IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC. Appellants, vs. ROBERT HOLLAND, Respondents,	Supreme Court Case No.: 82843 District Court Case No.: A-20-818754-J

REPLY IN SUPPORT MOTION FOR STAY OF DISTRICT COURT'S ORDER

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, CCMSI (CANNON COCHRAN MANAGEMENT SERVICES, INC.), states that it does not have any parent corporation, or any publicly held corporation that owns 10% or more of its stock, nor any publicly held corporation that has a direct financial interest in the outcome of the litigation. NRAP 26.1(a).
2. The Appellant LAS VEGAS METROPOLITAN POLICE DEPARTMENTis a governmental party and therefore exempt from the NRAP 26.1 disclosure requirements.
3. The undersigned counsel of record for LAS VEGAS METROPOLITAN POLICE DEPARTMENT, CANNON COCHRAN MANAGEMENT SERVICES, INC has appeared in this matter before District Court. DANIEL L. SCHWARTZ, ESQ. have also appeared for the same at the administrative proceedings before Department of Administration.

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These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

DATED this 18 day of May, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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REPLY

I. Appellants Will Suffer Irreparable Harm If The Stay Is Not Granted

In his Response, Claimant does not identify any particular harm that would befall him if this stay was granted. Rather, Claimant merely claims that, in general, he is entitled to benefits and that he should receive them, despite failing to identify what benefits he is actually seeking. Appellants would submit that without identifying any particular harm, Respondent has not actually alleged that he will suffer irreparable harm if this stay is granted.

However, as discussed in the underlying Motion, an insurer may not seek recoupment of benefits paid to a claimant that were later found to be unwarranted on appeal. Ransier v. SIIS, 104 Nev. 742, 766 P.2d 274 (1988). As such, without a stay, Appellants' appeal essentially becomes moot. Benefits must issue which Appellants likely cannot recover even if the instant Petition is successful. The injury is therefore irreparable. Kress v. Corey, 65 Nev. 1, 189 P.2d 353 (1948).

Indeed, beyond the expense of actually administering this claim which Appellants have a good faith belief that they should not have to do based on the merits of this appeal, Claimant will be entitled to routine medical follow-ups under this claim, an expense which Appellants are not guaranteed to recoup even if they are successful with this appeal. Further, if Respondent is deemed stable and ratable for his injuries and a permanent partial disability ("PPD") award is required,

Appellants certainly could not recoup that. Indeed, although he is retired and would not be entitled to any wage replacement benefits, all other non-medical benefits that may issue under this claim, such as a PPD award, absolutely cannot be recovered. As such, Appellants would submit that, absent a stay, their harm is irreparable and the object of this appeal will be defeated. Further, without an explicit allegation of irreparable harm, Appellants would submit that Claimant would not suffer any ill effects of a stay.

II. The District Court's Ruling Should Be Overturned

As for the merits of Appellants' appeal, Claimant does not even attempt to justify the District Court's Order. Rather, Claimant spends his entire argument discussing how the Appeals Officer's Decision was not based on substantial evidence. Indeed, the reason why Claimant dedicates none of the 18 pages of their Opposition to defending the District Court's Order is because it is indefensible. Claimant's failure to support the District Court's Order is a tacit admission that it was clearly erroneous and therefore this Court should stay that Decision and allow the Appeals Officer's Order to remain the status quo.

As this Court well knows:

> this court reviews an appeals officer's decision for clear error or arbitrary abuse of discretion. The appeals officer's fact-based conclusions of law are entitled to deference, and they will not be disturbed if supported by substantial evidence. Further, we may not substitute our judgment for that of the appeals officer as to the weight

> of the evidence on a question of fact, and our review is limited to the record before the appeals officer.

Manwill v. Clark Cty., 123 Nev. 238, 241, 162 P.3d 876, 879 (2007)

Here, the Appeals Officer was presented with purely factual questions under NRS 617.457(11): did Claimant's annual examining physicians assess him with predisposing conditions which lead to heart disease; if so, did Claimant correct those conditions; and if he did not correct the conditions, was it actually within his ability to correct. As was discussed in the underlying Motion, the Appeals Officer answered these questions and provided evidentiary justification therefore. Indeed, the Appeals Officer's Decision was absolutely based on substantial evidence.

However, the District Court decided that there were other issues at play and would have ruled differently on the facts. Although the space limitations for the underlying Motion and Reply do not permit a truly in-depth discussion of the District Court's ruling, the fact is that this appeal is concerned with *the Appeals Officer's Decision* and whether *it* was based on substantial evidence. Put simply, the District Court committed clear error by reweighing the facts and adding requirements to this claim that do not exist under NRS 617.457. Appellants should not be forced to comply with such an erroneous decision.

Indeed, as was laid out in the underlying Motion, it is uncontested that, prior to his retirement, Claimant was consistently warned about his high triglycerides and ordered to correct the same. However, when he filed the claim, Claimant's

triglycerides were noted to be 348, almost double what they were at the last exam before he retired 2012. Thus, it should be undisputed that Claimant was ordered to correct the conditions and he did not.

The District Court's ruling acknowledged this but added more requirements to the statute, claiming that the Appeals Officer erred because the orders to correct were "too general" and because although Claimant was assessed with predisposing conditions, he was still allowed to work. None of this is in NRS 617.457 and places undue burdens on the Appellants where the law simply does not require it. Appellants should not be forced to comply with such a legally erroneous interpretation of NRS 617.457.

What's more, the District Court also explicitly reweighed the evidence, concluding that correction of the predisposing conditions was not within Claimant's ability because his annual examining physicians did not prescribe him medication. However, again, there is no such requirement in NRS 617.457. Not withstanding the fact that annual examining physicians are not treating physicians and do not even prescribe medications, the fact that Claimant was not taking medication is evidence that it *was* within his ability to correct those conditions. If for nothing else, it was entirely within Claimant's ability to go to a physician and obtain medication if that is what is required for him to control his predisposing conditions. However, there is no evidence that he did that. There is no evidence

that he went to a physician to obtain medication or otherwise seek advice on how he might reduce his elevated levels. While correcting a predisposing condition that requires medication may very well be outside a claimant's ability by virtue of the need for the medication, the ability to go to a physician to obtain that medication is entirely within Claimant's ability and he did not do so.

Indeed, the central focus in this case is whether it was within Claimant's ability to correct his predisposing conditions and there was zero evidence that Claimant even attempted to correct his conditions. Appellants would submit that this was an explicit factual question for the Appeals Officer and the substantial evidence supports the Appeals Officer's conclusion. Indeed, if Claimant took no action to attempt to correct the conditions, how is any party (the Court included) supposed to know whether correction was indeed within his ability. By failing to take any action and because there was no evidence of any attempt to correct the conditions, the Appeals Officer concluded that Claimant was excluded from benefits by operation of NRS 617.457(11). (See Wright v. State DMV, 121 Nev. 122, 110 P.3d 1066, (2005), "substantial evidence need not be voluminous and may even be inferentially shown by a lack of certain evidence.")

As a counterpoint, Claimant cites to the unpublished Court of Appeals decision of City of Las Vegas v. Burns, 2019 Nev. App. Unpub. LEXIS 948, *1 and argues that it stands for the position that employers must *prove* that the

claimant did not attempt to correct. In that case, the Appeals Officer concluded that the claimant was consistently assessed with predisposing conditions and that the claimant's correction of those conditions was within the claimant's ability because claimant was ordered to diet and exercise.

However, the Court of Appeals held "there is not substantial evidence in the record to support the appeals officer's finding that correcting the predisposing conditions was within Burns' ability." The Court went on to detail the evidence:

> there is not substantial evidence in the record to indicate that Burns was capable of reducing his cholesterol, triglycerides, or weight by dieting and exercising. To the contrary, the record indicates that, following his required annual physicals in 2010, 2011, and 2012, the physicians' assessments and recommendations indicate Burns "continue [s] to do an excellent job maintaining [his] health;" that he should "[k]eep up [his] exercise regimen . . . it's doing great for [him];" and that he was "doing well maintaining [his] health." In 2012, the physician noted that although his "had" cholesterol and triglycerides were high, Burns was taking fish oil supplements as previously directed by his private physician and his total cholesterol was fine. Thus, the physicians' reports indicate that Burns was doing what he was instructed to do, he was exercising and taking supplements, and despite that, his predisposing factors did not change, which reflects that he was not capable of correcting his predisposing conditions.

Thus, Burns was a substantial evidence case wherein the Court concluded that the Appeals Officer committed clear error by failing to recognize that Mr. Burns was indeed attempting to correct his predisposing conditions but could not

despite following the orders to diet and exercise. Indeed, *there was evidence* in Burns to show that claimant was attempting to correct his predisposing conditions. The Court held that the Appeals Officer committed clear error by failing to recognize that evidence.

Contrast the facts of Burns with the present case where there is *no evidence* that Claimant actually took any steps to correct his predisposing conditions, none. Unlike Burns wherein the claimant's physician was actively treating heart conditions and was commenting on the claimant's exercise regimen, there is nothing in this record to show that Claimant was doing anything about his heart health and indeed allowed his triglycerides that were predisposing him to heart disease to almost double by the time this claim was filed.

Put simply, Appellants and indeed NRS 617.457 only ask that employees make a good faith effort to correct conditions which are predisposing them to heart disease if they desire to avail themselves of the protections afforded by the statute. If a claimant can show a documented, concerted, and good faith effort to take control of their own health and attempt to prevent potentially life threatening heart conditions, that is all that is asked when predisposing conditions are concerned. Here, there was no evidence of an effort to control the conditions. Claimant was warned for multiple years prior to his retirement that his elevated triglycerides were predisposing him to heart disease. And then, when he actually did have a

heart attack, his triglycerides were twice what they were when he was instructed to correct them. Claimant was warned in writing by an annual examining physician that his elevated triglycerides were placing him at risk for heart disease and he was ordered to correct the same. Without evidence of at least an *attempt* to correct and considering how high claimant's triglycerides were when he filed this claim, the Appeals Officer had more than substantial evidence to conclude that claimant was excluded from the benefits of NRS 617.457 by operation of subsection (11).

Appellants respectfully request that this Court stay the District Court's Order as it is clearly erroneous, explicitly reweighs the evidence in violation of NRS 233B.130, and because Appellants will be irreparably harmed if a stay is not granted. The Appeals Officer's Decision was based on substantial evidence and should be remain as the status quo in this case.

III.

CONCLUSION

Based upon all of the above, it is the belief of Appellants, LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., that a stay of the District Court's decision, dated April 5, 2021, is necessary to prevent irreparable harm to Appellants.

WHEREFORE, Appellants, LAS VEGAS METROPOLITAN POLICE DEPARTMENT and CANNON COCHRAN MANAGEMENT SERVICES, INC., respectfully requests that this Court grant its Motion For Stay.

Dated this 18 day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

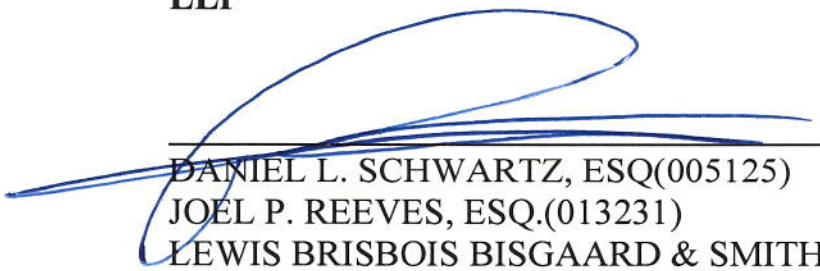
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

2. I further certify that this brief complies with the type-volume limitations of NRAP 27(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and that this Court permit a four (4) page extension as this Reply is nine (9) pages in length. The additional length was required to address Respondent's eighteen (18) page opposition.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP



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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 18th day of May, 2021, service of the attached **MOTION FOR STAY OF APPEAL OFFICER'S DECISION AND ORDER** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

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