the employee's job.

WORK COMP NAME (LAST) (FIRST) (MIDDLE) — Cabiles, Daniel — (SSN) — 2017343760

EMPLOYER NAME: Pepperhill Inc. JOB ADDRESS: 2985 Las Vegas Blvd. S. LV, NV 89109

INJURED EMPLOYEE'S JOB TITLE: Hostess/Cashier — D.O.T. — HOURS WORKED WEEKLY: 40

DESCRIPTION OF JOB RESPONSIBILITIES: (INCLUDE ALL JOB DUTIES)

See attached

1. Check the frequency of activity required of the employee to perform its job.

| ACTIVITY Hours Per Day | NEVER 0 hours | Occasional 0-3 hours | Frequent 3-6 hours | Constant 6-8 hours |
|---|---|---|---|---|
| Sitting | | X | | |
| Walking | | | | X |
| Standing | | | | X |
| Bending (neck) | | X | | |
| Bending (waist) | | X | | |
| Squatting | | X | | |
| Climbing | X | | | |
| Kneeling | X | | | |
| Crawling | X | | | |
| Twisting (neck) | | X | | |
| Twisting (waist) | | X | | |
| Hand Use: Dominant Hand Right Left | not sure | | | |
| Is repetitive use of hand required? Yes X No | | | | |
| Simple grasping (right hand) | | | X | |
| Simple Grasping (left hand) | | | X | |
| Power Grasping (right hand) | X | | | |
| Power Grasping (left hand) | X | | | |
| Fine manipulation (right hand) | | | X | |
| Fine manipulation (left hand) | | | X | |
| Pushing & pulling (right hand) | | | X | |
| Pushing & pulling (left hand) | | | X | |
| Reaching (above shoulder level) | X | | | |
| Reaching (below shoulder level | | | | X |
| Other Activity Not Listed: | | | | |

BC

02/08/2019

Daniel Castelan

**This Description is for a Permanent Modified/Alternative Job Offer.**

| LIFTING Pounds / CARRYING Distance (feet) | Never 0 hours | Occasional 0-3 hours | Frequent 3-6 hours | Constant 6-8 hours |
|---|---|---|---|---|
| 1-10 pounds | | | | X |
| 11-20 pounds | | X | | |
| 21-50 pounds | X | | | |
| 51-75 pounds | X | | | |
| 76-100 pounds | X | | | |
| 100+ pounds | X | | | |
| | X | | | |

Describe the heaviest item required to carry and the distance to be carried:

| Please indicate if your job requires: | | YES | NO | BRIEFLY DESCRIBE |
|---|---|---|---|---|
| A | Driving cars, trucks or other machinery | | X | |
| B | Working around equipment/machinery | | X | |
| C | Walking on uneven ground | | X | |
| D | Exposure to excessive noise | | X | |
| E | Exposure to extremes in temperature, humidity and dampness | | X | |
| F | Exposure to dust, gas, fumes, chemical | | X | |
| G | Working at heights | | X | |
| H | Operation of foot controls or repetitive foot movement | | X | |
| I | Use of visual or auditory protective equipment | | X | |
| J | Working with bio hazards, such as: blood borne pathogens, sewage, hospital waste | | X | |

**Wage Information** **Location:**

| | | | |
|---|---|---|---|
| Gross Wage $ 9.00 /hr. | | Permanent: | Yes/No |
| Net Wage $ /hr. | | Temporary: | Yes/No Duration |

Fringe Benefits: None

Experience or training required: None

Licenses or certifications required: None

| | |
|---|---|
| Employer Contact Name and Title: Amelia Sorau - Payroll | Employer Contact Telephone Number: 775-689-8981 |
| Employer Contact Signature: Amelia Sorau | Date: 1-17-19 |
| Vocational Counselor: Cindi Rivera | Date: 01/03/19 |
| PHYSICIANS USE ONLY | Please circle one option below |
| I/E is able to work in the above position | I/E is unable to work in the above position |
| PHYSICIANS SIGNATURE | Date: |

2

Daniel Castelan

# PEPPERMILL, INC.
## JOB DESCRIPTIONS
### *HOST/HOSTESS/CASHIER*

**PREREQUISITES:**

Educational: Basic Math

Linguistic: Must be able to speak, and understand English.

Experience: No experience necessary.

***ESSENTIAL FUNCTIONS:***

*Psychological Functions:*

Ability to work well with Co-Workers, Management, & Public.

*Physical Functions:*

Ability to walk, bend, squat, climb, twist, & stand continuously.

Ability to lift & carry 10 lbs.

Eye/Hand Coordination.

Ability to grasp, push, pull, reach & work at or below shoulder level.

Ability to hear and see.

*Functions:*

Greeting & Seating of guests.

Distributing guest between food servers to insure proper service.

Accepting payment on guest tickets & giving proper change.

Answering telephones & properly directing calls.

Directing the beverage service, bussing, & cleaning of tables.

2/17/2019
JOBDES99.doc

# REQUEST FOR HEARING

**DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION**
**2200 S. Rancho Drive Ste. 210**
***Las Vegas, NV 89102***

| INJURED EMPLOYEE INFORMATION |
|---|
| Injured Employee's Name and Address:<br>Daniel Castelan<br>4200 El Jardin Ave<br>Las Vegas, NV 89102 |
| Injured Employee's Telephone Number:<br>(562) 735-9192 |
| SSN: |

| EMPLOYER INFORMATION |
|---|
| Employer's Name and Address:<br>Peppermill Inc.<br>2985 Las Vegas Blvd. South<br>Las Vegas, NV 89109 |
| Employer's Telephone Number:<br>(702) 735-4177 |
| Claim Number: 201628667 |

**DO NOT COMPLETE OR MAIL THIS FORM UNLESS YOU DISAGREE WITH YOUR INSURER'S DETERMINATION.**

PERSON REQUESTING APPEAL: (circle one) INJURED EMPLOYEE EMPLOYER INSURER

I WISH TO APPEAL THE DETERMINATION DATED: 02/05/19

***INCLUDE A COPY OF YOUR DETERMINATION LETTER WITH THIS FORM AND MAIL TO THE ABOVE ADDRESS.***

***BRIEFLY EXPLAIN REASON FOR APPEAL:***

_____

_____

_____

If you are represented by an attorney or other agent, please print the name and address below:

| ATTORNEY/REPRESENTATIVE: |
|---|
| Name: Jason Mills, Esq. |
| Address:<br>1201 S. Maryland Pkwy<br>Las Vegas, NV 89104 |
| Telephone: (702) 822-4444 |

| INSURANCE COMPANY/Third Party Administrator |
|---|
| Name: EMPLOYERS Insurance Company |
| Address:<br>PO Box 32036<br>Lakeland, FL 33802-2036 |
| Telephone: (702) 671-7100 |

Signature of Injured Employee/Employer _____ Date _____

Signature of Injured Employee's/Employer's Rep. (Advisor) _____ Date _____

D-12a (Rev. 3/01)

02/08/2019

4



20

Certified Vocational Services
3440 E. Russell Road, Suite 220 Las Vegas, NV 89120
Phone: (702) 214-4330 Fax: (702) 214-4360

January 22, 2019

Ronald Kong, MD
501 S. Rancho Drive Suite A5
Las Vegas, NV 89106
Fax: (702) 382-5925

RE: Injured Employee: Daniel Castelan
Claim Number: 2017345360
Date of Injury: 12/31/2017

Dear Dr. Kong,

Mr. Castelan's Pre-Injury Employer, Peppermill Inc., has offered him a Permanent Job Offer. At this time I am requesting that you review the attached job description for Hostess/Cashier and advise whether this is medically appropriate per your prescribed permanent physical restrictions.

✓ Yes, Hostess/Cashier (per the attached job description) is medically appropriate for employment for Mr. Castelan.

___ No, Hostess/Cashier is not medically appropriate for employment for Mr. Castelan because:

_____

_____

Signed _____ Date 1/23/19.
Ronald Kong, M.D.

Please respond as promptly as possible, but no later than February 1, 2019. You may fax your response to (702) 214-4360 or (702) 214-4295. Thank you in advance for you immediate attention. I look forward to hearing from you soon.

Respectfully submitted,

Cindi Rivera, M.A., C.D.M.S.
Vocational Rehabilitation Counselor

Enclosures: Hostess/Cashier Job Description

**Name:** CASTELAN, DANIEL
**Date of Report:** 11-28-2020

# RADAR MEDICAL GROUP, LLP

Mailing address: 10624 South Eastern Avenue, Suite A-425, Henderson, NV 89052
Phone (702) 644-0500 Fax (702) 641-4600

**Russell J. Shah MD**
Neurology /Neurophysiology

## IME - NEUROLOGY Supplemental Report

David H. Benavidez, Esq.
Law Offices of David H. Benavidez
850 South Boulder Highway, # 375
Henderson, NV 89015
Office: (702) 565-9730
Fax: (702) 568-1301

| | |
|---|---|
| **PATIENT NAME:** | CASTELAN, DANIEL |
| **DOB:** | 09-30-1989 |
| **Gender:** | M |
| **Date of Injury:** | 12-31-2017 |
| **Claim Number** | 2017345360 |
| **Insurer:** | Employers Insurance Company of Nevada |
| **Employer:** | Peppermill, Inc |
| **Date of Supplemental:** | 11-28-2020 |

Dear Mr. David Benavidez:

Mr. DANIEL CASTELAN was seen on November 18th, 2019 for a Neurologic IME to determine if the head injury complaints were related to the work injury sustained on 12-31-2017. I was ask to review additional medical records and answer specific questions as outlined in your October 26th, 2020 letter to me.

**Name:** CASTELAN, DANIEL
**Date of Report:** 11-28-2020

## Question # 1:

On November 18, 2019 did you take Mr. Castlan off work?

Answer:

No. I did not take Mr. Daniel Castelan off work during my IME on November 18, 2019. I did not address the work status issue on my report. I put him as a *"temporary disability for the head"* body part injuries that I was evaluating him for. Mr. Daniel Castelan is able to work with accomodations and restriction while on treatment with his head injury related complaints.

## Question # 2:

Dr. Ronald Kong has approved a permanent light duty offer by the employer. Do you agree that the claimant can work the permanent light duty job?

Answer:

1) The claimant would benefit and be allowed to have a permanent light duty
2) I am unable to determine if Dr. Ronald Kong's signing off on this particular "new modified permanent light job duty" offer was medically appropriate. The basis of my opinion is that Mr. Daniel Castelan has migraines and head pains some of which are located in the occipital region arising from the upper neck area. The job description of the permanent light duty being offered by Peppermill Inc (employer) notes a constant 1-10 lbs. lifting, occasional 10-20 lb. lifting and constant walking. During the IME that I performed in November of 2019, the issue of spine pain appear to be instigating some of the head pain symptoms.
3) The instigating mechanisms that are producing the head trauma related migraine type symptoms are to be addressed if not cured.in order to determine the long term medication and/or non medication treatments that will be required once the patient reaches MMI status. It would be reasonable that ***"some of the occipital pain"*** (back of the head pain) arising from the cervicogenic (neck ) areas are instigating the head migraines. Please note that I only evaluated the head injuries from the face and head trauma and the ongoing head related complaints on my IME and have not addressed the spine issues on my IME.

I did try to reach Mr. Daniel Castelan by telephone today at 702-344-4274, but his telephone number contact from 2019 was disconnected. I am unable to determine if Mr. Daniel Castelan has reached MMI status for the head injury as I was not able to contact him.

**MEDICAL OPINION STATEMENT**

I reviewed the chart, previous 2019 IME that I produced, and reviewed the reports from Dr. Travis Snyder at Simon Med of the brain mri and brain mra that were ordered by myself for the IME and received post IME evaluation of 2019. I reviewed the materials from the October 26, 2020 correspondence by the Law Offices of David Benavidez. I reviewed the job offer description and the treating physician Dr. Ronald Kong's acceptance of the permanent light duty offer by Peppermill Inc employer. It notes constant 0 - 10 lbs. of lifting and occasional 10-20 lbs. of lifting with constant walking as a job duty that are all related to the spine

**Name:** CASTELAN, DANIEL
**Date of Report:** 11-28-2020

complaints that are not being evaluated by my IME. I personally required 66 minutes today to prepare the report after reviewing the records and offering a supplemental report and adequately answer the questions that were ask of me.

The above opinions were made by myself after careful examination of the claimant and review of the medical records. The opinions are were formulated after I personally reviewed all the information and used logic to assist the claimant to reach maximal medical improvement status. Should any additional information be made available to me, I will look at that informaation and may alter my medical opinion. I am a liccense active in good standing practicing Neurologist in the State of Nevada.

**Previous IME Impressions from 12/31/2017 Industrial Related Work Injury**

1. Face trauma
2. Concussion
3. Facial bleed - midline lower forehead just above nasal region with mild dermatologic scar
4. Cephalgia with biparietal /temporal head sharp pains
5. Post concussive syndrome with continued cognitive impairment, sleep impairment and vestibular impairment consisting of memory difficulties, focusing difficulties, insomnia, restlessness and imbalance sensations.
6. Transient neurologic episodes of intense head pains about 3 X/month that are likely migraines and had an apparent drug interaction with the topiramate currently being treated with Aleve medications
7. Bilateral occipital pains that are arising from the skull pain of the posterior upper cervical frequently occurring being treated with Aleve medication and/or cold showers and /or sleep combination

Sincerely,

Russell J Shah MD

cc: Jason D. Mills & Associates , Ltd.

cc: Law Offices of David H. Benavidez
850 S. Boulder Highway, #375
Henderson, NV 89015
(702) 565-9730
Fax (720) 568-1301

cc: Employers Insurance company of Nevada
Attn: Cary Ferguson
2550 Paseo Verde Pkwy, Suite 100
Henderson, NV 89074-9004

# RADAR MEDICAL GROUP, LLP

University Urgent Care

**Dr. Russell J. Shah, MD**
Neurology and Clinical Neurophysiology

**Dr. Dipti R. Shah, MD**
Internal Medicine/Nephrology

**Phone:** (702)644-0500 **Fax:** (702)641-4600

**DATE:** 12.07.20 **FROM: CLAUDIA G.**

| | |
|---|---|
| **TO:** Jason Mills. | **Fax Number:** 702-822-4440 |
| David Benavides | 702-568-1301 |

☒ **URGENT** ☐ **REPLY ASAP**

☐ **PLEASE REVIEW** ☐ **PLEASE COMMENT**

☐ **FOR YOUR INFORMATION**

**NUMBER OF PAGES INCLUDING COVER:** 4 pages

**Patient Name:** Daniel Castelan.

**DOB:** 09/30/89

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APPEALS OFFICE

STATE OF NEVADA

BEFORE THE DEPARTMENT OF ADMINISTRATION

APPEALS OFFICE

| | |
|---|---|
| In the Matter of the Contested Industrial Insurance Claim<br><br>of<br><br>DANIEL CASTELAN,<br><br>Claimant. | Claim No.: 2017345360<br><br>Appeal No.: 1908458-DM<br>1908459-DM<br>1911259-DM<br>1913610-DM<br>1913110-DM<br>2017002-DM |

## DECISION AND ORDER

The above-entitled matter came on for hearing before Appeals Officer DENISE MCKAY, ESQ., on October 22, 2020 at 9:00 a.m. pursuant to Chapters 616A-D, 617, and 233B of the Nevada Revised Statutes. The Claimant, DANIEL CASTELAN (hereinafter "Claimant") was represented by JASON D. MILLS, ESQ., of the law firm of JASON D. MILLS & ASSOCIATES, LTD. The EMPLOYERS INSURANCE COMPANY OF NEVADA (hereinafter "Insurer") was represented by DAVID H. BENAVIDEZ, ESQ. of the LAW OFFICE OF DAVID H. BENAVIDEZ. Having accepted and reviewed the filed evidence in the record, the Appeals Officer does hereby find, conclude and order as follows:

## FINDINGS OF FACT

1. Claimant sustained an industrial injury on December 31, 2017 during the course scope of employment while he was working for Peppermill Inc. ("Employer"). He was walking with dishes when he slipped and fell in standing water on the floor.
2. On December 31, 2017, Claimant received treatment at Sunrise Hospital where the C-4 Form was completed and he was diagnosed with facial injuries, head injury and laceration.

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3. On January 16, 2018, Employers Insurance Company of Nevada ("Insurer") notified Claimant that his claim was accepted for cervical strain, lumbar strain, right knee sprain, right elbow sprain, facial contusion, forehead laceration, closed head injury and left ring finger laceration.
4. Claimant received medical treatment at Concentra Medical Centers from January 22, 2018 to approximately March 2, 2018.
5. His medical care was subsequently transferred to Dr. Ronald Kong and Dr. Stuart Kaplan.
6. Claimant also received medical treatment by Dr. Leo Germin for his head injury and on December 12, 2018, a Hearing Officer affirmed an Insurer's October 31, 2018 determination denying Claimant's request for a follow up with Dr. Germin. Claimant timely appealed the Hearing Officer's Decision and Order. This is appeal number 1908458-DM.
7. On October 24, 2018, the Insurer denied Claimant's request for payment of medical bills for dry eye syndrome treatment. The determination was affirmed by a Hearing Officer, which Claimant timely appealed. This is Appeal number 1908459-DM.
8. As a result of the Insurer's determination to deny Claimant's continued medical treatment with Dr. Germin, Claimant requested an IME under NRS 616C.145 with Dr. Russell Shah for his head injury on November 9, 2018.
9. Claimant timely appealed the Insurer's de facto denial of his November 9, 2018 request. A Hearing Officer affirmed the de facto denial and Claimant timely appealed the Decision and Order. This is appeal number 1911529-DM.

10. Claimant had been placed on permanent light duty restrictions by Dr. Ronald Kong on November 6, 2018. The restrictions were based on the FCE performed on November 15, 2018, which indicated that Claimant "did not appear to be capable of safely performing all of his pre-injury job duties (clean up for Peppermill, Inc.) without modifications. Specifically, he appears to fall short of requirement for occasional lifting and carrying up to 80 lbs." The FCE report also indicated that Claimant is capable of working a medium physical demand level. The FCE evaluation did not take into account Claimant's head injury.

11. On February 5, 2019, the Vocational Rehabilitation Counselor notified Claimant that the Employer offered him a permanent light duty job of Hostess/Cashier, which required him to "greet and seat guests, distribute guest between food servers, accept payment on guest tickets and give proper change, answer phones and properly direct calls, and directing beverage service, bussing and cleaning of tables." The permanent light duty job was approved by Dr. Ronald Kong. The counselor also notified Claimant that because of the permanent light duty job offer, his vocational rehabilitation process closed February 12, 2019 and his vocational rehabilitation maintenance was terminated.

12. Claimant did not accept the permanent light duty job because of his head injury.

13. Claimant timely appealed the Vocational Rehabilitation's counselor's determination dated February 5, 2019 and the Hearing Officer was bypassed. This is appeal number 1912693-DM.

14. On December 12, 2018 and December 19, 2018, the Insurer notified Claimant that his claim was closed for further medical treatment and he was scheduled for a PPD

evaluation. This determination was affirmed by a Hearing Officer on March 6, 2019, which Claimant timely appealed. This is appeal number 1913110-DM.

15. Claimant underwent a PPD evaluation by Dr. Gobinder Chopra on February 1, 2019. Dr. Chopra indicated that Claimant did not suffer a whole person impairment and gave him a 0%.

16. On February 11, 2019, the Insurer notified Claimant that his claim was closed with a 0% whole person impairment. Claimant timely appealed and the Hearing Officer was bypassed. This is appeal number 1913610-DM.

17. Per an Interim Order entered by this Court on November 6, 2019, Dr. Russell Shah performed an IME pursuant to NRS 616C.145 on November 18, 2019 of Claimant's head injury.

18. Dr. Shah opined that Claimant's industrial related impressions included a concussion with "post concussive syndrome with continued cognitive impairment, sleep impairment and vestibular impairment consisting of memory difficulties, focusing difficulties, insomnia, restlessness and imbalance sensations." Dr. Shah also indicated that Claimant needed additional medical treatment for his head injury and he had not reached maximum medical improvement for the concussion and that he "more likely than not has a permanent post traumatic brain injury from the December 31 2017 trauma."

19. Dr. Shah recommended further medical treatment, which included brain exercises, medication and cognitive behavioral therapy. Dr. Shah also placed Claimant on temporary disability.

20. On January 17, 2020, Claimant requested authorization for Dr. Shah's treatment plan. However, the Insurer did not respond. Claimant then appealed its de facto denial of his request. The Hearing Officer was bypassed. This is appeal number 2017002-DM.

21. These Finding of Facts are based upon substantial evidence within the record.

22. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa.

## CONCLUSIONS OF LAW

The Appeals Officer concludes as follows:

23. Appeal number 1908458-DM is moot as Claimant was seen by Dr. Russell Shah.

24. Appeal number 1908459-DM is dismissed as the eye is not currently a part of this claim.

25. Appeal number 1911259-DM is also moot as the IME was performed via the Interim Order dated November 6, 2019.

26. The Claimant testified at the time of the hearing and the Appeals Officer finds him to be a genuine and credible witness.

27. Regarding appeal numbers 1913610-DM, 1913110-DM and 2017002-DM, claim closure and the scheduling of the PPD evaluation are premature pursuant to NRS 616C.235 and NRS 616C.490. Claimant has met his burden that he remains in need of industrial care based on the findings of Dr. Shah's reporting. As such the Claimant is not at maximum medical improvement and his claim was prematurely closed. He was also prematurely rated, and a new rating examination of his accepted body parts will be initiated once the Claimant has reached maximum medical improvement pursuant to NRS 616C.490.

28. Additionally, the treatment plan of Dr. Shah shall be authorized by the Insurer and as Dr. Shah is on the Insurer's current provider treating panel, Dr. Shah shall act as the treating physician on Claimant's claim pursuant to NRS 616C.090.

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

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

## ORDER

**THEREFORE, IT IS HEREBY ORDERED** that appeal numbers 1908458-DM, 1908459-DM and 1911259-DM are hereby **DISMISSED**.

**IT IS FURTHER ORDERED** that the Hearing Officer's Decision and Order (hearing numbers 1908633-MT and 1919684-MT) and the Insurer's February 11, 2019 determination are hereby **REVERSED,** and the Insurer is **REMANDED** to authorize Dr. Shah's treatment plan outlined in his November 18, 2019 IME report and to authorize Dr. Shah as Claimant's treating physician.

**IT IS FURTHER ORDERED** that the determination from the vocational rehabilitation services counselor dated February 5, 2019 is also **REVERSED** and the Insurer is

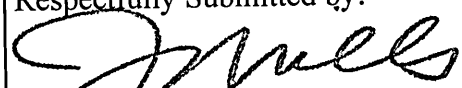
-1613

**REMANDED** to provide Claimant TTD benefits from November 18, 2019 to the present, plus interest.

Dated this 22nd day of December, 2020.

DENISE MCKAY, ESQ.
Appeals Officer

Respectfully Submitted by:



JASON D. MILLS, ESQ.
Nevada Bar No. 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste. 140
Las Vegas, NV 89102
Attorney for Claimant

**PURSUANT TO NRS 616C.370 and NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court with thirty (30) days after service by mail of this Decision**

## CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Hearings Division, Department of Administration, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate addressee runner file at the Department of Administration Hearings Division, 2200 S. Rancho, #220, Las Vegas, Nevada, to the following:

Daniel Castelan
PO Box 29066
Las Vegas, Nevada 89126

Jason D. Mills, Esq.
Jason D. Mills & Associates, Ltd.
2200 S. Rancho Dr., Ste. 140
Las Vegas, NV 89102

Peppermill Hotel & Casino
C/O Walt Kiser
380 Brinkby Avenue Suite B
Reno, NV 89509

Employers Insurance Cooperation of NV
ATTN: Maria Cable
2550 Paseo Verde Parkway, Suite 100
Henderson, NV 89074

Davide Benavidez, Esq.
Law Office of David Benavidez
850 S. Boulder Highway #375
Henderson, NV 89015

Dated this 22nd day December, 2020.

An Employee of the State of Nevada

FILED
JAN 14 2021
APPEALS OFFICE

**BEFORE THE APPEALS OFFICER**

| | | |
|---|---|---|
| In the Matter of the Industrial Insurance Claim of:<br><br>DANIEL CASTELAN,<br><br>Claimant. | Claim No: | 2017345360 |
| | Appeal No: | 1908458-DM<br>1908459-DM<br>1911259-DM<br>1912693-DM<br>1913610-DM<br>1913110-DM<br>2017002-DM |

**ORDER GRANTING EMPLOYERS INSURANCE COMPANY OF NEVADA'S MOTION FOR RECONSIDERATION**

Having received Employers' Motion for Reconsideration and Claimant's Opposition thereto, I determine as follows:

The evidence in the record supports the conclusion that the Claimant is not MMI. Dr. Kong's release of Claimant as MMI was for Claimant's physical conditions only and did not address Claimant's ongoing cognitive problems. (Ex. 1, pp. 171-73). As to the latter, Dr. Shah concluded the Claimant is still in need of treatment. (Ex. 3, pp. 212-14).

At the time of the hearing in this matter, I read Dr. Shah's description of the Claimant's ongoing cognitive problems and need for further treatment as necessarily limiting the Claimant's ability to perform the light duty job offered by the employer. However, Dr. Shah's November 28, 2020, letter clarifies that the Claimant is not so limited and would, in fact, benefit from working in the offered light-duty position. This evidence constitutes good cause for reconsidering my December 22, 2020, Order insofar as it awarded Claimant TTD beginning from November 18, 2019 (the date employer made the light-duty job offer). Accordingly, the Motion for Reconsideration is granted and Claimant is not entitled to receive TTD payments.

With the benefit of hindsight, the determination from the vocational rehabilitation services counselor dated February 5, 2019, removing Claimant from voc rehab services, was not appropriate because since Claimant is not and was not MMI, he should not have been receiving voc rehab services yet.

The Order dated December 22, 2020, is modified as follows: lines 4-8 of page 6, beginning with the word "Additionally," are deleted. Lines 12-14 of page 6, beginning with the word "However," are deleted. Lines 27-28 of page 6 and lines 1-2 of page 7 are modified to

DOC004

read, "IT IS FURTHER ORDERED that the determination from the vocational rehabilitation services counselor dated February 5, 2019, is REVERSED. Claimant's eligibility for vocational rehabilitation services shall be determined upon his being released as MMI on all accepted conditions."

**IT IS SO ORDERED** this 14th day of January, 2021.

DENISE S MCKAY, ESQ.
APPEALS OFFICER

NOTICE: Pursuant to N.R.S. 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty **(30)** days after service by mail of this decision

## CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **ORDER GRANTING EMPLOYERS INSURANCE COMPANY OF NEVADA'S MOTION FOR RECONSIDERATION** was duly mailed, postage prepaid **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada, to the following:

DANIEL CASTELAN
PO BOX 29066
LAS VEGAS NV 89126

JASON MILLS ESQ
GREENMAN GOLDBERG RABY & MARTINEZ
2770 S MARYLAND PKWY STE 100
LAS VEGAS NV 89109

PEPPERMILL HOTEL & CASINO
ATTN PAM SPRAU
380 BRINKBY AVE STE B
RENO NV 89509

EMPLOYERS INS CO OF NV
ATTN WORKERS COMP DIVISION
2340 CORPORATE CIRCLE STE 200
HENDERSON NV 89074-7753

DAVID BENAVIDEZ ESQ
LAW OFFICE OF DAVID BENAVIDEZ
850 S BOULDER HIGHWAY # 375
HENDERSON NV 89015-7564

Dated this 14th day of January, 2021.

Bianca Salazar, Legal Secretary II
Employee of the State of Nevada

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11/3/2021 1:48 PM

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11/03/2021 1:47 PM
CLERK OF THE COURT

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| DANIEL CASTELAN,<br><br>Petitioner,<br><br>v.<br><br>PEPPERMILL, INC., EMPLOYERS INSURANCE COMPANY OF NEVADA and THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE, an Agency of the State of Nevada<br><br>Respondents. | CASE NO: A-21-828981-J<br><br>DEPT NO: XIV |

**ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

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

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

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

## FINDINGS OF FACT

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,



GGRM NEVADA'S PREMIER INJURY LAW FIRM

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

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

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

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



GGRM NEVADA'S PREMIER INJURY LAW FIRM

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

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

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



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

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

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

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

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



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

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

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

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



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

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

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



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

> "Regarding appeal number 1912693-DM, under NRS 616C.590, the vocational rehabilitation issue is premature at this time because he has not been placed on a permanent light duty restriction based upon his closed head injuries because he is not at maximum medical improvement. Additionally, Dr. Shah's reporting of November 18, 2019, indicates that as of that date, claimant is on temporary total disability status as it pertains to Claimant's industrial closed head injury. As such, the Claimant is entitled to TTD benefits pursuant to NRS 616C.475, plus interest pursuant to NRS 616C.335."
>
> (ROA 59).
>
> "The full nature and duration and whether claimant can return to gainful employment will be determined by Dr. Shah in the future following additional industrial care by Dr. Shah. At that time, depending on the subsequent findings by Dr. Shah, the issue of permanent restrictions and what type, if any, permanent modified duty job Claimant is capable of performing will be determined at that time pursuant to NRS 616C.590. However, the issue is not currently ripe for adjudication given the state of Claimant's temporary total disability status."
>
> (ROA 59).

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



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

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

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

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

The Issue before the Court is whether the Appeals Officer's Decision and Order initially dated December 22, 2020, but later modified by the Appeals



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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.

## CONCLUSIONS OF LAW

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

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

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

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

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

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



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

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

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

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

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



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

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

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

The Court acknowledges that motions for reconsideration are not recognized under Nevada Workers' Compensation administration, rather petitions for rehearing are the regulatorily accepted means for aggrieved parties to seek remedies outside of the appellate process. *See* NAC 616C.327. But for the purposes of this Order, the Court will treat the Respondent's motion for



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reconsideration as a petition for rehearing, as the title of the respondent's December 9, 2020, document has no bearing on the Court's decision in this case.

The Court finds that the amendments made to the Administrative Decision post trial, and therefore the Administrative Decision in and of itself, are in violation of regulatory and statutory law. NRS 233B.135(3)(c) provides that a court may remand an agency decision if the Petitioner's substantial rights have been prejudiced because the agency's decision is made upon unlawful procedure or is in violation of statutory procedures. The Supreme Court of Nevada has previously found that an appeals officer's failure to meet relevant statutory requirements is considered "procedurally deficient." Elizondo v. Hood Mach., Inc., 129 Nev. 780, 785, (2013).

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

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The Court finds that the facts of Elizondo are similar to the facts of this petition, and the facts before this Court lend themselves to an interpretation under the precedent established by the Supreme Court of Nevada in Elizondo. The appeals officer violated plain and unambiguous regulatory law when she failed to hold a rehearing within 30 days after the Respondent's Motion was granted, as it is evident that no rehearing was scheduled. Rather, the appeals officer simply granted the Respondent's Motion and stripped the Petitioner of his monetary benefits via amended order. The Appeals Officer's failure to schedule the rehearing directly contradicts NAC 616C.327, which constitutes a clear violation of a regulatory provision and is highly prejudicial to the Petitioner's substantial rights.

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

In support of its position, the Respondent argued that the Administrative Order is supported by substantial evidence and contains no error of law. (Respondent's Brief p. 8). For the aforementioned reasons, the Court finds that this argument bears no relevance to judicial review as NRS 233B.135(3) identifies multiple scenarios in which the reviewing court may set it aside in whole or in part



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an administrative decision. That is when a petitioner's substantial rights have been prejudiced as a result of unlawful procedure. *See* NRS 233B.135(3)(c).

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

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

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



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

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



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

Similarly, in this case, the Court finds that the evidence submitted by the Respondent in support of its Motion for Reconsideration could have been discovered with reasonable diligence during the normal course of discovery, prior to the conclusion of the administrative trial, and therefore must not be considered "newly discovered." The Court finds that the Respondent cannot show that the documents offered in support of its Motion for Reconsideration satisfy the burden of being considered "newly discovered." In support of its Motion for Reconsideration, the Respondent supplied only the response of Dr. Shah to a letter crafted by the Respondent's counsel on October 28, 2020, post-trial. The Respondent conceded in its Motion and its Brief that it was only after the Appeals



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Officer issued a ruling ordering the Respondent to pay TTD benefits that Respondent's counsel prepared the letter to Dr. Shah. (ROA 68-69, Respondent's Brief p. 6-7). The Respondent made no allegation that this evidence was unobtainable prior to the administrative trial, and the Court concludes that, had Respondent's counsel simply exercised reasonable diligence, this evidence could have easily been obtained and submitted to the record prior to the October 22, 2020, hearing.

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

**ORDER**

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



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

DATED this ~~day of~~ _____, 2021.

By: _____
ADRIANA ESCOBAR
DISTRICT COURT JUDGE

**Dated this 3rd day of November, 2021**

**20A 746 3D18 705A**
**Adriana Escobar**
**District Court Judge**

Submitted by:
GGRM LAW FIRM

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

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**CERTIFICATION PURSUANT TO COURT GUIDELINES**

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

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

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

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

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

/s/ David Benavidez
DAVID H. BENAVIDEZ ESQ., of THE LAW OFFICE OF DAVID H. BENAVIDEZ, Attorney for Respondents PEPPERMILL, INC., and EMPLOYERS INSURANCE COMPANY OF NEVADA.

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## 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

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Daniel Castelan, Petitioner(s)<br><br>vs.<br><br>Peppermill Hotel & Casino, Respondent(s) | CASE NO: A-21-828981-J<br><br>DEPT. NO. Department 14 |

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 11/3/2021

| | |
|---|---|
| Ethan Wallace | ewallace@ggrmlawfirm.com |
| Veronica Salas | vsalas@ggrmlawfirm.com |
| Jason Mills | jmills@ggrmlawfirm.com |
| Denise McKay | denise.mckay@admin.nv.gov |
| David Benavidez | davidbenavidez@gmail.com |

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**ODM**
**JASON D. MILLS, ESQ.**
Nevada Bar No. 7447
**GGRM LAW FIRM**
2770 S. Maryland Parkway, Suite 100
Las Vegas, Nevada 89109
Phone: (702) 384-1616
Facsimile: (702) 384-2990
Email: jmills@ggrmlawfirm.com
*Attorneys for Respondent*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| EMPLOYERS INSURANCE COMPANY OF NEVADA,<br><br>Appellant,<br><br>v.<br><br>DANIEL CASTELAN,<br><br>Respondent. | CASE NO: A-21-828981-J<br><br>DEPT NO: XIV |

**ORDER DENYING MOTION FOR STAY PENDING APPEAL TO THE NEVADA SUPREME COURT**

This matter came before this Court on November 30, 2021, on the Motion for Stay Pending Appeal to the Nevada Supreme Court filed by Appellant, EMPLOYER'S INSURANCE COMPANY OF NEVADA ("Appellant"). Appellant was represented by DAVID H. BENAVIDEZ, ESQ. of THE LAW OFFICE OF DAVID H. BENAVIDEZ. Respondent, DANIEL CASTELAN, was

represented by JUAN M. SCLAFANI, ESQ. of the law firm of GGRM LAW FIRM. No other parties were present or represented.

After a review and consideration of the record, the Points and Authorities on file herein, and oral arguments of counsel, the Court determined as follows:

An order for stay is not a right to be exercised, but a matter of judicial discretion to be used by the Court, when appropriate, upon application of a party. NRS 233B.140(3) provides that in making a ruling, the Court shall give deference to the trier of fact and consider the risk to the public, if any, of staying the administrative decision.

When considering an application for a stay order pending appeal, there are four factors which must be addressed:

1) Whether the petitioner for the stay order has made a *strong* showing that it is likely to prevail on the merits of the appeal;

2) Whether or not the petitioner has shown it would sustain irreparable injury absent the stay order;

3) Whether or not the issuance of a stay order would substantially harm the other interested parties; and

4) Where the public interest lies.

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Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d 1371, 1374 (Nev. 1975); American Horse Protection Assoc. v. Frizzel, 403 F.Supp. 1206, 1215 (Nev. 1975).

Appellant has the burden of demonstrating that it will suffer irreparable harm if the stay order is not issued. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. Appellant argues in its Motion that if the stay is not granted, it will be irreparably harmed because of the payment of benefits.

In order to show that it will prevail on the merits, Appellant has the burden of demonstrating that the Appeals Officer's decision was factually or legally incorrect and that the Appeals Officer acted arbitrarily or capriciously. NRS 233B.135(2); Campbell v. Nevada Tax Com'n, 853 P.2d 717 (Nev. 1993). In determining the appropriateness of the Appeals Officer's decision, this Court may not substitute its judgment for that of the Appeals Officer as to the weight of the evidence. N.R.S. 233B.135; SIIS v. Campbell, 862 P.2d 1184 (Nev. 1993); Campbell v. Nev. Tax Com'n, 853 P.2d 717 (Nev. 1993). On questions of fact, this Court is limited to determining whether *substantial evidence* exists in the record to support the Appeals Officer's decision. Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 792 P.2d 400, 401 (1990); SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). Substantial evidence is "that quantity and quality of



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evidence which a reasonable [person] could accept as adequate to support a conclusion." State of Nevada Emplmt. Sec. Dept. v. Hilton Hotels Corp., 102 Nev. 606, 607-08, 729 P.2d 497, 498 (1986), quoting Robertson Transp. Co. v. P.S.C., 39 Wis.2d 653, 159 N.W.2d. 636, 638 (1968).

The Court finds that, upon review of the record, the Appellant has failed to establish a strong showing to prevail on the merits of its appeal to the Supreme Court of Nevada. Further, Appellant argued in its Motion that if the stay is not granted, it will be irreparably harmed because of the payment of benefits. This argument, however, is without merit since there are no Nevada Supreme Court cases that indicate irreparable harm results from the sole payment of money. To the contrary, the Nevada Supreme Court, in DIIR v. Circus Circus Enterprises, held that:

> ...the object of workers' (sic) compensation social legislation is to provide the disabled worker with benefits during the period of his disability so that the worker and his dependents may survive the catastrophe which the temporary cessation of necessary income occasions.
>
> 101 Nev. 405, 408, 705 P.2d 645, 648 (1985).

The court also indicated that "...it is clearly the injured worker and not the employer who is more likely to be irreparably harmed when immediate payment of benefits is contrasted with delayed payment pending the outcome of the hearing



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on the merits." Id. Respondent is the party more likely to be harmed by the issuance of a stay since he would continue to be denied the payment of appropriate benefits currently being withheld. Respondent is the only party that will suffer tangible harm as he will be the party that will be subject to a continued delay of substantial monetary benefits that have been affirmed by the Administrative Appeals Officer. The Court concludes that, while the Appellant may not be able to recover these costs, this is insufficient to establish the irreparable harm required to justify granting its Motion for Stay. Finally, the Court finds that public policy favors the payment of benefits to the Respondent over any potential harm that may result to the Appellant.

**ORDER**

In summation, THIS COURT FINDS AND ORDERS that the Appellant has failed to establish a likelihood of prevailing on the merits of its appeal before the Supreme Court of Nevada and have further failed to establish that it will suffer irreparable harm if the stay is not granted. Accordingly, the Appellant's Motion for Stay Pending Appeal to the Nevada Supreme Court is DENIED and the Order Denying Petition for Judicial Review remains in effect.

Dated this 13th day of December, 2021

DATED this 9. Escobar day of _____, 2021.

89B ECF ACF5 964A
Adriana Escobar
District Court Judge

By:_____
ADRIANA ESCOBAR
DISTRICT COURT JUDGE



GGRM NEVADA'S PREMIER INJURY LAW FIRM

Submitted by:
GGRM LAW FIRM

By: /s/ Jason D. Mills, Esq.
JASON D. MILLS, ESQ.
Nevada Bar No. 7447
2770 S. Maryland Parkway
Suite 100
Las Vegas, Nevada 89109
*Attorneys for Respondent*
Daniel Castelan

## CERTIFICATION PURSUANT TO COURT GUIDELINES

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

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

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

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

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

/s/ David H. Benavidez, Esq.

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

GGRM
NEVADA'S PREMIER INJURY LAW FIRM

## Ethan Wallace

**From:** David Benavidez <davidbenavidez@gmail.com>
**Sent:** Monday, December 13, 2021 12:03 PM
**To:** Ethan Wallace
**Cc:** Jason Mills
**Subject:** Re: Order Denying Motion for Stay, Peppermill v. Castelan

Approved.

On Mon, Dec 13, 2021 at 11:38 AM Ethan Wallace <ewallace@ggrmlawfirm.com> wrote:

Good Morning Mr. Benavidez,

I am just following up on this Order.

Thank you,

NEVADA'S PREMIER INJURY LAW FIRM

**Ethan Wallace**
Litigation Specialist

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

**From:** Ethan Wallace
**Sent:** Tuesday, December 7, 2021 4:29 PM
**To:** David Benavidez <davidbenavidez@gmail.com>
**Cc:** Jason Mills <jmills@ggrmlawfirm.com>
**Subject:** Order Denying Motion for Stay, Peppermill v. Castelan

Good Afternoon Mr. Benavidez,

Please see attached for your review the proposed Order Denying Motion for Stay Pending Appeal to the Nevada Supreme Court. Please review the order and let me know if you approve or disapprove of the order so that I may submit the order to the Court.

Thank you,

NEVADA'S PREMIER INJURY LAW FIRM

**Ethan Wallace**
Litigation Specialist

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

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David H. Benavidez
Law Office of David H. Benavidez
850 S. Boulder Highway #375
Henderson Nevada 89015
Office: (702) 565-9730
Fax: (702) 568-1301

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Daniel Castelan, Petitioner(s)<br><br>vs.<br><br>Peppermill Hotel & Casino, Respondent(s) | CASE NO: A-21-828981-J<br><br>DEPT. NO. Department 14 |

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 12/13/2021

| | |
|---|---|
| Ethan Wallace | ewallace@ggrmlawfirm.com |
| Veronica Salas | vsalas@ggrmlawfirm.com |
| Jason Mills | jmills@ggrmlawfirm.com |
| Denise McKay | denise.mckay@admin.nv.gov |
| David Benavidez | davidbenavidez@gmail.com |