

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

2
3 INTERNATIONAL ACADEMY OF STYLE,

4
5 Petitioner,

6 vs.

7 DIVISION OF INDUSTRIAL RELATIONS,
8 and the NEVADA DEPARTMENT OF
9 ADMINISTRATION, APPEALSOFFICER
10 SHEILA MOORE,

11 Respondents.

Electronically Filed
Case No. : CV20-00445
Oct 05 2021 11:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

12 **JOINT APPENDIX,**
13 **VOLUME XI OF XI**

14
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Division of Industrial Relations

JOINT APPENDIX INDEX
(Chronological)

Document Name	Date Filed	Bates	Vol. No.
Petition for Judicial Review	03/06/20	JA0001- JA0010	I
Exhibit 1 to Petition for Judicial Review – Decision and Order before the Appeals Officer under Appeal No.’s 1702537-SYM & 1702545-SYM dated February 20, 2020	3/6/2020	JA0011- JA0024	I
Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445	03/06/20	JA0025- JA0052	II
Exhibit 1 to Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 -International Academy of Style’s Documentary Exhibit 1 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0053- JA0072	II
Exhibit 2 to Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 – International Academy of Style’s Documentary Exhibit 2 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0073- JA0225	II
Exhibit 3 to Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 – International Academy of Style’s Documentary Exhibit 3 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0226- JA0316	III
Exhibit 4 to Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 - International Academy of Style’s Documentary Exhibit 4 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0317- JA0406	III
Exhibit 5 to Application for Stay of Appeal Officer’s February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 - International Academy of Style’s Documentary Exhibit 5 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0407- JA0430	III

1	Exhibit 6 to Application for Stay of Appeal Officer's February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 - International Academy of Style's Documentary Exhibit 6 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0431-JA0660	IV
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4	Exhibit 7 to Application for Stay of Appeal Officer's February 20, 2020 Decision and Order filed under District Court Case No. CV20-00445 - International Academy of Style's Documentary Exhibit 7 Before the Appeals Officer under Appeal No. 1702537-SYM dated June 28, 2017	3/6/2020	JA0661-JA0667	V
5				
6				
7	Minutes [Court finds Plaintiff's Application for Stay of Appeal Officer's February 20, 2020 is deemed moot. Plaintiff must keep worker's compensation coverage active pending resolution of this case] filed under District Court Case No. CV20-00445	3/10/2020	JA0668	V
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10	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445	04/22/20	JA0669-JA0675	V
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12	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445- <i>Decision and Order, Appeals Officer Sheila Y. Moore dated 2/20/2020 under Appeal No. 's 1702537-SYM and 1702545-SYM</i>	4/22/2020	JA0676-JA0688	VI
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15	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Reply in Support of Closing Argument submitted on behalf of Employer/Petitioner dated 8/9/2019 under Appeal No. 's 1702537-SYM and 1702545-SYM</i>	4/22/2020	JA0689-JA0704	VI
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19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>DIR Closing Argument on behalf of DIR/Respondent dated 8/1/2019 under Appeal No. 's 1702537-SYM and 1702545-SYM</i>	4/22/2020	JA0705-JA0711	VI
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25	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Transcript of Proceedings from Appeal Hearing dated November 8, 2018 filed 11/28/2018</i>	4/22/2020	JA0739-JA0795	VI
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit # 1 under Case No. 1706718</i>	4/22/2020	JA0796- JA0809	VI
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4	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #2 dated 6/28/2017</i>	4/22/2020	JA0810- JA0961	VI,VII
5				
6	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #3 dated 6/28/2017</i>	4/22/2020	JA0962- JA1051	VII
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9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #4 dated 6/28/2017</i>	4/22/2020	JA1052- JA1140	VII
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11	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #5 dated 6/28/2017</i>	4/22/2020	JA1141- JA1164	VII,VIII
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14	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #6 dated 6/28/2017</i>	4/22/2020	JA1165- JA1394	VIII
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16	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Documentary Exhibit #7 dated 6/28/2017</i>	4/22/2020	JA1395- JA1400	IX
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19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Evidence Packet for the Division of Industrial Relations (DIR) Exhibit #8 dated 6/27/2017</i>	4/22/2020	JA1401- JA1556	IX
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22	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Evidence Packet for the Division of Industrial Relations (DIR) Exhibit #9 dated 6/27/2017</i>	4/22/2020	JA1557- JA1643	IX, X
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25	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Supplemental Evidence Packet for the Division of Industrial Relations (DIR) Exhibit #10 dated 11/8/2018</i>	4/22/2020	JA1644- JA1649	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore filed 1/17/2020</i>	4/22/2020	JA1650- JA1651	X
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4	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, Filed 7/3/2019</i>	4/22/2020	JA1652- JA1653	X
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6	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, Filed 6/27/2019</i>	4/22/2019	JA1654- JA1655	X
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9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, Filed 11/13/2018</i>	4/22/2019	JA1656- JA1657	X
10				
11	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, Filed 9/18/2018</i>	4/22/2019	JA1658- JA1659	X
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14	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, Filed 8/17/2018</i>	4/22/2019	JA1660- JA1661	X
15				
16	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 8/15/2018</i>	4/22/2019	JA1662- JA1663	X
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19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 6/26/2018</i>	4/22/2019	JA1664- JA1665	X
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21	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 5/24/2018</i>	4/22/2019	JA1666- JA1667	X
22				
23	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 2/23/2018</i>	4/22/2019	JA1668- JA1669	X
24				
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26	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 12/22/2017</i>	4/22/2019	JA1670- JA1671	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 12/08/2017</i>	4/22/2019	JA1672- JA1673	X
2				
3	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 9/7/2017</i>	4/22/2019	JA1674- JA1675	X
4				
5	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 7/18/2017</i>	4/22/2019	JA1676- JA1677	X
6				
7	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style’s Motion for Continuance and Resetting dated 7/14/2017</i>	4/22/2019	JA1678- JA1681	X
8				
9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Pre-Hearing Statement of the Division of Industrial Relations (DIR) dated 6/30/2017</i>	4/22/2019	JA1682- JA1684	X
10				
11	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Notice of Appearance filed 6/27/2017</i>	4/22/2019	JA1685- JA1686	X
12				
13	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Pre-Hearing Statement submitted on behalf of International Academy of Style filed on 6/28/2017</i>	4/22/2019	JA1687- JA1690	X
14				
15	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed 5/4/2017</i>	4/22/2019	JA1691- JA1692	X
16				
17	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance submitted on behalf of International Academy of Style filed on 5/3/2017</i>	4/22/2019	JA1693- JA1696	X
18				
19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed 4/20/2017</i>	4/20/2019	JA1697- JA1698	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance submitted on behalf of International Academy of Style filed on 4/19/2017</i>	4/20/2019	JA1699- JA1702	X
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4	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Notice of Appeal and Order to Appear filed on March 23, 2017</i>	4/20/2019	JA1703- JA1704	X
5				
6	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Request for Hearing Before the Appeals Officer filed on 3/20/2017</i>	4/20/2019	JA1705	X
7				
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9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Certificate of Mailing dated 3/20/2017</i>	4/20/2019	JA1706	X
10				
11	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Letter of Determination dated 3/14/2017</i>	4/20/2019	JA1707- JA1708	X
12				
13				
14	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed 7/18/2017</i>	4/20/2019	JA1709- JA1710	X
15				
16	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance and Resetting submitted on behalf of Employer/Petitioner</i>	4/20/2019	JA1711- JA1714	X
17				
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19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Pre-Hearing Statement of the Division of Industrial Relations filed 6/30/2017</i>	4/20/2019	JA1715- JA1717	X
20				
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22	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Notice of Appearance filed 6/27/2017</i>	4/20/2019	JA1718- JA1719	X
23				
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25	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>International Academy of Style's Pre-Hearing Statement</i>	4/20/2019	JA1720- JA1723	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed on 5/4/2017</i>	4/20/2019	JA1724-JA1725	X
2				
3	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance and Resetting Hearing submitted on behalf of International Academy of Style filed on 5/2/2017</i>	4/20/2019	JA1726-JA1729	X
4				
5	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed on 4/20/2017</i>	4/20/2019	JA1730-JA1731	X
6				
7	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance and Resetting submitted on behalf of International Academy of Style filed on 4/19/2017</i>	4/20/2019	JA1730-JA1735	X
8				
9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Notice of Appeal and Order to Appear filed on 3/23/2017</i>	4/20/2019	JA1736-JA1737	X
10				
11	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Request for Hearing Before the Appeals Officer filed on 3/20/2017</i>	4/20/2019	JA1738	X
12				
13	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Certificate of Mailing filed March 23, 2017</i>	4/20/2019	JA1739	X
14				
15	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Letter of Determination dated 3/14/2017</i>	4/20/2019	JA1740-JA1741	X
16				
17	Transmittal of Record on Appeal filed under District Court Case No. CV20-00445	04/22/20	JA1742-JA1744	XI
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19	Petitioner's Opening Brief filed under District Court Case No. CV20-00445	06/01/20	JA1745-JA1776	XI
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21	Respondent Division's Answering Brief filed under District Court Case No. CV20-00445	08/13/20	JA1777-JA1820	XI
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23	Petitioner's Reply Brief filed under District Court Case No. CV20-00445	09/14/20	JA1821-JA1829	XI
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Order Setting Hearing filed under District Court Case No. CV20-00445	10/29/20	JA1830- JA1831	XI
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Case Appeal Statement filed under District Court Case No. CV20-00445	04/30/21	JA1861- JA1867	XI
Notice of Appeal filed under District Court Case No. CV20-00445	04/30/21	JA1868- JA1883	XI
Certificate of Clerk and Transmittal—Notice of Appeal filed under District Court Case No. CV20-00445	05/03/21	JA1884	XI

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I declare under penalty of perjury that the foregoing is true and correct.

/s/ Bernadette Francis

BERNADETTE FRANCIS

1 CASE NO. CV20-00445

2 DEPT NO. 8

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

* * * * *

9 INTERNATIONAL ACADEMY OF STYLE,

10 Petitioner,

11 vs.

12 DIVISION OF INDUSTRIAL RELATIONS,
13 and the NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
14 SHEILA MOORE,

15 Respondents.

16 _____/

17 TRANSMITTAL OF RECORD ON APPEAL

18 TO: The Clerk of the Second Judicial District Court

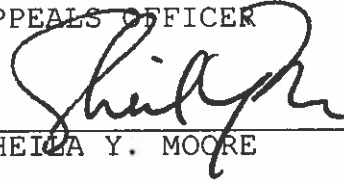
19 Pursuant to NRS 233B.140, the transmittal of the
20 entire record on appeal in accordance with the Nevada
21 Administrative Procedure Act (Chapter 233B of NRS) is hereby
22 made as follows:

23 1. The entire record herein, including each and
24 every pleading, document, affidavit, order, decision, and
25 exhibit now on file with the Office of the Appeals Officer
26 under the Nevada Industrial Insurance Act, 1050 East William
27 Street, Suite 450, Carson City, Nevada, in the above-entitled
28 action.

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2. Transcript of proceedings.
3. This transmittal.

APPEALS OFFICER



SHEILA Y. MOORE

1 CASE NO. CV20-00445

2 DEPT NO. 8

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

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* * * * *

9 INTERNATIONAL ACADEMY OF STYLE,

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Petitioner,

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vs.

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DIVISION OF INDUSTRIAL RELATIONS,
and the NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

13

14

Respondents.

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16

AFFIRMATION

17

Pursuant to NRS 239B.030

18

The undersigned does hereby affirm that the following
document **DOES NOT** contain the social security number of any
person:

19

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1. Transmittal of Record on Appeal

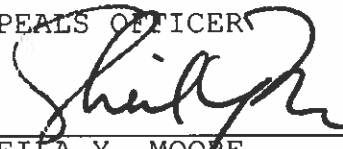
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APPEALS OFFICER

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SHEILA Y. MOORE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Petitioner, vs. DIVISION OF INDUSTRIAL RELATIONS, and the NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICER SHEILA MOORE, Respondents.	Case No.: CV20-00445 Dept. No.: 8
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PETITION FOR JUDICIAL REVIEW

PETITIONER'S OPENING BRIEF

ATTORNEY FOR THE PETITIONER: Jason Guinasso, Esq. Nevada Bar No. 8478 Hutchison & Steffen, PLLC 500 Damonte Ranch Parkway, Suite 980 Reno, NV 89521 Tel.: 775-853-8746 Fax: 775-201-9611 Attorney for International Academy of Style	ATTORNEY FOR THE RESPONDENTS: Donald C. Smith, Esq., Senior Division Counsel Division of Industrial Relations Workers' Compensation Section 400 West King Street, Suite 201 Carson City, NV 89703 Tel.: 775-684-7286 Fax: 775-687-1621 Attorney for Dept. of Business and Industry, Division of Industrial Relations
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1 **DISCLOSURE STATEMENT IN COMPLIANCE WITH NRAP 26.1**

2 The undersigned counsel of record certifies that the following are persons and entities as
3 described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the
4 judges of this court may evaluate possible disqualification or recusal.

- 5 1. International Academy of Style “IAS”- a small for-profit institution located in Reno,
6 Nevada offering licensure in Cosmetology, Hair Design, Esthetician, and Nail
7 Technician.
- 8 2. Jason D. Guinasso, Esq., is and has been at all times relevant to the commencement
9 of litigation subject to the Petitioner's appeal, the attorney of record for International
10 Academy of Style. Since November of 2017 Jason D. Guinasso, Esq. has been
11 employed by HUTCHISON & STEFFEN, PLLC. No other partners or associates
12 from Hutchison & Steffen are expected to appear before this Court with respect to
13 the appeal now pending.
- 14 3. Prior to November of 2017, Jason D. Guinasso, Esq. was with the firm Reese Kintz
15 Guinasso, LLC. Jason D. Guinasso, Esq. has appeared with Reese Kintz Guinasso on
16 behalf of International Academy of Style before the State of Nevada Department of
17 Administration, Appeals Division.
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1 **III. JURISDICTION**

2 This Court has jurisdiction to review the findings of fact and conclusions law of the Appeals
3 Officer. See NRS 617.405; NRS 233B.130. NRS 233B.130 provides that:

4 1. Any party who is:

5 (a) Identified as a party of record by an agency in an administrative proceeding; and
6 (b) Aggrieved by a final decision in a contested case,
7 is entitled to judicial review of the decision. Where appeal is provided within an agency,
8 only the decision at the highest level is reviewable unless a decision made at a lower
level in the agency is made final by statute. Any preliminary, procedural or intermediate
act or ruling by an agency in a contested case is reviewable if review of the final
decision of the agency would not provide an adequate remedy.

9 6. The provisions of this chapter are the exclusive means of judicial review of, or judicial
10 action concerning, a final decision in a contested case involving an agency to which this
chapter applies.

11 This Petition has been timely filed in the Second Judicial District Court in and for Washoe
12 County.

13 **IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

14 A. Whether the cosmetology professionals who contracted with the International Academy
15 of Style are excluded from the definition of "Employee" under the Nevada Industrial Insurance Act
16 ("NIIA").

17 B. Whether IAS is the statutory "Employer" of the cosmetology professionals they
18 contracted with.

19 C. Whether the cosmetology professionals who contract with IAS are "Independent
20 Contractors" under Nevada law.

21 D. Whether the cosmetology professionals who contract with IAS are "Independent
22 Enterprises."

23 E. Whether the cosmetology professionals who contract with IAS are in the "Same Trade"
24 as IAS.

1 F. Whether, despite the fact that all cosmetology professionals had workers' compensation
2 coverage either through their own coverage or through coverage provided by IAS, the Division of
3 Industrial Relations ("DIR") determinations issued on March 14, 2017, and assessing a premium
4 penalty in the amount of \$251.10 for the period of December 1 to December 30, 2016, and a premium
5 penalty in the amount of \$16,390.94 for the period of December 21, 2010, to November 30, 2015, are
6 supported by the evidence presented and Nevada law.

7 G. Whether DIR is barred by Res Judicata, the Doctrine of Laches, and the Doctrine of
8 Equitable Estoppel from asserting claims for premium penalties for the period December 21, 2010 to
9 November 30, 2015.

10 **V. SUMMARY OF ARGUMENT**

11 Since 1998, every cosmetology professional engaged by IAS executed a contract with IAS
12 recognizing them as independent contractors working with the school. These contracts constitute
13 written agreements between IAS and cosmetology professionals, expressly providing that cosmetology
14 professionals performing services under the Agreement are not employees under the Nevada Industrial
15 Insurance Act ("NIIA"). Out of caution and based on an agreement with the State of Nevada, each
16 Independent Contractor planning to work with IAS obtained a Certificate of Liability Insurance for
17 2017, signing an Independent Instructor Agreement in the process, and acquiring a Sole Proprietor
18 Business License in the state of Nevada. Meanwhile, IAS also obtained workers' compensation
19 insurance for 2016 and 2017.

20 Simply, DIR has misclassified the cosmetology professionals who contract with IAS. IAS is
21 not the "Employer" of the cosmetology professionals they contract with. Instead, cosmetology
22 professionals who contract with IAS are "Independent Contractors" and "Independent Enterprises"
23 under Nevada Law. They are not in the "same trade or business" as IAS.

24 The March 14, 2017, DIR determinations assessing a premium penalty in the amount of
25 \$251.10 for the period of December 1 to December 30, 2016, and a premium penalty in the amount of

1 \$16,390.94 for the period of December 21, 2010, to November 30, 2015, against IAS are not supported
2 by the evidence or Nevada law. Every cosmetology professional who contracted with IAS had
3 workers' compensation coverage either through their own coverage or through coverage provided by
4 IAS during the relevant period of inquiry, December 1 to December 30, 2016. Moreover, the premium
5 penalties for the period December 21, 2010 to November 30, 2015 were unlawfully assessed against
6 IAS and should have been barred by the Appeals Officer under the Doctrine of Res Judicata, the
7 Doctrine of Laches, and the Doctrine of Equitable Estoppel from asserting claims for premium
8 penalties.

9 In this regard, the Appeals Officer has abused her discretion in affirming the determinations of
10 DIR to impose premium penalties. IAS petitions this Court to review the Appeals Officer's findings of
11 fact and conclusions of law under NRS 233B.135(3) because the final decision of the Appeals Officer
12 has prejudiced its rights under the Nevada Industrial Insurance Act ("NIIA"), has been affected by
13 other grievous errors of law, is clearly erroneous in view of the reliable, probative, and substantial
14 evidence on the whole record, and is otherwise arbitrary, capricious, or characterized by abuse of
15 discretion.

16 VI. STATEMENT OF THE CASE

17 A. PROCEDURAL HISTORY

18 1. Appeal Nos. 1702537-SYM & 1702545-SYM

19 On March 14, 2017, DIR rendered a determination notifying IAS of the premium penalty owed
20 in the amount of \$16,390.94. **ROA at 1037-1038.** Also on March 14, 2017, DIR rendered a
21 determination notifying IAS of the premium penalty owed in the amount of \$251.10. **ROA at 1070-**
22 **1071.**

23 On March 20, 2017, IAS filed its Requests for Hearing Before the Appeals Officer. **ROA at**
24 **1035 & 1068.**

1 On March 23, 2017, the Appeals Division scheduled hearings before the Appeals Officer to be
2 heard on Wednesday, May 3, 2017, at 3:30 p.m. **ROA at 1033 & 1066.**

3 On April 20, 2017, the matters were continued and reset to be heard on Friday, June 16, 2017, at
4 10:00 a.m. **ROA at 1027-1028 & 1060-1061.**

5 On May 4, 2017, the matters were continued and reset to be heard on Wednesday, July 12,
6 2017, at 2:30 p.m. **ROA at 1021-1022 & 1054-1055.**

7 On July 18, 2017, the matters were continued and reset to be heard on Wednesday, September
8 6, 2017, at 9:00 a.m. **ROA at 1006-1007 & 1039-1040.**

9 On September 7, 2017, the Appeals Officer issued an Order scheduling a conference call among
10 all parties for Wednesday, December 6, 2017, at 1:00 p.m., to discuss the status of the case. **ROA at**
11 **1004-1005.**

12 On December 8, 2017, the Appeals Officer issued an Order scheduling a conference call among
13 all parties for Wednesday, December 20, 2017, at 1:15 p.m., to discuss the status of the case. **ROA at**
14 **1002-1003.**

15 On December 22, 2017, the Appeals Officer issued an Order scheduling a conference call
16 among all parties for Wednesday, February 21, 2018, at 1:00 p.m., to discuss the status of the case.
17 **ROA at 1000-1001.**

18 On February 23, 2018, the Appeals Officer issued an Order scheduling a conference call among
19 all parties for Wednesday, May 23, 2018, at 1:00 p.m., to discuss the status of the case. **ROA at 998-**
20 **999.**

21 On May 24, 2018, the Appeals Officer issued an Order scheduling a conference call among all
22 parties for Monday, June 25, 2018, at 1:00 p.m., to discuss the status of the case. **ROA at 996-997.**

23 Then, on June 26, 2018, the appeal hearings were reset for hearing and set to be heard on
24 Wednesday, September 12, 2018, at 11:00 a.m. **ROA at 994-995.**

1 On August 17, 2018, the matters were continued and reset to be heard on Wednesday, October
2 3, 2018, at 2:30 p.m. **ROA at 990-991.**

3 On September 18, 2018, the matters were continued and reset to be heard on Thursday,
4 November 8, 2018, at 11:30 a.m. **ROA at 988-989.**

5 After the hearing took place, on November 13, 2018, the Appeals Officer issued an Order
6 directing counsels to file their Closing Briefs with assigned deadlines. **ROA at 986-987.**

7 On June 27, 2019, the Appeals Officer rendered an Order resetting the appeals for Oral Closing
8 Arguments on Wednesday, July 10, 2019, at 11:00 a.m. **ROA at 984-985.**

9 On July 3, 2019, the closing argument hearing was rescheduled for Thursday, August 1, 2019,
10 at 11:00 a.m. **ROA at 982-983.**

11 On October 2, 2019, the Appeals Officer sent a letter directed to DIR requesting that their office
12 prepare the Findings of Fact, Conclusions of Law, and Decision of the Appeals Officer consistent with
13 their position.

14 On January 17, 2020, the Appeals Officer issued an Order scheduling an In-Court Status Check
15 for Wednesday, February 5, 2020, at 10:00 a.m. to discuss the status of the proposed decision. **ROA at**
16 **980-981.**

17 Finally, on February 20, 2020, the Appeal Officer's Decision and Order was signed and
18 distributed to all parties. **ROA at 001-013.**

19 **2. Case No. CV20-00445**

20 On March 6, 2020, Petitioners IAS timely filed its Petition for Judicial Review with the Second
21 Judicial District Court, initiating the appeal of the administrative Order, assigned to Case No. CV20-
22 00445.

23 ///

24 ///

25 ///

1 **B. STATEMENT OF FACTS**

2 **A. International Academy of Style and Its Historic Use of Outside Instructors**

3 The International Academy of Style (“IAS”) is an educational facility providing instruction in
4 the areas of cosmetology, hair design, aesthetics, and nail technology. **ROA at 140; ROA at 291;**
5 **ROA at 496; ROA at 082, lines 24-25 to 083, lines 1-3.** IAS provides its students with specialized
6 instructions, beyond that required by the Board of Cosmetology and Nevada law, as a unique and
7 valuable feature that sets IAS graduates apart from graduates of other cosmetology schools in Nevada.
8 **ROA at 140; ROA at 291; ROA at 496; ROA at 084-086.**

9 Since 1998, IAS has engaged highly qualified cosmetology professionals who are experts in
10 various fields of cosmetology and who are up-to-date on current new trends and beauty techniques. **Id.;**
11 **see also ROA at 471-489 (witness statements).** These cosmetology professionals are engaged as
12 Independent Contractors who provide high quality consultation and instruction to students based on
13 each individual instructor’s area(s) of expertise. **Id.;** **see also ROA at 471-489 (witness statements).**
14 Cosmetology professionals who provide consulting services and teach at IAS are professionals who
15 primarily work at salons in Northern Nevada. **Id.;** **see also ROA at 471-489 (witness statements).**
16 These cosmetology professionals are not in the education business. **Id.;** **see also ROA at 085, lines 11-**
17 **16.**

18 Importantly, the consulting services and teaching provided by cosmetology professionals are not
19 integral to the operation of IAS, but rather are provided for the benefit of students by IAS to expose
20 them to a broad range of experience, expertise and techniques in the various areas of cosmetology. **Id.**
21 IAS can operate without the use of these independent contractors because the two owners of IAS are
22 licensed instructors who are primarily responsible for providing the education needed by students. **Id.**

23 **B. Independent Instructor Agreements**

24 From 1998 to 2014, IAS memorialized its relationship with cosmetology professionals by
25 entering into a basic independent contractor agreement. **ROA at 089, line 14 to 094, line 17; ROA at**

1 148 to 234; see also ROA at 381-465. In each agreement, the cosmetology professional affirmed and
2 agreed:

3 I . . . am under contract with International Academy of Style as Independent Licensed
4 Instructor. I am in compliance with all that is required by Law of the City, State, and Federal
5 Government as an Independent Contractor.

6 ROA at 090, lines 5-20; ROA at 149, 155, 162, 168, 174, 180, 186, 192, 200, 205, 211, 217, 223, 229;
7 see also ROA at 381-465. Additionally, the agreements provided that each cosmetology professional
8 is able to:

9 Contract my services outside of International Academy of Style during the duration of this
10 contract as International Academy of Style is not my sole source of income.

11 Id. The agreement also provided: I have full control of my schedule. Id. Thereafter, each cosmetology
12 professional dictated to IAS the schedule they would work in the agreement. Id.; see also ROA at 090,
13 lines 1-4; ROA at 092, line 15 to 093, line 9.

14 Further, the agreement provided that the cosmetology professional would invoice IAS an hourly
15 rate for services rendered. ROA at 090, lines 5-20; ROA at 149, 155, 162, 168, 174, 180, 186, 192,
16 200, 205, 211, 217, 223, 229; see also ROA at 381-465. Hourly rates are negotiated separately with
17 each cosmetology professional. Id.

18 In addition to the agreements, the cosmetology professionals completed W-9 forms, 1099
19 Forms, Affidavits of Rejection of Coverage under NRS 616B and NRS 617.210, and Nevada Business
20 Registration forms. ROA at 150-154; 156-161; 163-167; 169-173; 175-179; 181-185; 187-191; 193-
21 199; 201-204; 206-210; 212-216; 218-222; 224-228; 231-233; see also ROA at 381-465. Each of the
22 cosmetology professionals also operated under state and city business licenses since his or her
23 employment at a salon would require them to do so. Id.

24 However, since 2014, IAS has updated the terms of the Agreement with cosmetology
25 professionals in order to more clearly and completely set forth the nature of the Independent Contractor

1 relationship between IAS and cosmetology professionals providing consultation and instruction
2 services. **ROA at 299-376; ROA at 495-719.**

3 Pursuant to the revised agreements between IAS and cosmetology professionals, a set term is
4 provided for and either party may terminate the Agreement with ten (10) days written notice unless IAS
5 terminates the agreement for cause. **Id.** Cosmetology professionals understand that they are not being
6 retained to fulfill the requirements of NRS 644.395, therefore, they are able to set their own schedules,
7 come and go as they see fit as long as they are fulfilling the promises made in the Agreement, and they
8 are in full control of how they provide services under the Agreement and in keeping records of student
9 attendance and grades for said services. **Id.**

10 Cosmetology professionals acknowledge that IAS is a licensed educational facility under NRS
11 644.380 and, therefore, Instructors are subject to any standards, policies or procedures set forth by the
12 Board of Cosmetology in the performance of their services, but they are not required to comply with
13 any standard or policy set forth by IAS. **Id.** If a cosmetology professional needs assistance in fulfilling
14 his or her terms and obligations under the Agreement, such as maintaining records of attendance and
15 grades, purchasing supplies, etc., the cosmetology professionals must employ his or her own assistant.
16 **Id.** The cosmetology professionals acknowledge and understand that any employees hired by them are
17 not IAS employees and the cosmetology professional is fully responsible for any insurance,
18 compensation, etc., for his or her employees. **Id.**

19 Cosmetology professionals are compensated based on the negotiated rate set forth in the
20 Agreement. **Id.** Cosmetology professionals bill IAS for their services as they see fit, provided they bill
21 a minimum of once per month in order for IAS to keep accurate records of student accounts. **Id.** Chair
22 rental fees are due once per month, although cosmetology professionals can choose at his or her own
23 discretion to teach other general classes in lieu of the rental fee. **Id.** No other compensation is
24 provided for the instruction of the general class(es) taught in lieu of the fee and the cosmetology
25 professional has complete discretion on whether they pay the monthly fee or teach class(es). **Id.**

1 Cosmetology professionals are responsible for their own supplies, materials and equipment,
2 other than the rented chair, in providing services to students. Id. IAS provides students with supplies
3 and equipment, which can be used during an Instructor's services. Id. However, if a cosmetology
4 professional desires students to use any supplies, materials or equipment not already provided by IAS,
5 such as a specific brand or tool, the cosmetology professional is responsible for those costs and cannot
6 pass said costs onto the students unless expressly agreed to in writing in advance of the service by the
7 student(s). Id. IAS does not refund any business costs associated with providing services under the
8 Agreement to cosmetology professionals. Id.

9 Cosmetology professionals have full control over the days and number of hours they intend to
10 provide services to IAS students. Id. Cosmetology professionals provide services when they want to
11 provide services. Id. They set their own billable hourly rates (similar to how billable hourly rates are
12 set by attorneys) and cosmetology professionals essentially bid for open spots/chairs when space
13 becomes available. Id. After services are performed, cosmetology professionals provide invoices to
14 IAS for payment pursuant to the Agreement. Id. Part of each student's tuition at IAS includes a
15 percentage set aside that is used for payment to cosmetology professionals for the specialized services
16 to students. Id. In the event the student withdraws prematurely from IAS prior to completing a
17 program and that student is entitled to a refund of any tuition monies, any monies set aside for payment
18 to cosmetology professionals is also refunded to the student as part of his or her tuition reimbursement.
19 Id.

20 Although cosmetology professionals perform services on IAS premises, similar to services
21 provided by independent cosmetologists who rent/lease space in a salon, cosmetology professionals are
22 not limited to providing services on IAS premises; rather, they may also provide services to students
23 off-campus at the cosmetology professionals' own scheduling, expense and liability. Id. Additionally,
24 the Agreement between IAS and the cosmetology professionals is not exclusive and cosmetology
25

1 professionals are free to provide instructional services, cosmetology services, etc. to other
2 establishments as the cosmetology professionals choose. Id.

3 Cosmetology professionals expressly acknowledge that they are being retained as independent
4 contractors subject only to the terms and conditions set forth in the Agreement and any laws applicable
5 to the services being performed. Id. Cosmetology professionals have the right to supervise, manage,
6 operate, control, and direct performance of the details incident to their duties under the Agreement. Id.
7 Moreover, cosmetology professionals acknowledge that they are solely responsible for withholding of
8 income taxes or any other taxes, industrial insurance coverage if applicable, accumulation of vacation
9 or sick leave, and unemployment compensation coverage. Id. Cosmetology professionals are also
10 responsible for paying their own medical bills in the event of an injury during the performance of their
11 service and cosmetology professionals expressly agree to indemnify and hold IAS harmless from, and
12 defend against, any and all losses, damages, claims, costs, penalties, liabilities, and expenses arising
13 from or incurred because of, incident to, or otherwise with respect to any such taxes or fees. Id.

14 IAS provides no training to cosmetology professionals in the performance of their services
15 under the Agreement and cosmetology professionals hold themselves out to be engaged in separate
16 businesses from IAS, including having their own business licenses in their own names and/or
17 owning/renting property in furtherance of their businesses. Id. Business licenses are provided and
18 attached to the Agreements. Id.

19 Cosmetology professionals acknowledge and agree that they are not employees as defined in
20 NRS 616A for purposes of workers' compensation coverage, but rather they are expressly exempted
21 from the definition pursuant to NRS 616A.110(9)(c). Id. Specifically, they are excluded from the
22 definition of employee because they perform services pursuant to a written Agreement, which expressly
23 provides that cosmetology professionals are not performing services as employees for purposes of NRS
24 616A. Id. Copies of proof of workers' compensation coverage or a notice of sole proprietorship with
25 no employees are attached to the Agreements. Id.

1 Cosmetology professionals are responsible for maintaining all licenses, continuing education,
2 certifications, etc. in providing services to IAS students under the Agreement. **Id.** IAS does not
3 reimburse any such costs or expenses. **Id.** Additionally, cosmetology professionals may not assign the
4 Agreements and they are solely responsible for any cancellations, substitutions, make-ups, etc. of
5 services to students, including compensation to any substitute or contractor. **Id.** IAS does not keep
6 track of a cosmetology professional's schedule of services beyond ensuring the desired results are being
7 obtained as set forth in the Agreement. **Id.**

8 If a cosmetology professional schedules a service with students, the cosmetology professionals
9 is responsible for meeting that obligation or informing students of any cancellations, rescheduling, or
10 substitutions. **Id.** If students are unhappy with a cosmetology professional's performance of services
11 and complain to IAS, IAS will get involved merely to determine if the cosmetology professional is
12 complying with the terms and obligations under the Agreement or if there has been a breach of the
13 Agreement for which liability may attach. This portion of the Agreement is the cosmetology
14 professional's assurance that he or she shall perform services with care, skill and diligence in
15 accordance with applicable professional standards currently issued by such profession in similar
16 circumstances. **Id.** Cosmetology professionals are responsible for the quality and completeness of all
17 services performed under the Agreement. **Id.**

18 Each and every cosmetology professional engaged by IAS executed the foregoing contract with
19 IAS regarding his or her hire by the beauty school and the agreement made by them as independent
20 contractors working with the school. **ROA at 381-465.** Cosmetology professionals Joyce Mikesell,
21 Melissa Wolf, Meledie Wolf, Charissa Banks, Faustine Flamm, and Lisa Pike all completed statements
22 which support the foregoing factual representations of IAS regarding their engagement and service at
23 the school. **ROA at 471-489.**

24 In 2016, for the year of 2017, each Independent Contractor that planned to continue to do work
25 for IAS obtained a Certificate of Liability Insurance, signed an Independent Instructor Agreement, and

1 acquired a Sole Proprietor Business License in the State of Nevada. **ROA at 495-719.** IAS also
2 obtained Certificates of Liability Insurance for 2016 and 2017. **ROA at 724-725.**

3 Nevertheless, despite the fact that all cosmetology professionals had workers' compensation
4 coverage either through their own coverage or through coverage provided by IAS, on March 14, 2017,
5 DIR rendered two determinations. One determination notified IAS of the premium penalty owed in the
6 amount of \$251.10. **ROA at 1070-1071.** The other determination notified IAS of the premium penalty
7 owed in the amount of \$16,390.94. **ROA at 1037-1038.**

8 On March 20, 2017, IAS filed timely appealed both determinations to the Appeals Officer.
9 **ROA at 1035 & 1068.**

10 **VII. ARGUMENT**

11 **A. Petition for Judicial Review Standard of Review**

12 The parameters of judicial review are established by statute. Judicial review of a final decision
13 of an agency must be conducted by the Court without a jury and confined to the record. NRS
14 233B.135(1). The final decision of the agency shall be deemed reasonable and lawful until reversed or
15 set aside in whole or in part by the Court. NRS 233B.135(2). The burden of proof is on the party
16 attacking the decision to show that the final decision is invalid. NRS 233B.135(2). However, a Court
17 may set aside, in whole or in part, a final decision of an administrative agency where substantial rights
18 of the petitioner have been prejudiced because the final decision is in violation of statutory provisions,
19 affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial
20 evidence on the whole record, or arbitrary, capricious, or characterized by abuse of discretion. NRS
21 233B.135(3).

22 There are two (2) steps in the long-established methodology for applying the substantial
23 evidence standard set forth in NRS 233B.135(3)(e)-(f).

24 First, identifying the law which governs the contested issue, as such law establishes what facts
25 had to be proven, and how such facts had to be proven. United Exposition Service Co. v. State Indus.

1 Ins. Sys., 109 Nev. 421, 424, 851 P.2d 423 (1993); Horne v. State Indus. Sys., 113 Nev. 532, 936 P.2d
2 839 (1997); State Emp. Sec. Div. v. Reliable Health Care Servs., 115 Nev. 253, 983 P.2d 414 (1999);
3 Langman v. Nev. Admr's, Inc., 114 Nev. 203, 955 P.2d 188 (1998); Bullock v. Pinnacle Risk Mgmt.,
4 113 Nev. 1385, 1388, 951 P.2d 1036 (1997); Gubber v. Independence Mining Co., 112 Nev. 190, 192,
5 911 P.2d 1191 (1996); Installation & Dismantle v. State Indus. Ins. Sys., 110 Nev. 930, 879 P.2d 58
6 (1994); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355 (1983).

7 Second, review the record on appeal and determine whether the record contains both that
8 quantity and quality of factual evidence which a reasonable person could accept as adequate proof of
9 what the governing law requires. Id. If the record on appeal does not contain both that quantity and
10 quality of factual evidence which a reasonable person could accept as adequate proof of what the
11 governing law requires, then the decision of the administrative agency (Appeals Officer in this case)
12 may be deemed by the Court to be clearly erroneous in view of the reliable, probative and substantial
13 evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS
14 233B.135(3).

15 This Court has the authority and the responsibility to independently review an Appeals Officer's
16 application of the statutes governing the payment of workers' compensation benefits. See
17 Amazon.com v. Magee, 121 Nev. 632 (Nev. 2005); Washoe Co. School Dist. v. Bowen, 114 Nev. 879,
18 882, (1998). Therefore, this Court should address this matter anew, without deference to the Appeals
19 Officer's conclusions.

20 **B. The Cosmetology Professionals Who Contracted with IAS Are Expressly Excluded**
21 **From The Definition Of "Employee" Under The Nevada Industrial Insurance Act**
22 **("NIIA").**

23 Pursuant to the NIIA, NRS 616A.105 defines, in pertinent part, "Employee" and "worker" as:

24 *"every person in the service of an employer under any appointment or contract of hire or*
25 *apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed..."*

1 NRS 616A.110 then expressly excludes certain persons from the definition of Employee. Importantly,
2 NRS 616A.110(9)(c) expressly excludes any person who:

3 “*[p]erforms pursuant to a written agreement with the person for whom the services are*
4 *performed which provides that the person who performs the services is not an employee for the*
5 *purposes of this chapter.*” **[Emphasis added]**.

6 The cosmetology professionals clearly conform to this exclusion. Cosmetology professionals
7 acknowledge and agree that they are not employees as defined in NRS 616A for purposes of workers’
8 compensation coverage, but rather they are expressly exempted from the definition pursuant to NRS
9 616A.110(9)(c). **ROA at 299-376; ROA at 495-719.** Specifically, they are excluded from the
10 definition of employee because they perform services pursuant to a written Agreement, which expressly
11 provides that cosmetology professionals are not performing services as employees for purposes of NRS
12 616A. **Id.** Copies of proof of workers’ compensation coverage or a notice of sole proprietorship with
13 no employees are attached to the Agreements. **Id.**

14 Their contracts constitute written agreements between IAS and the cosmetology professional,
15 which provide that the cosmetology professionals who are performing services under the Agreement
16 are not employees for purposes of the NIIA. Further, each cosmetology professional expressly
17 acknowledges that IAS is not responsible for workers’ compensation coverage under the Agreement
18 and will not provide any such benefit under the Agreement. **Id.** Therefore, IAS is not required to
19 maintain workers’ compensation coverage on the cosmetology professionals they contract with because
20 they are expressly excluded from the definition of employee pursuant to NRS 616A.110(9)(c).

21 In accordance with the foregoing, the Appeals Officer erred as a matter of law in finding that
22 IAS had violated any laws pertaining to providing workers’ compensation coverage.

23 ///

24 ///

25 ///

1 **C. IAS Is Not The Statutory “Employer” Of The Cosmetology Professionals With Which**
2 **They Have Contracted.**

3 NRS 616B.603 expressly provides:

- 4 1. A person is not an employer for purposes of chapters 616A to 616D, inclusive of NRS if:
5 (a) The person enters into a contract with another person or business which is an
6 independent enterprise; and
(b) The person is not in the same trade, business, profession or occupation as the
independent enterprise.

7 **1. The Cosmetology Professionals Who Contract with IAS Meet The Definition**
8 **Of “Independent Contractors” Under Nevada Law.**

9 For purposes of Nevada’s workers’ compensation law, an “independent contractor” is defined
10 as:

11 . . . any person who renders service for a specified recompense for a specified result, under the
12 control of the person's principal as to the result of the person's work only and not as to the
means by which such result is accomplished.

13 NRS 616A.255. In determining whether an employer-employee relationship exists, the courts apply a
14 five-factor test, known as “the control test,” giving equal weight to the following factors:

- 15 (1) the degree of supervision;
16 (2) the source of wages;
17 (3) the existence of a right to hire and fire;
18 (4) the right to control the hours and location of employment; and
19 (5) the extent to which the workers’ activities further the general business concerns of the
20 alleged employer.

21 Clark County v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986). In applying these five factors to the
22 cosmetology professionals, each factor weighs in favor of independent contractor classification.

23 First, IAS does not supervise the cosmetology professionals. Rather, IAS merely ensures
24 cosmetology professionals comply with the terms of the independent contractor Agreements. **ROA at**
25 **113, line 16 to 114, line 21.** In this regard, Section 8 of the Agreement provides:

Instructor is associated with IAS only for the purposes and to the extent specified in this Agreement. Instructor is and shall be an independent contractor and, subject only to the terms of this Agreement and state laws applicable to the services performed, shall have the sole right to supervise, manage, operate, control, and direct performance of the duties incident to his or her duties under this Agreement. *** Instructor and his or her employees, agents, or representatives, shall not be considered employees, agents or representatives of IAS. IAS and Instructor shall monitor the work relationship throughout the term of this Agreement to ensure that the independent contractor relationship remains as such.

ROA at 500-501.

Second, the source of payment (wages) to cosmetology professionals is student tuition monies paid after an invoice is submitted to IAS. The Agreement provides that the cosmetology professional invoices IAS an hourly rate for services rendered. **ROA at 086, lines 19-23 & 090, lines 5-20; ROA at 149, 155, 162, 168, 174, 180, 186, 192, 200, 205, 211, 217, 223, 229; see also ROA at 381-465.** Cosmetology professionals are compensated based on the negotiated rate set forth in the Agreement. **ROA at 299-376; ROA at 495-719.** Cosmetology professionals bill IAS for their services as they see fit, provided they bill a minimum of once per month in order for IAS to keep accurate records of student accounts. **Id.** Chair rental fees are due once per month, although cosmetology professionals can choose at his or her own discretion to teach other general classes in lieu of the rental fee. **Id.** No other compensation is provided for the instruction of the general class(s) taught in lieu of the fee and the cosmetology professional has complete discretion on whether they pay the monthly fee or teach a class(es). **Id.**

Third, IAS does not hire and fire the cosmetology professionals. **ROA at 095, line 19 to 096, line 17.** Once an Agreement is entered into, the Agreement governs the relationship, including any termination of the Agreement and potential liability as a result of early termination or a breach. **ROA at 496-497 (Section 2 of Agreement).**

Fourth, IAS does not control or have the right to control the hours the cosmetology professionals work other than control over the hours of operation of the school. **ROA at 499 (Section 7 of Agreement provides, "Hours the Instructor desires to work are the sole discretion and control of the instructor.").** Cosmetology professionals have full control over the days and number of hours

1 they intend to provide services to IAS students. **Id.** Cosmetology professionals provide services when
2 they want to provide services. **Id.** The cosmetology professionals set their own schedules and hours of
3 work and they are free to change said hours as needed. Each cosmetology professional dictates to IAS
4 the schedule they will work under the Agreement. **Id.**; **see also** ROA at 090, lines 1-3; 092, line 15 to
5 **093, line 9.** Additionally, while the services primarily take place on campus, cosmetology professionals
6 are not limited to campus and are free to conduct their services in other locations at their choosing.
7 **ROA at 499; ROA at 095, lines 2-12.**

8 Finally, the cosmetology professionals' services do not further the general business concerns of
9 IAS; rather, they provide a unique benefit **to IAS students.** **ROA at 496.** IAS can conduct its business
10 with or without the cosmetology professionals. In other words, IAS contracts with the cosmetology
11 professionals solely for the **students' benefit**, not because they are necessary for IAS to conduct its
12 business of education and instruction. **ROA at 084, line 7 to 086, line 8.**¹

13 Based on all the foregoing, the Appeals Officer's conclusion that the cosmetology professionals
14 are not classified as independent contractors, but rather as employees of IAS, is erroneous.

15 **2. The Cosmetology Professionals Who Contract With IAS Are "Independent**
16 **Enterprises."**

17 In addition to being "independent contractors", the cosmetology professionals satisfy the
18 definition of "independent enterprises." Pursuant to NRS 616B.603(2), an "independent enterprise" is
19 a person who holds himself out as being engaged in a separate business and holds a business license in
20 his own name or owns, rents, or leases property used in furtherance of his or her business.

21 _____
22 ¹ At the hearing before the Appeals Officer, Loni Casteel explained:

23 "... we wanted people that actually were still working and still active in the industry so that the
24 students would in fact then learn the most current techniques and the most current ways of doing
25 anything. ... We thought that when we brought in people for demos and the students really got a good
education out of the demo. ... So that the students have a well-rounded education. ... the more
different ways you can show a student how to do something, the highly likely you're going to actually
connect with that student."

1 All cosmetology professionals hold themselves out to be engaged in separate businesses from
2 IAS, including having their own business licenses in their own names and/or owning/renting property
3 in furtherance of their businesses. **ROA at 299-376; ROA at 495-719.** Business licenses are provided
4 and attached to the Agreements. **Id.; see also ROA at 150-154; 156-161; 163-167; 169-173; 175-179;**
5 **181-185; 187-191; 193-199; 201-204; 206-210; 212-216; 218-222; 224-228; 231-233; see also ROA**
6 **at 381-465.** Each of the cosmetology professionals also operated under state and city business licenses.
7 **Id.**

8 Moreover, all of the cosmetology professionals lease a chair from IAS to perform teaching and
9 consulting services, and many, if not all, lease space in a salon to conduct their own businesses. **See**
10 **ROA at 471-489 (witness statements).**

11 Therefore, the Appeals Officer should have concluded that the cosmetology professionals are
12 independent enterprises as defined in NRS 616B.603(2).

13 **3. The Cosmetology Professionals Who Contract With IAS Are Not In The**
14 **“Same Trade” As IAS.**

15 The cosmetology professionals are not in the “same trade” as IAS. The Nevada Supreme Court
16 applies the Meers test to determine whether an independent contractor is a statutory employee for
17 purposes of workers’ compensation coverage. Meers v. Haughton Elevator, 101 Nev. 283, 286, 701
18 P.2d 1006, 1007 (1985). Under Meers, the Nevada Supreme Court stated that the type of work
19 performed by the independent contractor determines whether an employment relationship exists. **Id.**
20 The test is not whether the independent contractor’s activity is useful, necessary or even absolutely
21 indispensable to the statutory employer’s business; rather, the test is whether that “indispensable
22 activity” is, in that business, normally carried on through employees rather than independent
23 contractors. **Id.** This test is codified in NRS 616B.603, which states that an employment relationship
24 only exists if the parties are, “in the same trade, business, profession or occupation.”
25

1 Here, the cosmetology professionals are not in the same trade, business, profession or
2 occupation as IAS as defined by the statute and Nevada case law.

3 First, the services provided by the cosmetology professionals are not indispensable to IAS. As
4 previously stated, the cosmetology professionals are there to expose the students to a broad range of
5 experience and expertise in the industry merely as an added benefit to the students. The school can
6 operate without any of the cosmetology professionals' services. Cosmetology professionals who
7 provide consulting services and teach at IAS are professionals who primarily work at salons in
8 Northern Nevada. **Id.; see also ROA at 471-489 (witness statements).** These cosmetology
9 professionals are not in the education business. **Id.; see also ROA at 085, lines 11-16.** Importantly,
10 the consulting services and teaching provided by cosmetology professionals are not integral to the
11 operation of IAS, but rather are provided for the benefit of students by IAS to expose them to a broad
12 range of experience, expertise and techniques in the various areas of cosmetology. **Id.** IAS can operate
13 without the use of these independent contractor because the two owners of IAS are licensed instructors
14 who are primarily responsible for providing the education needed by students. **Id.**²

15 Second, the services the cosmetology professionals provide to IAS students are not services
16 normally carried on through employees in IAS rather than independent contractors. In fact, no
17 employees whatsoever carry on the same services as the cosmetology professionals. Accordingly,
18 under the Meers test, IAS is not a statutory employer because the activities of the cosmetology
19 professionals are not indispensable to IAS and said activities, in this business, are not normally carried
20 on through employees.

23 ² See ROA at 086, lines 9-23, "JASON GUINASSO: So, notwithstanding the benefits of having people in the
24 salon business come in and assist you in your education business, can-notwithstanding those benefits, could
your school deliver quality-the education that you're in the business of delivering without those contractors?
LONI CASTEEL: Yes.
25 JASON GUINASSO: Are these contractors an integral part of your business operation?
LONI CASTEEL: They're not a have to, no."

1 Furthermore, the cosmetology professionals are akin to booth renters in salons. It has long been
2 established and accepted in this industry (and in Nevada) that salon owners are not required to maintain
3 workers' compensation coverage on booth renters/independent contractors who lease space in a salon.
4 In fact, Nevada law clearly recognizes this type of business model in this industry. NAC 644.307 states
5 specifically that an "owner of a cosmetological establishment may lease space only to licensed
6 manicurists, electrologists, hair designers, aestheticians and cosmetologists within the premises of his
7 establishment." In the same manner as a salon leases space to licensed professionals within the
8 premises of the salon, IAS has set up its business model to lease space to cosmetology professionals
9 within the premises of its school solely for the purpose of providing an added benefit to IAS students.
10 In this regard, IAS acts more as a landlord during the time the cosmetology professionals are providing
11 services to IAS students. Accordingly, because IAS's business model is akin to salons that lease space
12 to booth renters and, under this type of business model in this industry salon owners are not required to
13 maintain workers' compensation coverage on the booth renters, IAS is also not required to maintain
14 workers' compensation coverage on its independent contracting cosmetology professionals.

15 Based on all of the foregoing, IAS respectfully requests that the Appeals Officer's conclusion
16 that the cosmetology professionals are not independent enterprises that are not in the same trade as IAS,
17 and therefore finding that IAS is required by law to maintain workers' compensation coverage on the
18 cosmetology professionals, be reversed.

19 **4. Other Considerations.**

20 In addition to all of the foregoing points and authorities, the following factors demonstrate that
21 the cosmetology professionals subject to the revised Agreements with IAS are not employees of IAS:

- 22 • No cosmetology professionals work as a supervisory instructor.
- 23 • No cosmetology professional is responsible for opening and closing the facility, although
24 cosmetology professionals do have keys in order to provide their services on their own
25 schedules.

- 1 • No cosmetology professional performs “a variety of tasks” at IAS’ direction.
- 2 • IAS has not terminated cosmetology professionals from any employment.
- 3 • IAS does not have the right to control and direct the cosmetology professionals’ daily manner
- 4 and means of work.
- 5 • No cosmetology professional is required to follow IAS’s instructions.
- 6 • No cosmetology professional is prohibited from refusing work or fears ramification if work is
- 7 refused.
- 8 • No cosmetology professional is required to work exclusively for IAS.
- 9 • No cosmetology professional is expected to locate an “employee” to cover his or her work.
- 10 • No cosmetology professional’s job duties consist of opening the school, working the front desk,
- 11 answering phones, or supervising other cosmetology professionals.
- 12 • No cosmetology professional’s services are a direct extension and integral part of IAS’s
- 13 commercial business enterprise.
- 14 • No cosmetology professional is required to perform assigned tasks in the order of sequence
- 15 prescribed by IAS.
- 16 • No cosmetology professional assists in managing the school operations, school staff, and the
- 17 school’s instructional programs as directed.
- 18 • No cosmetology professional is employed for the specific purpose of assisting in the
- 19 management of the school under contract with IAS.

20 All of these additional considerations provide further support that the Appeals Officer
21 erroneously concluded that DIR committed no mistake when concluding that there was an
22 employer/employee relationship between IAS and the cosmetology professionals they contract with.

23 ///

24 ///

1 **D. IAS Is Not Required To Maintain Workers' Compensation Coverage On Cosmetology**
2 **Professional Because It Is Not Liable For Payment Of Compensation Under The NIIA**
3 **For Any Industrial Injury Suffered By A Cosmetology Professional.**

4 IAS is not responsible for maintaining workers' compensation coverage for the cosmetology
5 professionals because they have agreed to maintain their own coverage and have acknowledged in the
6 Agreement that IAS will not provide this benefit. NRS 616B.639 expressly states a:

7 “principal contractor is not liable for the payment of compensation for any industrial injury to
8 any independent contractor or any employee of any independent contractor if:

9 (a) The contract between the principal contractor and the independent contractor is in
10 writing and the contract provides that the independent contractor agrees to maintain coverage
11 for industrial insurance pursuant to chapters 616A to 616D, inclusive, of NRS;

12 (b) Proof of such coverage is provided to the principal contractor;

13 (c) The principal contractor is not engaged in any construction project; and

14 (d) The independent contractor is not in the same trade, business, profession or
15 occupation as the principal contractor.”

16 Each Agreement between IAS and each cosmetology professional clearly states that he or she
17 acknowledges a duty to comply with all City, State and federal laws required of independent
18 contractors. The Agreements also clearly state that IAS will not provide workers' compensation
19 coverage for cosmetology professionals and the cosmetology professionals are responsible for
20 complying with all state and federal laws. Id.

21 **E. Both The Benefit Penalty Of \$251.10 And Of \$16,190.19 Assessed Against IAS Were**
22 **Unlawfully Charged.**

23 NRS 616D.200(1) provides:

24 If the Administrator finds that an employer within the provisions of NRS 616B.633 has failed to
25 provide and secure compensation as required by the terms of chapters 616A to 616D, inclusive,
or chapter 617 of NRS or that the employer has provided and secured that compensation but has
failed to maintain it, the Administrator shall make a determination thereon and may charge the
employer an amount equal to the sum of:

(a) The premiums that would otherwise have been owed to a private carrier pursuant to the
terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS, as determined by the
Administrator based upon the manual rates adopted by the Commissioner, for the period that the
employer was doing business in this State without providing, securing or maintaining that
compensation, but not to exceed 6 years; and

1 (b) Interest at a rate determined pursuant to NRS 17.130 computed from the time that the
2 premiums should have been paid.

3 The money collected pursuant to this subsection must be paid into the Uninsured Employers'
4 Claim Account.

5 2. The Administrator shall deliver a copy of his or her determination to the employer. An
6 employer who is aggrieved by the determination of the Administrator may appeal from the
7 determination pursuant to subsection 2 of NRS 616D.220.

8 Here, as set forth fully herein above, DIR has failed to establish that IAS is the statutory
9 employer of the cosmetology professionals.

10 However, even assuming *arguendo* that the cosmetology professionals are found to be
11 employees of IAS, DIR has failed to establish that the cosmetology professionals did not have workers'
12 compensation coverage from December 1, 2016, to December 30, 2016, and/or for the five year period
13 proceeding December 1, 2016. In 2016, for the year of 2017, each cosmetology professional that
14 planned to continue to do work for IAS obtained a Certificate of Liability Insurance, signed an
15 Independent Instructor Agreement, and acquired a Sole Proprietor Business License in the state of
16 Nevada. **ROA at 495-719.**

17 IAS obtained Certificates of Liability Insurance for 2016 and 2017. **ROA at 724-725.**

18 Nevertheless, despite the fact that all cosmetology professionals had workers' compensation
19 coverage either through their own coverage or through coverage provided by IAS, on March 14, 2017,
20 DIR rendered two determinations. One determination notified IAS of the premium penalty owed in the
21 amount of \$251.10 for alleged non-coverage for the period of December 1 to December 30, 2016. The
22 other determination notifying IAS of the premium penalty owed in the amount of \$16,390.94 for
23 alleged non-coverage during the period December 21, 2010, to November 30, 2015. DIR had no lawful
24 basis to charge these penalties.

25 Moreover, the five-year lookback was unlawfully applied under the doctrine of res judicata or
issue preclusion. The following factors are necessary for application of issue preclusion: "(1) the issue
decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial

1 ruling must have been on the merits and have become final; ... (3) the party against whom the judgment
2 is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was
3 actually and necessarily litigated.” Five Star Capital Corporation v. Ruby, 124 Nev. 1048, 1054, 194
4 P.3d 709, 713 (2008). Here, if DIR were going to assess such a penalty, the time to have assessed that
5 penalty was in 2015 when it made its final determination regarding the status of the cosmetology
6 professional working for IAS. In this regard, on October 25, 2016, the State dismissed its claims
7 against IAS. **ROA at 132-134.** The rights of DIR relative to December 21, 2010, to November 30,
8 2015, had been asserted in both a penalty and a fine pursuant to an agreement with the State of Nevada.
9 Therefore, the Appeals Officer should bar DIR from assessing a penalty as a matter of law under the
10 doctrine of issue preclusion.

11 DIR should also be barred by the doctrine of laches from assessing the premium penalties
12 against IAS it now seeks. The doctrine of laches is based on the maxim that "equity aids the vigilant
13 and not those who slumber on their rights." See Black's Law Dictionary. Laches is, simply put,
14 negligence, consisting in the omission of something which a party might do, and might reasonably be
15 expected to do, towards the vindication or enforcement of his rights. **Id.** The outcome is that a legal
16 right or claim will not be enforced or allowed if a long delay in asserting the right or claim has
17 prejudiced the adverse party. Laches is an equitable doctrine which may be invoked when delay by one
18 party works to the disadvantage of the other, causing a change of circumstances which would make the
19 grant of relief to the delaying party inequitable.” Building & Constr. Trades v. Public Works, 108 Nev.
20 605, 610–11, 836 P.2d 633, 636–37 (1992); Carson City v. Price, 113 Nev. 409, 412, 934 P.2d 1042,
21 1043 (1997). Elements of laches include knowledge of a claim, unreasonable delay, neglect, which
22 taken together cause actual prejudice to defending party. If you have a legal claim, you have to act on
23 it in a timely manner.

24 Again, if DIR was going to assess such premium penalties for the five-year period of December
25 21, 2010, to November 30, 2015, the time to have assessed that penalty was in 2014 when the State first

1 intervened and investigated IAS. DIR's negligence in doing what it might well have been expected or
2 required to do should not be overlooked to the detriment of IAS, especially when all cosmetology
3 professionals have had workers' compensation coverage and the State's interests have not been harmed
4 in any way. Accordingly, DIR's attempt to charge a premium penalty against IAS should be reversed
5 by the Appeals Officer.

6 Finally, DIR should be equitably estopped from asserting premium penalties against IAS. In
7 this regard, equitable estoppel operates as a bar to a party from asserting a legal claim or defense that is
8 contrary or inconsistent with his or her prior action of conduct. "Equitable estoppel functions to
9 prevent the assertion of legal rights that in equity and good conscience should not be available due to a
10 party's conduct." In re Harrison Living Tr., 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005).
11 There are four elements of equitable estoppel: (1) the party to be estopped must be apprised of the true
12 facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting
13 estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant
14 of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be
15 estopped. Among other things, "silence can raise an estoppel quite as effectively as can words."

16 Here, IAS agreed to make sure that all cosmetology professionals had workers' compensation
17 coverage from 2015 to present. IAS fulfilled its duty and all cosmetology professionals engaged as
18 instructors had workers' compensation coverage either through IAS or through their own policies. IAS
19 took these actions with the reasonable expectation that any dispute over whether workers'
20 compensation coverage had been provided for the cosmetology professionals had been fully and finally
21 resolved. This expectation was codified in an agreement with the State and honored by DIR as evinced
22 by the fact that DIR did not assess a premium penalty in 2015. Now, inexplicably, DIR is attempting
23 to charge a penalty that it had waived as a result of IAS entering into an agreement with the State of
24 Nevada to make sure there was workers' compensation coverage for each of the cosmetology
25 professionals engaged with IAS. Based on these facts, DIR should be equitably estopped from acting

1 in bad faith and charging a premium penalty for periods preceding 2015 and the Decision and Order of
2 the Appeals Officer should be REVERSED.

3 **VIII. CONCLUSION**

4 In accordance with the foregoing, Petitioner, IAS, respectfully requests that the Petition for
5 Judicial Review be GRANTED.

6 **AFFIRMATION**

7 The undersigned does hereby affirm that the foregoing document filed in this matter does not
8 contain the social security number of any person.

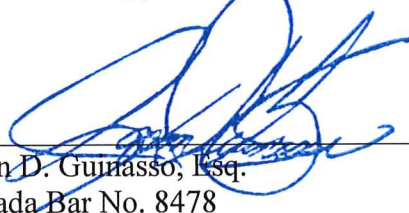
9 DATED this 1st day of June 2020

10 
11 Jason D. Guinasso, Esq.
Attorney for International Academy of Style

12 **IX. ATTORNEY'S CERTIFICATE OF COMPLIANCE**

13 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
14 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that
15 this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P.
16 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a
17 reference to the page of the transcript or appendix where the matter relied on is to be found. I
18 understand that I may be subject to sanctions in the event that the accompanying brief is not in
19 conformity with the requirements of the Nevada Rules of Appellate Procedure.

20 Dated this 1st day of June 2020.

21 
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1 **CERTIFICATE OF SERVICE**

2 I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the
3 within action. My business address is 500 Damonte Ranch Parkway, Suite 980, Reno, NV 89521.

4 On June 1, 2020, I served the following:

5 **OPENING BRIEF**

6 on the following in said cause as indicated below:

7 INTERNATIONAL ACADEMY OF STYLE 8 BONNIE SCHULTZ & LONI CASTEEL 2295 MARKET STREET 9 RENO, NV 89502 (VIA U.S. MAIL)	LEGAL SECTION DIVISION OF INDUSTRIAL RELATIONS 400 WEST KING STREET, SUITE 201 CARSON CITY, NV 89703 (VIA U.S. MAIL)
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15
16 I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1,
17 2020, at Reno, Nevada.

18 
19 _____
KATRINA A. TORRES

**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE**

INTERNATIONAL ACADEMY OF STYLE,

Petitioner,

vs.

DIVISION OF INDUSTRIAL RELATIONS,
and the NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

Respondents.

Case No.: CV20-00445

Dept No.: 8

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I. OVERVIEW

Respondent State of Nevada, Department of Business and Industry, Division of Industrial Relations ("DIR"), is a state regulatory agency. DIR's Workers' Compensation Section ("WCS") is charged with ensuring the timely and accurate delivery of workers' compensation benefits and employer compliance with mandatory coverage provisions. NRS 616A.400. Workers' compensation insurance is mandatory in Nevada. NRS 616B.633 provides as follows:

NRS 616B.633 Applicability to all employers who employ at least one employee.

Where an employer has in his service any employee under a contract of hire, except as otherwise expressly provided in chapters 616A to 616D, inclusive, of NRS, the terms, conditions and provisions of those chapters are conclusive, compulsory and obligatory upon both employer and employee.

NRS 616D.120 and NRS 616D.200 provide DIR and the Attorney General's Workers' Compensation Fraud Unit ("WCFU") with methods of pursuing employers who fail to insure their worksite and employees. It states in relevant part:

NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.

1. If the Administrator finds that an employer within the provisions of NRS 616B.633 has failed to provide and secure compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS or that the employer has provided and secured that compensation but has failed to maintain it, he shall make a determination thereon and **may charge the employer an amount equal to the sum of:**

(a) **The premiums that would otherwise have been owed to a private carrier pursuant to the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS**, as determined by the Administrator based upon the manual rates adopted by the Commissioner, for the period that the employer was doing business in this state without providing, securing or maintaining that compensation, but not to exceed 6 years; and

(b) Interest at a rate determined pursuant to NRS 17.130 computed from the time that the premiums should have been paid.

↳ The money collected pursuant to this subsection must be paid into the Uninsured Employers' Claim Account.

NRS 616D.200(1) (emphasis added).

In 2014, the WCFU conducted an investigation into Petitioner, International Academy of Style ("IAS" or Petitioner). A criminal complaint was filed against IAS pursuant to NRS 616D.200(3)(a)¹ for a misdemeanor violation of NRS 616D.200(3)(a) for failing to maintain workers' compensation coverage for its employees for the period of December 21, 2010 through September 2, 2015.² IAS

NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.

3. Any employer within the provisions of NRS 616B.633 who fails to provide, secure or maintain compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS, shall be punished as follows:

(a) Except as otherwise provided in paragraph (b), if it is a first offense, for a misdemeanor.

NRS 616D.600 Prosecution of criminal actions by Attorney General: Prosecution not precluded by commencement of civil action; duty to furnish information to assist in prosecution; penalty.

1. The Attorney General may prosecute all criminal actions for the violation of any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive. The commencement of a civil action by the Attorney General pursuant to NRS 616D.230 or 616D.430 or for the recovery of any civil penalties, fines, fees or assessments imposed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS does not preclude the prosecution of a criminal action by the Attorney General pursuant to this section.

1 then completed the terms of a deferred prosecution agreement on March 17, 2016
2 and the charges were dismissed on October 19, 2016.

3 As part of the deferred prosecution agreement, IAS obtained workers'
4 compensation insurance for the business effective December 1, 2015. However, IAS
5 failed to renew the policy once the charges were dismissed, effective December 1,
6 2016. DIR was then informed of the cancelled policy and notified IAS by mail to its
7 owners, Loni Casteel and Bonnie Schultz, of its obligation to maintain workers'
8 compensation coverage and that failure to provide evidence the business was closed
9 or had no employees would result in further action taken by the state including a
10 premium penalty. IAS' attorney informed DIR that IAS had a "formal agreement
11 with DIR" that it was not required to cover instructors. A new workers'
12 compensation policy was obtained effective on December 31, 2016.

13 DIR conducted an investigation and issued a determination dated March 14,
14 2017 to impose a premium penalty in the amount of \$16,390.94 for the lapse of
15 coverage from December 21, 2010 through November 30, 2015. IAS appealed the
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24 2. Upon request, any person shall furnish to the Attorney General
25 information which would assist in the prosecution of any person
26 alleged to have violated any of the provisions of NRS 616D.200,
27 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440,
28 inclusive. Any person who fails to furnish such information upon
request is guilty of a misdemeanor.

1 determination to the Appeals Officer.³ DIR also issued a determination for the period
2 of time from December 1, 2016 through December 30, 2016 on March 14, 2017 in
3 the amount of \$251.10. IAS appealed this determination on March 20, 2017. DIR
4 amended the first determination assessing a premium penalty for the period
5 December 31, 2010 through December 1, 2015 for a corrected amount of
6 \$16,190.15.
7

8 IAS argued that its personnel were all independent contractors and therefore,
9 IAS was not required to provide any of the personnel with workers' compensation
10 insurance. IAS also argued that the instructors/personnel are engaged in an
11 independent enterprise pursuant to NRS 616B.603. The Division argued that IAS
12 was a licensed school of cosmetology which was required to have at least two
13 licensed instructors on premises and are in the same trade or business as NAS.
14 Therefore, the instructors were employees and not independent contractors nor
15 operated in an independent enterprise.
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19 The Appeals Officer issued a Decision and Order finding that the instructors
20 were not independent contractors and that the premium penalties were calculated and
21 imposed properly. The Appeals Officer found IAS's other arguments to be without
22 merit as well. IAS thereafter filed the instant petition for judicial review.
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26 ³ An aggrieved party has the right to file a request for hearing with the Department
27 of Administration, Hearings Division, Appeals Officer ("Appeals Officer"), an
28 administrative law judge. NRS 616C.220(9).

II. ISSUE PRESENTED FOR REVIEW

Whether the Appeals Officer's Decision and Order filed February 20, 2020 affirming DIR's determinations to assess two premium penalties is supported by substantial evidence in the record.

III. STATEMENT OF FACTS

IAS is a school of cosmetology licensed by the Nevada Board of Cosmetology whose mission statement is to "reach all students and equip them with the skills they need to be successful in the professional industry of cosmetology to mentor students to have a command of skill so they can make a positive difference in the world." Record on Appeal ("ROA") at 775. In 2014, the WCFU for the State of Nevada investigated IAS. ROA 857. A criminal complaint, Case No. RCR2015-083504, was filed by the WCFU for a misdemeanor violation of NRS 616D.200(3)(a) for not maintaining workers' compensation insurance for its employees for the period of December 21, 2010 through September 2, 2015. ROA 927-928. IAS entered into a deferred prosecution agreement. IAS completed the terms of the deferred prosecution agreement on March 17, 2016 and on October 19, 2016, charges were dismissed. ROA 926, 945.

IAS obtained workers' compensation for the business effective December 1, 2015. ROA 735. However, once the criminal complaint was dismissed, IAS decided not to renew its workers' compensation insurance policy effective December 1, 2016. ROA 738. DIR received notification from the National Council of

1 Compensation Insurance ("NCCI") that IAS's policy lapsed. ROA 961. The
2 Attorney General's office also sent DIR documentation of the prior lapse from 2010
3 through 2015. ROA 961-962. On December 14, 2016, the Division notified IAS by
4 mail to its owners Schultz and Casteel that the business was required to maintain
5 workers' compensation insurance. ROA 823. Failure to provide evidence of
6 workers' compensation insurance or evidence the school was out of business or had
7 no employees would result in further action taken by the State of Nevada including
8 the imposition of a premium penalty pursuant to NRS 616D.200(1). ROA 825.
9

11 IAS' attorney called DIR to request a two week extension to obtain workers'
12 compensation insurance. He also stated that there was a "formal agreement with
13 DIR. Do not need to cover instructors as they all work at other salons." ROA 824.
14 IAS did obtain a new workers' compensation policy which was effective December
15 31, 2016. ROA 879-881. No evidence of this "formal agreement" has been
16 produced by IAS.
17

19 On December 31, 2016, DIR investigators visited the business at
20 approximately 10:59 a.m. ROA 875-876. The doors were locked with a sign posted
21 reading that the business was closed through January 1, 2017. Investigators posted a
22 Stop Work Order. ROA 874. A woman inside the building noticed the sign and
23 identified herself as Char and stated she was an employee. ROA 875. Char
24 contacted one of the owners, Bonnie Schultz, who arrived at the business. Ms.
25 Schultz stated IAS has independent contractors, not employees. Investigators
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1 informed Ms. Schultz that the so-called independent contractors did not meet the
2 criteria for an exemption from workers' compensation coverage. For example, the
3 investigators mentioned two individuals, Amber Larosa and Maggie Rosado, who
4 did not have cosmetology licenses. Ms. Schultz stated Ms. Larosa was not a
5 cosmetologist but rather performed admissions and financial aid tasks for the school.
6
7 ROA 875. Investigators confirmed IAS obtained a workers' compensation policy
8 that same day and removed the Stop Work Orders. ROA 876.
9

10 Upon completion of its investigation, DIR issued a determination dated March
11 14, 2017 imposing a premium penalty in the amount of \$16,390.94 for a lapse in
12 coverage from December 21, 2015 through November 30, 2015. ROA 889-890.
13 IAS appealed that determination to the Appeals Officer on March 20, 2017. DIR
14 issued a second determination on March 14, 2017 imposing a premium penalty for
15 the lapse in coverage from December 1, 2016 through December 30, 2016. ROA
16 729-732. IAS also appealed this determination on March 20, 2017. ROA 886. On
17 June 9, 2017, DIR issued a determination amending the dates of the initial lapse
18 from December 21, 2010 through December 1, 2015 to December 31, 2010 through
19 December 1, 2015 for a corrected premium penalty of \$16,190.15. ROA 965.
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22 IAS argued to DIR that all personnel are independent contractors for whom
23 IAS was and is not required to insure for workers' compensation protection. On
24 December 20, 2016, IAS' attorney sent DIR copies of Certificates of Liability
25 Insurance for Maggie Rosado aka Maggie Vong, Amber Larosa, Charissa Banks,
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1 Mychel Christian, Laura Hartman, Jeannine Achter, Meledie Wolf, and Melissa
2 Wolf. However, those policies appeared to be general liability insurance rather than
3 workers' compensation policies. ROA 932-939. Moreover, the policies all had
4 effective dates ranging from October 19, 2016 through November 1, 2016, well after
5 the first lapse period expired on December 1, 2015. *Id.*

7 In preparation for the evidentiary hearing at the Appeals Office, IAS produced
8 additional Certificates of Liability Insurance for Ashley Singer, Faustine Flamm, and
9 Cheyanna Wolf. ROA 495-719. Once again, these policies appeared to be general
10 liability insurance rather than workers' compensation coverage and none of them
11 was in effect during the initial lapse period from 2010 through 2015. In addition,
12 IAS produced "Independent Instructor Agreements ("Agreements"), W-9 forms,
13 Nevada State and Reno business licenses for Charissa Banks, Melissa Wolf, Meledie
14 Wolf, Laura Hartman, Jeannine Achter, Maggie Rosado aka Maggie Vong, Mychel
15 Christian, Ashley Singer, Faustine Flamm, and Cheyanna Wolf. ROA 495-719.

19 Said Agreements purported to declare each instructor an independent
20 contractor. Each contractor declared that he or she provided cosmetology services,
21 hair design services, licensed instructor services and aesthetician and/or nail
22 technology services. ROA 709-717. Each Agreement claimed that while IAS was
23 an educational facility licensed pursuant to NRS 644.380 to conduct a school of
24 cosmetology, it further claimed to abrogate the legal requirements of a school of
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1 cosmetology licensed under NRS 644.395, which requires IAS to maintain a staff of
2 at least two licensed instructor and other requirements. *Id.*

3 Many of the Agreements required the Instructor to pay a monthly chair rental
4 agreement to IAS while one did not [Ashley Singer]. ROA 662. Each Agreement
5 contained a Schedule of Services wherein it states, "Instructor must perform services
6 under this Agreement for IAS students during IAS regularly scheduled hours unless
7 Instructor and student(s) agree in writing to hours outside of normal IAS hours."
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9 See, e.g., ROA 663. Each Agreement contained a schedule during which the
10 Instructor was to work between Tuesday and Saturday with hours ranging from 8:45
11 a.m. to 10:30 p.m. In addition, IAS stated in the Agreement that "IAS will not be
12 responsible for cancellations, substitutions or modifications to the above schedule
13 under this Agreement." See, e.g., ROA 664. Moreover, "student complaints
14 regarding an Instructor not fulfilling any promises or requirements under this
15 Agreement may subject Instructor to a breach of this Agreement and any liabilities
16 that arise out of said breach." *Id.*
17

18 The Agreements also required that "actual service of instruction provided to
19 students under this Agreement must be performed by Instructor personally, as the
20 services agreed to are specialized in nature based on Instructor's own personal
21 experience, skill and knowledge. ROA 663-664.
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23 An evidentiary hearing in front of the Appeals Officer was held on November
24 6, 2018. ROA 64-120. At the hearing, Loni Casteel testified that IAS opened in
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1 1998 and started using salon workers in the same year. ROA 87, ll. 8-15. She
2 claimed that IAS always had agreements dating back to 1998 but said agreements
3 dated prior to 2012 were never produced. She testified that the instructors set their
4 own schedules; that they can teach at other schools but seldom do. Some do product
5 demonstrations. ROA 92, ll. 18-24; 95, ll. 6-12. She also testified the instructors
6 perform no other tasks and that a no-show does not have any effect on the instructor.
7 ROA 97, ll. 13-16. She herself testified her responsibilities include student aid and
8 instructor for nails. The co-owner, Bonnie Schultz, also instructs in hair, skin and
9 nails. ROA 84, ll. 1-3. Ms. Casteel testified that in 1998, IAS had 25 students and
10 from 2010 through 2015 had 50 students. ROA 97, ll. 13-16. She testified she
11 changed contracts in 2015-2016 because an unemployment compensation claim was
12 filed by one of the instructors. ROA 109, ll. 1-9; 110, ll. 11-25. Of consequence,
13 the Department of Employment, Training and Rehabilitation ("DETR") found the
14 individual who filed the unemployment claim was in fact an employee, not an
15 independent contractor. ROA 142.

16 IAS argued that NRS 616A.110(9)(c) expressly excludes employees who
17 perform services pursuant to a written agreement and that since the instructors had
18 written agreements with IAS about the services they provided, they are not
19 employees. In the Decision and Order dated February 19, 2020, the Appeals Officer
20 issued a finding of fact that "the instructors do not solicit or sell products and do not
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1 receive remuneration based on sales, NRS 616A.110(9) does not apply to exclude the
2 instructors as employees of IAS.” ROA 6.

3 IAS next claimed that the instructors are engaged in an independent enterprise
4 and should have been classified as independent contractors and not employees. DIR
5 responded that as a licensed school of cosmetology, IAS was required to have at least
6 two licensed instructors on premises and who are in the same trade or business as
7 IAS, and therefore, do not meet the definition of independent enterprise pursuant to
8 NRS 616B.603. In the Decision and Order, the Appeals Officer found:
9

11 that the substantial, probative and relevant evidence shows that
12 the instructors are clearly furthering the operation of the business
13 of the school by providing the instruction necessary to qualify as
14 a cosmetology school. The instructors are clearly in the same
15 trade business, occupation or profession as Ms. Casteel and Ms.
16 Schultz.

17 ROA 6.

18 IAS further argued that the instructors are independent contractors pursuant to
19 NRS 616A.255 and the five factor test enunciated in *Clark County v. SIIS*, 102 Nev.
20 353 (1986). The five factors to be weighed to determine independent contractor
21 status are (1) the degree of supervision; (2) the source of wages; (3) the existence of
22 a right to hire and fire; (4) the right to control the hours and location of employment;
23 and (5) the extent to which the worker’s activities further the general business
24 concerns of the alleged employer. ROA 6.

25 The Appeals Officer specifically found **the testimony of Ms. Casteel** to be
26 “self-serving and appeared scripted and therefore **not found to be credible.**” ROA
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6 (emphasis added). The Appeals Officer also found **the witness statements** introduced by IAS to be “nearly verbatim and obviously prepared by the same individual and **therefore were given no weight.**” *Id.* (Emphasis added).

The Appeals Officer issued the following finding of fact:

...IAS must ensure that the instructors are providing proper instruction according to the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary. Second, the source of wages come from IAS. Simply designating a specific account does not negate this fact. A certain amount of money is set aside from student tuition to provide for compensation to the instructors similar in fashion to [a] corporation setting aside a certain amount of profit for the compensation of employees. Third, IAS argues that it does not have a right to hire and fire. Clearly, IAS has a right to sever a relationship with an instructor that is not teaching according to the guidelines of the Board of Cosmetology. Fourth, IAS controls the location of employment since the instruction must be done at the school. The instructor is not allowed to provide the instruction at a salon or residence. The hours are controlled by the school as two instructors are required to be present at all times. Lastly, obviously the instructors are furthering the business concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz who also both instruct students. Therefore, the instructors are not independent contractors.

ROA 6-7.

The Appeals Officer also found IAS’s argument that *res judicata* applies, to be in error. She found that DIR was not a party to the prosecution by the Nevada Attorney General. *Res judicata* requires identical issues and identical parties and therefore, it is inapplicable to the case at bar. Likewise, the doctrine of laches does not apply. The Appeals Officer found that the premium penalty was issued for the

1 period of December 1, 2010 through November 30, 2015. DIR issued its
2 determination on March 14, 2017. No statute requires DIR to issue a premium
3 penalty within a certain time frame. Moreover, 15 months is not an extensive period
4 of time in which to investigate an employer/employee relationship. Lastly, the
5 Appeals Officer found that IAS was not disadvantaged by the delay. ROA 7.
6

7 As to IAS's argument that equitable estoppel applies due to the fact that DIR
8 honored an agreement with the State during the prosecution, the Appeals Officer
9 found no evidence to exist for IAS's assertion. ROA 7. Furthermore, the Appeals
10 Officer found that equitable estoppel requires the party asserting the estoppel be
11 ignorant of the true state of the facts in the matter. "Although IAS may not have
12 understood the law regarding the requirement to carry workers' compensation
13 coverage for its employees, they were not ignorant of any facts in this matter." *Id.*
14

15 The Appeals Officer found that IAS's argument mainly revolved around the
16 fact that it alleged to have agreements in place with its instructors. However, there
17 were additional staff members who were not instructors or licensed cosmetologists.
18 The Appeals Officer noted that "NRS 616B.609 renders void any agreement
19 designed to modify liability under Chapters 616A to 616D of the NRS." ROA 7.
20

21 Ultimately, the Appeals Officer found that based upon the totality of the
22 probative, substantial and relevant evidence, that IAS staff members were employees
23 and that IAS was required to but failed to maintain workers' compensation coverage
24 for these employees. The Appeals Officer affirmed DIR's determination to impose
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1 both premium penalties and the amount of each penalty. ROA 8. After the Appeals
2 Officer issued the Decision and Order, IAS filed the instant petition for judicial
3 review.

4 IV. ARGUMENT

5 A. Standard of Review

6 Pursuant to the Nevada Administrative Procedure Act, when a party alleges
7 that a final decision of an administrative agency is erroneous, the aggrieved party
8 may file a petition for judicial review. NRS 233B.135. In accordance with NRS
9 233B.135(3), the reviewing court may *remand*, affirm, or *set the decision aside in*
10 *whole, or in part*, if the substantial rights of the petitioner have been prejudiced
11 because the final decision of agency is:

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

19 NRS 233B.135(3)(a)-(f).

20 When a decision of an administrative body is challenged, the function of the
21 court is to review the evidence presented to the administrative body and ascertain
22 whether that body acted arbitrarily or capriciously thus abusing its discretion. *Gandy*
23 *v. State Div. of Investigation and Narcotics*, 96 Nev. 281, 607 P.2d 581 (1980); *State*
24 *Employment Sec. Dept. v. Holmes*, 112 Nev. 275, 914 P.2d 611 (1996). While in
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1 reviewing the decision by an administrative officer, it is true that the court may not
2 substitute its judgment for that of the officer as to the weight of evidence on
3 questions of fact (*SIIS v. Campbell*, 109 Nev. 997, 862 P.2d 1184 (1993)), if such
4 facts as stated are not supported by substantial evidence, which the Nevada Supreme
5 Court has defined as evidence that “a reasonable mind might as accept as adequate to
6 support a conclusion,” the agency’s decision must be set aside. *See i.e., Yamaha*
7 *Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (internal
8 citations omitted), *Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 900, 59 P.3d
9 1212, 1219 (2002).

12 Moreover, an agency charged with the duty of administering an act is
13 impliedly empowered with the ability to construe, and the agency’s interpretation
14 while not controlling must be given great deference. *Pyramid Lake Paiute Tribe v.*
15 *Washoe County*, 112 Nev. 743, 918 P2d 697 (1996). This is particularly true where
16 the agency has expertise in a particular area. *Currier v. SIIS*, 114 Nev. 328, 333, 956
17 P2d 810 (1998). In this case, DIR is responsible for enforcing the Nevada Industrial
18 Insurance Act and it has determined that the staff of IAS were and are employees
19 and therefore, properly assessed the premium penalties in this matter.

23 In addition, the determination that the staff members are employees of IAS
24 and not an independent enterprise is based upon factual findings. IAS cannot meet
25 its burden to show the Appeals Officer acted capriciously in determining that the
26 staff members were IAS’s employees at all relevant times or prove that there was
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1 any abuse of discretion. Moreover, the Appeals Officer found that both the
2 testimony of the owner was not credible and that the purported “witness statements”
3 were worthless are both issues that may not be reversed on appeal. Therefore,
4 because the Decision at Order was based upon substantial evidence, the Petition for
5 Judicial Review should be denied and the Appeals Officer’s Decision and Order
6 should be affirmed.
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9 B. The faculty and staff of IAS are employees, not independent
10 contractors pursuant to the requirements of NRS 616A through 616D.

11 IAS argues that NRS 616A.110(9) excludes IAS instructors because they
12 operate pursuant to a written agreement which acknowledges the instructors are not
13 employees. NRS 616A.110(9) is written in the conjunctive meaning that each of the
14 three conditions must be met for the instructor/staff member to be excluded from the
15 definition of “employee” under the Nevada Industrial Insurance Act (“NIIA”),
16 Chapters 616A through 616D and 617 of the NRS.
17

18 **NRS 616A.110 “Employee”:Persons**
19 **excluded.** “Employee” excludes:

20 9. Any person who:

21 (a) Directly sells or solicits the sale of products, in person
22 or by telephone:

23 (1) On the basis of a deposit, commission, purchase for
24 resale or similar arrangement specified by the Administrator by
25 regulation, if the products are to be resold to another person in
26 his or her home or place other than a retail store; or

27 (2) To another person from his or her home or place
28 other than a retail store;

(b) Receives compensation or remuneration based on sales
to customers rather than for the number of hours that the person
works; **and**

1 (c) Performs pursuant to a written agreement with the
2 person for whom the services are performed which provides
3 that the person who performs the services is not an employee
4 for the purposes of this chapter.

5 There is no evidence that IAS instructors or staff members sell or solicit the
6 sale of products let alone sell those products from their home or place other than a
7 retail location; therefore, NRS 616A.110(9)(a) does not apply. In addition, IAS
8 instructors per the terms of their Agreements are paid per hour and not by
9 commission based upon sales. Therefore, NRS 616A.110(9)(b) does not apply.
10 Consequently, IAS teachers and staff do not meet the requirements of the statute
11 regardless of the existence of a written agreement that they are employees.
12

13 C. IAS is still required to maintain workers' compensation coverage
14 regardless of the instructors and staff's employment status.

15 IAS next argues that its faculty are independent contractors pursuant to NRS
16 616A.255:

17 **NRS 616A.255 "Independent contractor" defined.**
18 "Independent contractor" means any person who renders
19 service for a specified recompense for a specified result, under
20 the control of the person's principal as to the result of the
21 person's work only and not as to the means by which such
22 result is accomplished.

23 Regardless of whether IAS instructors or staff are independent contractors is
24 irrelevant because under the NIIA, independent contractors are considered
25 employees of the principal contractor for the purposes of workers' compensation
26 coverage.

27 **NRS 616A.210 "Employee": Subcontractors and**
28 **employees.**

1. Except as otherwise provided in NRS 616B.603, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS.

2. If the subcontractor is a sole proprietor or partnership licensed pursuant to chapter 624 of NRS, the sole proprietor or partner shall be deemed to receive a wage of \$500 per month for the purposes of chapters 616A to 616D, inclusive, of NRS.

3. This section does not affect the relationship between a principal contractor and a subcontractor or independent contractor for any purpose outside the scope of chapters 616A to 616D, inclusive, of NRS.

“Principal contractor” is defined by NRS 616A.285:

NRS 616A.285 “Principal contractor” defined.

“Principal contractor” means a person who:

1. Coordinates all the work on an entire project;
2. Contracts to complete an entire project;
3. Contracts for the services of any subcontractor or independent contractor; or
4. Is responsible for payment to any contracted subcontractors or independent contractors.

IAS is licensed as a cosmetology school pursuant to NRS 644.380⁴ which statute requires sufficient staff, two licensed instructors present at all times. IAS

⁴
NRS 644.380 Application for license; determinations by Board; fee; new license required for operation after change in ownership or location; approval of changes in physical structure of school by Board; regulations.

1. Any person desiring to conduct a school of cosmetology in which any one or any combination of the occupations of cosmetology are taught must apply to the Board for a license, through the owner, manager or person in charge, upon forms prepared and furnished by the Board. Each application must contain proof of the particular requisites for a license provided for in this chapter, and must be verified by the oath of the maker. The forms must be accompanied by:

contracts with its students to provide them with accredited instruction pursuant to both NRS Chapter 644 and the National Accreditation Commission of Career Arts such that when their training is complete, the students meet the requirements to obtain a license as a cosmetologist by the Nevada State Board of Cosmetology. IAS contracts for the services of its instructors and staff and is responsible for paying them pursuant to the terms of the Agreements IAS alleges it requires every instructor and staff member to sign. Therefore, it was appropriate for the Appeals Officer to conclude that IAS is the principal contractor and that all of the instructors are employees for the purposes of workers' compensation coverage.

(a) A detailed floor plan of the proposed school;

2. Upon receipt by the Board of the application, the Board shall, before issuing a license, determine whether the proposed school:

(a) Is suitably located.

(b) Contains adequate floor space and adequate equipment.

(c) Has a contract for the enrollment of a student in a program at the school of cosmetology that is approved by the Board.

(d) Admits as regular students only persons who have received a certificate of graduation from high school, or the recognized equivalent of such a certificate, or who are beyond the age of compulsory school attendance.

(e) Meets all requirements established by regulations of the Board.

7. After a license has been issued for the operation of a school of cosmetology, the licensee must obtain the approval of the Board before making any changes in the physical structure of the school.

1 D. The instructors are “employees” for the purpose of workers’
2 compensation coverage.

3 1. The instructors are not “independent enterprises.”

4 NRS 616B.603(1) provides that a person is not an employer if:

- 5 a. He enters into a contract with another person or business
6 which is an independent enterprise; and
7 b. He is not in the same trade, business, profession or
8 occupation as the independent enterprise.

9 NRS 616B.603(2) defines an “independent enterprise:”

10 As used in this section, an “independent enterprise means a
11 person who holds himself out as being engaged in a separate
12 business and:

- 13 a. Holds a business or occupational license in his own name; or
14 b. Owns, rents or leases property used in furtherance of his
15 business.

16 The “control test” that forms the basis for IAS’s argument was previously
17 employed by the Nevada Supreme Court to determine whether an individual was an
18 independent contractor or employee and was nullified when the Nevada Legislature
19 enacted NRS 616B.603. *See, Tucker v. Action Equipment and Scaffold Co.*, 113 Nev.
20 1349, 951 P.2d 1027 (1997). (“*Tucker* abandoned the ‘control test’ as the primary
21 standard applicable to determine whether one is immune from suit under the
22 NIIA...*Tucker* also entirely abandoned the use of the “control test” when the
23 workplace accident occurs in the course of a construction project.” *Harris v. Rio*
24 *Hotel & Casino*, 117 Nev. 482, 488-892 P.3d 206 (2001)).

25 The Nevada Supreme Court held that what the Legislature intended in the
26 adoption of NRS 616B.603 is that the “normal work test” found in *Meers v.*
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1 *Houghton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985), be applied in all cases.
2 Succinctly stated, the Court held that “[i]f a principal contractor is not a licensed
3 contractor, it will be the statutory employer ... if it can show that it is in the same
4 trade under the *Meers* test, i.e., whether the activity is, in that business, normally
5 carried on through employees rather than independent contractors.” *Oliver v. Barrick*
6 *Goldstrike*, 111 Nev. 1338, 1348, 905 P.2d 168 (1995).

7
8 More recently, the Court analyzed the *Meers* test in *Hays Home Delivery, Inc.*
9
10 v. *EICN*, 117 Nev. 678, 31 P.3d 367 (2001). In *Hays*, the Court considered whether
11 Green, the owner-operator of a local trucking company, was the statutory employee
12 of Hays Home Delivery. The court found that Green was a statutory employee of
13 Hays because they were not independent enterprises, but, instead, because Green and
14 Hays were both in the same trade of delivery merchandise, Green was an employee.
15 Further, the Court examined whether the service provided by Green would normally
16 be carried out by an independent contractor or an employee, following the *Meers*
17 test.⁵ Hays was a national logistics management company who provided delivery
18 services for national retailers from their retail stores/warehouses to customers. Hays
19 then entered into agreements with owner-operators like Green to deliver
20 merchandise. In discussing “independent enterprise” under NRS 616B.603(2), the
21 Court found that Green held himself out as being engaged in a separate business,
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⁵ The Court removed the distinction between “construction” and “non-construction” workplaces and applied the *Meers* test to both.

1 maintained a business license and leased the truck he used to deliver the merchandise
2 in furtherance of his business.

3 Nevertheless, despite the fact that Green met the definition of an independent
4 enterprise under NRS 616B.603(2), the Court concluded that Green was in the same
5 trade as Hays under NRS 616B.603(1(b) and, therefore, Hays was Green's statutory
6 employer.
7

8 In the instant case, IAS first failed to have any written agreements in place
9 prior to 2013 and therefore, fails to meet the requirement of NRS 616B.603(2)(a)
10 which requires an employment agreement for the period from 2010 to 2013. In
11 addition, IAS fails to meet the requirement for independent enterprise in NRS
12 616B.603(2)(b) during the uninsured periods of time between 2010 and 2015 and
13 December 2016. IAS argues that the instructors may pay "chair rental fees" or "can
14 choose at his or her own discretion to teach other general classes in lieu of the rental
15 fee." IAS' Opening Brief at 8. However, there is no mention of rental chairs or
16 booths in any of the original Agreements. Moreover, the "chair rental fee" of \$2 per
17 hour, when instructors are simultaneously paid an hourly wage, was clearly meant to
18 try unsuccessfully to meet the requirements of NRS 616B.603(2)(b).
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23 In addition, "IAS provides students with supplies and equipment, which may
24 be used during an Instructor's services." *Id.* at 9. Instructors need never use their
25 own personal property to perform their job functions, are, therefore, not independent
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enterprises and consequently, IAS is not excluded from being the employer of its instructors.

Even if IAS met the definition of independent enterprise in NRS 616B.603(2), IAS must still prove that it is not in the same trade or business as its instructors pursuant to NRS 616B.603(1)(b). IAS acknowledges that IAS is a licensed cosmetology school under NRS 644.380. Opening Brief at 8. To be a licensed school of cosmetology, IAS is required to fulfill specific statutory and regulatory requirements. IAS must have a licensed staff of instructors, who are subject to specific restrictions. NRS 644.395 and NAC 644.105(4) provide:

NRS 644.395 Staff of instructors. Each school of cosmetology shall maintain a staff of at least two licensed instructors and one additional licensed instructor for each 25 enrolled students, or major portion thereof, over 50 students. A school of cosmetology must have at least two licensed instructors present and teaching at any time while the school is open. Persons instructing pursuant to provisional licenses issued pursuant to NRS 644.193 are considered instructors for the purposes of this section.

NAC 644.105 Instructors; badges; limitation on practice by certain students. (NRS 644.110, 644.395, 644.408)

4. No instructor in a licensed school of cosmetology may, during the hours in which he or she is on duty as an instructor, devote his or her time to the public or to the private practice of cosmetology for compensation. **Each instructor shall devote the instructor's full time during the hours he or she is on duty as an instructor to instructing students.**

(Emphasis added).

1 These statutory and regulatory restrictions require the instruction staff to be in
2 the “same trade, business or profession” as IAS. To be an instructor, each individual
3 must be a licensed as an instructor with the Cosmetology Board. Each school must
4 have “at least two licensed instructors” teaching and present “at any time the school
5 is open.” The IAS instructors are required to be licensed by the same Board that
6 licenses IAS as a cosmetology school. IAS could not operate as a licensed
7 cosmetology school without licensed cosmetology instructors, but somehow, IAS
8 argues, the instructors and the school are not in the same trade or business.

11 In *Hays*, “Green arguably delivered the merchandise, while Hays arguably
12 only acted as an administrator and oversaw the deliveries, both Green and Hays are
13 in the same trade of delivering merchandise from retailers to end-customers.
14 Therefore, notwithstanding any minimal distinction between Green's and Hays's
15 functions, both are in the same trade of delivering merchandise.” 117 Nev. at 684.
16 In IAS’ case, not only do the hired instructors provide training, both owners do as
17 well. There is no distinction whatsoever between what IAS is and what the
18 instructors do. The Appeals Officer did not err in finding that IAS was the statutory
19 employer of the instructors and staff.

23 2. Even if the control test applies, IAS is still the instructors’
24 statutory employer.

25 IAS argues that the five-part control test enunciated by the Nevada Supreme
26 Court in *Clark County v. SIIS, supra*, proves that the instructors are not employees of
27 IAS. Even though, that “control test” was abrogated by the adoption of NRS
28

1 616B.603, IAS's instructors still would not meet the requirements to be independent
2 contractors.

3 a. Degree of supervision exercised by putative employer
4 over details of work.

5 IAS argues the instructors operate unsupervised. The NSCB maintains
6 standards with which IAS instructors must comply in order to remain an accredited
7 school. Some of the Agreements IAS drafted require "instruction and records shall
8 be in a format that complies with the standards and policies of the accrediting agency
9 for International Academy of Style." ROA 192. Moreover, the Agreements require
10 instructors to perform certain tasks. For instance, one of the contracts required the
11 instructor to record students' grades and attendance. Ms. Casteel testified that despite
12 the contract, instructors were "not required to do anything like that." ROA 101, ll. 1-
13 9. However, the Appeals Officer found Ms. Casteel's testimony to be self-serving
14 and not credible.
15

16 Contrast IAS' arguments and Ms. Casteel's testimony with the later
17 Agreements dating from 2014 and later. Those Agreements required instructors to
18 provide instruction in a "competent manner" or be subject to termination of the
19 contract. ROA, e.g., 300. Those later Agreements also provide the following:
20

21 19. QUALITY OF SERVICE: Instructor shall perform his
22 or her services with care, skill and diligence in accordance
23 with applicable professional standards currently issued by such
24 profession in similar circumstances, and shall be responsible
25 for the professional quality and completeness of all services
26 performed under this Agreement.
27

1 ROA, e.g., 305. DIR posits it would be impossible for Ms. Casteel and/or Ms.
2 Schultz to determine whether an instructor was providing competent instruction in
3 accordance with professional standards without any supervision. Therefore, IAS fails
4 to meet the first part of the five-part test.
5

6 b. Source of the workers' wages

7 IAS next argues that the source of payment (wages) to cosmetology
8 professionals is student tuition monies somehow means that the instructors are
9 independent contractors. Opening Brief at 16. Many, but not all the Agreements,
10 provide an hourly rate the instructor is paid for providing services. Some
11 Agreements left the wage blank. Some Agreements provide for a chair rental fee but
12 not before 2016. All businesses take a portion of their revenue and set it aside to
13 compensate employees. IAS is no different in that respect. The fact that the money
14 came from tuition versus sales of merchandise makes no difference in the status of
15 IAC as an employer.
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19 c. Right to hire and fire.

20 IAS argues that the Agreement dictates the terms of employment as if no
21 human is involved in the decision-making. The earlier Agreements drafted by IAS
22 did not provide termination clauses. However, later Agreements provided that "IAS
23 may terminate this Agreement at any time "for cause," the grounds for which are
24 defined below." Those grounds include "C. Instructor fails to perform his or her
25 services in a competent manner" and "Instructor fails to maintain a safe environment
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1 for students while performing services on IAS' premises or instructing IAS
2 students," and "G. Instructor fails to perform the terms and conditions as agreed
3 upon under this Agreement." ROA 300.

4
5 Ms. Casteel testified, again not credibly, that terminating an instructor "it
6 never happens...So, for the most part, they're with us until they-- until they decide
7 they don't want to teach anymore." ROA 96. In fact, IAS first came to the attention
8 of the Attorney General's office because IAS fired an instructor for misconduct. Ms.
9 Casteel told the Attorney General's investigator that one of the instructors was
10 terminated because she required a student to bring her food, which conduct was
11 unacceptable to Ms. Casteel and possibly in violation of NRS 644.103. ROA 906.
12
13 The Instructor successfully filed an unemployment claim with DETR against IAS.
14
15 Therefore, IAS clearly has the right to hire and fire its instructors.

16
17 d. Extent to which the workers' activities further 'general
18 business concerns.'

19 IAS argues that it can be operated exclusively by the two owners and that the
20 instructors provide a "unique benefit" to IAS students.⁶ Opening Brief at 17. This
21 part of the test does not require the services of employees to be necessary but that
22 they further the general business concern. Ms. Casteel testified IAS uses instructors
23 to provide a "well-rounded education. They're [students] going to learn more if they
24 have several people showing them the same thing" rather than just Ms. Schultz or
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Ms. Casteel instructing the students. Opening Brief at 84-85. Instructors are required in order for the school to be properly licensed:

NAC 644.115 Curriculum for cosmetologists; exemption for barbers in certain circumstances. (NRS 644.110, 644.400)

1. Each school of cosmetology must offer the following subjects for training barbers and students to be cosmetologists:

- (a) Aesthetic services.
- (b) Chemical hair services.
- (c) Cosmetology theory, with a minimum of 3 percent of the total hours of training mandatory for students who are barbers and 10 percent of the total hours of training mandatory for all other students.
- (d) Field trips and modeling, with a maximum of 5 percent of the total hours of training optional for all students.

The instructors are invited to IAS for the benefit of the students and the success of IAS's students are surely of concern to the business if the school wants to remain open. Once again, without instructors, there exists no IAS.

e. Right to control hours and location of work.

IAS argues that IAS does not control the hours the instructors teach. However, while ostensibly the instructor chooses his or her schedule, he or she still must teach during the hours IAS is open unless he or she specifically gets permission to work after hours. IAS controls the hours within which the instructor may work. Moreover, the instructors must teach on IAS's premises. As for the right to control the location of work, NRS 644.380(1)(a) requires a school of cosmetology to submit

⁶ Of course, this would require both owners to be on site from approximately 8:45 in the morning to 10:30 at night five days a week. This may be physically possible but unlikely.

1 a detailed floor plan of the school for approval. NRS 644.380(2)(b) requires that a
2 school “contains adequate floor space and adequate equipment.” It stands to reason
3 that instructors must teach on IAS’s premises to work for IAS.
4

5 E. The doctrine of laches does not apply to the facts of this matter.

6 IAS next argues that DIR’s actions should be barred by the equitable doctrine
7 of laches. “Laches is an equitable doctrine which may be invoked when delay by
8 one party works to the disadvantage of the other, causing a change of circumstances
9 which would make the grant of relief to the delaying party inequitable.” *Building &*
10 *Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37
11 (1992). Thus, laches is more than a mere delay in seeking to enforce one's rights; it is
12 a delay that works to the disadvantage of another. *Home Savings v. Bigelow*, 105
13 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches
14 must become so changed that the party cannot be restored to its former state." *Id.*,
15 779 P.2d at 86.
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19 “It is well-established that “[e]specially strong circumstances must exist to
20 sustain the defense of laches when the statute of limitations has not run.’ *Lanigir v.*
21 *Arden*, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966).” The length of time between the
22 date DIR was notified IAS was operating without workers’ compensation insurance
23 and began its investigation into IAS, December, 2016, and the date it issued its
24 determinations, March, 2017 is a period of four (4) months. IAS and IAS’s attorney
25 knew of DIR’s investigation from the beginning in December, 2016.
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Furthermore, NRS 616D.200 allows the Division to charge a penalty equal to the amount an employer would pay in workers' compensation insurance premiums for the period of time an employer operates unlawfully without workers' compensation coverage up to six (6) years. DIR imposed a premium penalty going back 5 years when in fact, IAS was operating sans workers' compensation insurance since 1998.

In *Bigelow, supra*, Forest Lane Associates sued Home Savings for shoddy construction of an apartment complex. 105 Nev. at 495. Home Savings then brought a third-party suit against Bigelow alleging Bigelow was responsible for the construction of the complex. *Id.* Bigelow moved to dismiss the complaint based upon the doctrine of laches. Bigelow alleged he had an opportunity to purchase the complex before the litigation but did not complete the sale. Bigelow argued that had he known Home Savings was going to look to him for indemnification, he would have completed the purchase of the complex in order to settle the litigation. *Id.* Because he could no longer buy the complex, Bigelow alleged he was prejudiced by the delay in Home Savings' third-party suit. Home Savings argued that Bigelow sought and was refused indemnification before the filing of the third-party complaint and had notice he may be brought into the case. *Id.* at 496.

The Nevada Supreme Court found that Bigelow failed to present "especially strong circumstances" to invoke laches. In addition, the Court determined that by dismissing the third-party complaint by virtue of engaging laches, Bigelow would

1 escape a nearly \$6 million dollar obligation. “We cannot allow the application of the
2 equitable doctrine of laches to produce such an inequitable result.” 105 Nev. at 497.

3 In the instant case, by allowing IAS to escape liability through laches, IAS would
4 receive a windfall in the form of five (5) years of unpaid premiums to the detriment
5 of other law-abiding Nevada businesses. IAS argues repeatedly that there was no
6 harm because IAS required its instructors to obtain individual workers’
7 compensation policies. However, the evidence shows those policies were general
8 liability policies rather than workers’ compensation policies.
9

11 In addition, the Appeals Officer found that “no statute requires the Division to
12 issue a premium penalty within a certain timeframe. 15 months is not an extensive
13 period in which to investigate of an employer-employee relationship. Lastly, IAS
14 was not disadvantaged by the delay.” ROA 7. IAS has repeatedly alleged without
15 proof that DIR was involved or a part of either the prosecution of IAS by the WCFU
16 or the deferred prosecution agreement entered into by IAS. DIR was not notified of
17 the Attorney General’s prosecution until after it was notified that IAS allowed its
18 insurance policy to lapse again in December, 2016. The Appeals Officer properly
19 held that the equitable doctrine of laches should not be applied to the circumstances
20 of this matter.
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24 F. Res judicata or issue preclusion does not apply.

25 IAS states the correct rule for the application of *res judicata* or issue
26 preclusion but misapplies the rule. “We begin by setting forth the three-part test for
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determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.” *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 (2008).

The instant case fails the very first part. The parties to the original litigation and this matter are not identical. DIR is a division of the Department of Business and Industry created pursuant to NRS 232.505 through NRS 232.700. The WCFU was established pursuant to NRS 228.420(2) as the sole state agency to prosecute criminal violations of NRS 616D.200. DIR was not and could not be part of the criminal prosecution of IAS for its failure to obtain and maintain workers’ compensation insurance and therefore, as the Appeals Officer properly found, *res judicata* or issue preclusion is inapplicable to the case at bar.

G. Equitable estoppel likewise does not apply.

The last of IAS’s nearly innumerable arguments is that the DIR should be estopped from imposing the premium penalties against IAS. Again, IAS recited the correct law regarding equitable estoppel but fails to apply it properly. The Nevada Supreme Court established the four elements of equitable estoppel:

- (1) the party to be estopped must be apprised of the true facts;
- (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended;
- (3) the party asserting the estoppel must be ignorant of the true state of facts;
- (4) he must have relied to his detriment on the conduct of the party to be estopped

1 *Teriano v. Nev. State Bank (In re Harrison Living Trust)*, 121 Nev. 217, 223 (2005).
2 As the Appeals Officer found based upon the documentary evidence and the self-
3 serving testimony of Ms. Casteel, equitable estoppel does not apply because IAS
4 clearly knew of the true state of facts at issue. IAS knew there was an issue
5 regarding the problematic status of its instructors and staff at least as early as when
6 the WCFU initiated its investigation, if not earlier. In fact, it is clear that when IAS
7 first required Agreements with its faculty and staff, it knew workers' compensation
8 may be required. Instead of providing such coverage it attempted to circumvent its
9 legal obligations by requiring instructors affirmatively waive their entitlement to
10 workers' compensation benefits.

11 In addition, the statute IAS violated does not require *scienter*. NRS 616D.200
12 is a no-fault statute and the premium penalty is charged regardless of the intent or
13 lack of intent of Ms. Casteel and Ms. Schultz in failing to obtain workers'
14 compensation insurance for IAS. Of course, such statutes are permissible. "The
15 power of the legislature to declare an offense, and to exclude the elements of
16 knowledge and due diligence from any inquiry as to its commission, cannot, we
17 think, be questioned." *Chicago, B. & O. Ry. v. United States*, 220 U.S. 559, 578
18 (1911). As an employer, Petitioner is presumed to know the law regarding workers'
19 compensation. *Frazier v. Industrial Comm'n*, 145 Ariz. 488, 492, 702 P.2d. 717, 721
20 (1985). The Appeals Officer correctly found that "Although IAS may not have
21 understood the law regarding the requirement to carry workers' compensation
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1 coverage for its employees, they were not ignorant of any facts in this matter.”

2 ROA 7.

3 H. Nevada law prohibits IAS from requiring staff to waive their right to
4 workers’ compensation.

5 Nevada statutes specifically preclude an employer from modifying its liability
6 in a contract of employment and any such modification is void, not voidable. NRS
7 61B.609 states, in part:
8

9 **NRS 616B.609 Devices modifying liability void;**
10 **exception.**

11 1. Except as otherwise provided in subsection 2:

12 (a) A contract of employment, insurance, relief benefit,
13 indemnity, or any other device, does not modify, change or
14 waive any liability created by chapters 616A to 616D,
15 inclusive, of NRS.

16 (b) A contract of employment, insurance, relief benefit,
17 indemnity, or any other device, having for its purpose the
18 waiver or modification of the terms or liability created
19 by chapters 616A to 616D, inclusive, of NRS is void.

20 2. Nothing in this section prevents an owner or lessor of
21 real property from requiring an employer who is leasing the real
22 property from agreeing to insure the owner or lessor of the
23 property against any liability for repair or maintenance of the
24 premises.

25 The facts and law establish IAS’s instructors and staff, including Char who
26 admitted to DIR investigators she provided financial aid and other services to the
27 school rather than instruction, are employees. IAS cannot legally negotiate its way
28 out of providing mandatory workers’ compensation coverage for its employees.

V. CONCLUSION

It is helpful to note that the premium penalties paid by uninsured employers under NRS 616D.200 are paid into the Uninsured Employer's Claim Account (the "UECA"). The UECA is used to provide compensation, including medical benefits and disability payments, to employees of uninsured employers who are injured on the job, the exact benefits a workers' compensation carrier would have provided if the employer had complied with Nevada law. It should therefore be considered a disgorgement of an unjust enrichment, to level the playing field among Nevada employers.

The International Academy of Style is a licensed school of cosmetology required by law to have at least two licensed cosmetology instructors on the premises at all times the school is open. Clearly, the instructors and the school, both licensed by the same Board of Cosmetology are in the same trade, business or profession.

Therefore, the licensed instructors must be employees of the cosmetology school for the purpose of workers' compensation coverage. The Appeals Officer's Decision and Order was based upon substantial evidence and not affected by any error.

1 As long as substantial evidence supports that factual determination, it cannot
2 be reversed in a Petition for Judicial Review.

3
4 Dated this 3rd day of August, 2020 and respectfully submitted by:

5 /s/ Donald C. Smith

6
7 Donald C. Smith, Esq.
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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(1)(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 14 point font. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points and contains 9,054 words.

Finally, I 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief 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.

Dated this 3rd day of August, 2020.

/s/ *Donald C. Smith*
Donald C. Smith, Senior Division Counsel

CERTIFICATE OF SERVICE

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

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**Respondent Division of Industrial Relations'
Answering Brief in Case No. CV20-00445**

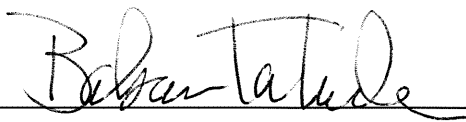
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Jason Guinasso, Esq.
Hutchison & Steffen
500 Damonte Ranch Pkwy Ste 980
Reno NV 89511

U.S. Mail
☒ **via State Mail room** (regular or certified) circle one
☐ **deposited directly with U.S. Mail Service**
☐ **Overnight Mail**
☐ **Interdepartmental Mail**
☐ **Messenger Service**
☐ **Facsimile fax number:** _____

DATED this 31st day of August, 2020.



State of Nevada Employee

AFFIRMATION
PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Respondent Division of Industrial Relations' Answering Brief filed in or submitted for District Court Case number **CV20-00445**.



Does not contain the social security number of any person

or

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

or

B. For the Administration of a public program or for an application
for a federal or state grant.

Dated this 3rd day of August, 2020.

/s/ *Donald C. Smith*_____

Donald C. Smith, Esq.

Jennifer J. Leonescu, Esq.

Division of Industrial Relations

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Petitioner, vs. DIVISION OF INDUSTRIAL RELATIONS, and the NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICER SHEILA MOORE, Respondents.	Case No.: CV20-00445 Dept. No.: 8
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PETITION FOR JUDICIAL REVIEW

PETITIONER'S REPLY BRIEF

ATTORNEY FOR THE PETITIONER: Jason Guinasso, Esq. Nevada Bar No. 8478 Hutchison & Steffen, PLLC 500 Damonte Ranch Parkway, Suite 980 Reno, NV 89521 Tel.: 775-853-8746 Fax: 775-201-9611 Attorney for International Academy of Style	ATTORNEY FOR THE RESPONDENTS: Donald C. Smith, Esq., Senior Division Counsel Division of Industrial Relations Workers' Compensation Section 400 West King Street, Suite 201 Carson City, NV 89703 Tel.: 775-684-7286 Fax: 775-687-1621 Attorney for Dept. of Business and Industry, Division of Industrial Relations
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COMES NOW Petitioner, International Academy of Style (“IAS”), by and through their attorney of record, Jason D. Guinasso, Esq., and Hutchison & Steffen, PLLC, having received Respondent’s Answering Brief, now respectfully submits their Reply.

I.

INTRODUCTION

DIR’s response raises a litany of arguments that don’t address the core concepts in IAS’s petition. DIR misclassified the cosmetology professionals who contract with IAS. IAS is not the “Employer” of the cosmetology professionals they contract with. Instead, cosmetology professionals who contract with IAS are “Independent Contractors” and “Independent Enterprises” under Nevada Law. They are not in the “same trade or business” as IAS. And there is no evidence in the record that any instructor is licensed in the same trade as IAS, which is a school. The only evidence in the record is that the owners are licensed in the same trade as IAS—which satisfies the cosmetology board’s requirements and negates the need for workers compensation coverage.

Rather than regurgitating the areas where DIR failed to respond, this reply focuses on a few key distinctions. First, the cosmetology professionals who contracted with IAS are not “licensed instructors” for the school and, therefore, were not employees of IAS merely because the instructors are alleged to be in the same trade and business as IAS. This Court should require more—substantial evidence certainly does—because nothing in the record establishes anyone other than the owners (who do not require workers compensation) were licensed with the Cosmetology Board. Second, the independent contractor agreements are valid, and the employment relationship establishes, the instructors are not and never have been employees. The Appeals Officer’s decision is not supported by substantial evidence in parts and is arbitrary and capricious in others. This Court should grant the petition.

///

///

1 II.

2 DISCUSSION

3 **A. The Appeals Officer erred when it concluded that IAS Independent Contractor**
4 **Agreements are not permitted under NRS 616B.609, which expressly them.**

5 DIR Argues first that IAS agreements are not protected by NRS 616A.110(9)(c). However,
6 NRS 616A.110(9)(c) expressly excludes any person who:

7 *“[p]erforms pursuant to a written agreement with the person for whom the services are*
8 *performed which provides that the person who performs the services is not an employee*
for the purposes of this chapter.”

9 [Emphasis added].

10 As is explained in the opening brief, the cosmetology professionals clearly satisfy this
11 exclusion. Cosmetology professionals acknowledge in a written agreement that they are not employees
12 as defined in NRS 616A for purposes of worker’s compensation coverage, but rather they are expressly
13 exempted from the definition pursuant to NRS 616A.110(9)(c). **Ex. 3 at IAS0167 to IAS0244; Ex. 6 at**
14 **IAS0349 to IAS0572.** Because they perform services pursuant to a “written agreement,” they are
15 expressly precluded for purposes of NRS 616A. Id. Reading NRS 616A.110(9)(c) any other way
16 would lead to absurd results. If the Legislature wanted the portion of statute to apply solely to
17 salespeople, it would not include “service” in explaining what type of written agreements lead to
18 employee exemptions. Therefore, this Court should find the IAS independent contractors exempt.

19 **B. The Appeals Officer’s conclusion that the Cosmetology Board’s requirement two**
20 **instructors must be at the school somehow includes all instructors at IAS is not**
21 **supported by substantial evidence and wrongfully informed the Appeals Officer’s**
reading of NRS Chapter 616.

22 IAS does not need to maintain workers compensation insurance, merely because of a
23 Cosmetology Board requirement. While it is true that each school of cosmetology must have two
24 licensed instructors and one additional licensed instructor for each 25 enrolled students, IAS has always
25 satisfied this requirement without having to rely on their contracts with cosmetology professionals.

1 IAS can operate without the use of these independent contractor because the two owners of IAS are
2 licensed instructors who are primarily responsible for providing the education needed by students. *See*
3 Tr. at 21:11-16. The owner of IAS explained during the hearing:

4 "JASON GUINASSO: So, notwithstanding the benefits of having people in the salon
5 business come in and assist you in your education business, can-notwithstanding those
6 benefits, could your school deliver quality-the education that you're in the business of
7 delivering without those contractors?

8 LONI CASTEEL: Yes.

9 JASON GUINASSO: Are these contractors an integral part of your business operation?

10 LONI CASTEEL: They're not a have to, no."

11 See Tr. at 22:9-23.

12 This is supported by substantial evidence because there is no evidence to the contrary. Nothing
13 in the record says that instructors are licensed. The only licensed instructors are the owners who are
14 not required to have workers compensation coverage. Everyone else is outside the same trade and
15 occupation. Cosmetology professionals is to be a cosmetologist. They have their own business license
16 and their own insurance. When they come to provide adjunct instruction, they do not leave their
17 identities as separate business. The services provided by the professionals provide a unique benefit to
18 the school, which is supported by the record.

19 Further, the services the cosmetology professionals provide to IAS students are not services
20 normally carried on through employees in IAS rather than independent contractors. In fact, no
21 employees whatsoever carry on the same services as the cosmetology professionals. Accordingly,
22 under the Meers test, IAS is not a statutory employer because the activities of the cosmetology
23 professionals are not indispensable to IAS and said activities, in this business, are not normally carried
24 on through employees.

25 **B. Substantial evidence does not support the Appeals Officer's finding that IAS
instructors are employees under Nevada law**

For purposes of Nevada's worker's compensation law, an "independent contractor" is defined
as:

1 . . . any person who renders service for a specified recompense for a specified result, under the
2 control of the person's principal as to the result of the person's work only and not as to the
means by which such result is accomplished.

3 NRS 616A.255. In determining whether an employer-employee relationship exists, in addition to
4 considering a written agreement, the courts apply a five-factor test, known as "the control test," giving
5 equal weight to the following factors:

6 (1) the degree of supervision;

7 (2) the source of wages;

8 (3) the existence of a right to hire and fire;

9 (4) the right to control the hours and location of employment; and

10 (5) the extent to which the worker's activities further the general business concerns of the
11 alleged employer.

12 Clark County v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986). All of these factors weigh in favor of
13 IAS. IAS does not supervise the professionals. **Tr. At 49:16 to 50:21.** The source of payment (wages)
14 to cosmetology professionals is student tuition monies paid after an invoice is submitted to IAS. **Tr. At**
15 **22:19-23, 26:5-20; Ex. 2 at IAS0021, 27, 34, 40, 46, 52, 58, 64, 72, 77, 83, 89, 95, 101; see also**
16 **Exhibit 4.** IAS does not hire and fire the cosmetology professionals. **Tr. At 31:19 to 32:17.** IAS does
17 not control or have the right to control the hours the cosmetology professionals work other than control
18 over the hours of operation of the school. **Ex. 6 at IAS0353 (Section 7 of Agreement provides,**
19 **"Hours the Instructor desires to work are the sole discretion and control of the instructor.").**
20 And, the cosmetology professionals' services do not further the general business concerns of IAS;
21 rather, they provide a unique benefit to IAS students. **Ex. 6 at IAS0350.** IAS can conduct its business
22 with or without the cosmetology professionals. In other words, IAS contracts with the cosmetology
23
24
25

1 professionals solely for the students' benefit, not because they are necessary for IAS to conduct its
2 business of education and instruction. **Tr. At 20:7 to 22:8.**¹

3 This Court should therefore reverse the Appeals Officer's conclusion that the cosmetology
4 professionals should have been classified as independent contractors, not employees of IAS, under
5 Nevada workers' compensation law by DIR and that no fines or penalties should have been assessed
6 against IAS.

7 **C. DIR's attempt to distinguish IAS Independent Contractors from Independent**
8 **Enterprise is unpersuasive.**

9 The instructors are an independent enterprise. This is driven by statute, not case law. NRS
10 616B.613 makes clear that IAS is not a statutory employer because the activities of the cosmetology
11 professionals are not indispensable to IAS and said activities, in this business, are not normally carried
12 on through employees. IAS chooses to have instructors who are not full-time employees, and who have
13 their own separate and distinct careers, because it enriches the learning experience for the students.
14 That choice, however, does not change their classification. In fact, Pursuant to NRS 616B.603(2), an
15 "independent enterprise" is a person who holds himself out as being engaged in a separate business and
16 holds a business license in his own name or owns, rents, or leases property used in furtherance of his or
17 her business.

18 The record supports this point and is uncontradicted. All cosmetology professionals hold
19 themselves out to be engaged in separate businesses from IAS, including having their own business
20 licenses in their own names and/or owning/renting property in furtherance of their businesses. **Ex. 3 at**

23 ¹ At the hearing before the Appeals Officer, Loni Casteel explained:

24 "... we wanted people that actually were still working and still active in the industry so that the
25 students would in fact then learn the most current techniques and the most current ways of doing
anything. ... We thought that when we brought in people for demos and the students really got a good
education out of the demo. ... So that the students have a well-rounded education. ... the more
different ways you can show a student how to do something, the highly likely you're going to actually
connect with that student."

1 IAS0167 to IAS0244; Ex. 6 at IAS0349 to IAS0572. Business licenses are provided and attached to
2 the Agreements. **Id.** And each cosmetology professional operates under their respective license.

3 DIR's use of Meer's is misguided. Under Meers, the Nevada Supreme Court stated that the
4 type of work performed by the independent contractor determines whether an employment relationship
5 exists. 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985). The test is not whether the independent
6 contractor's activity is useful, necessary or even absolutely indispensable to the statutory employer's
7 business; rather, the test is whether that "indispensable activity" is, in that business, normally carried on
8 through employees rather than independent contractors. **Id.** Under this test, the cosmetology
9 professionals are not in the same trade, business, profession or occupation as IAS and are not
10 indispensable. First, the profession is distinct because one is the provision of cosmetological services
11 and the other is the teaching of cosmetological services. the services provided by the cosmetology
12 professionals are not indispensable to IAS. Further, the cosmetology professionals are there to expose
13 the students to a broad range of experience and expertise in the industry merely as an added benefit to
14 the students. The school can operate without any of the cosmetology professionals' services.
15 Cosmetology professionals who provide consulting services and teach at IAS are professionals who
16 primarily work at salons in Northern Nevada

17 **See Ex. 5 at IAS0330-348 (witness statements).**

18 Neither does *Hays Home Delivery, Inc. v. EICN*, 117 Nev. 678 (2001) support DIR's position.
19 *See Answering Brief p.25.* There, the key fact was that the employee's sole employment was the
20 delivery of merchandise for a trucking company. As a result, he was in the same trade as the trucking
21 company. In contrast, the instructors for IAS are in the business of providing salon services, not
22 teaching cosmetology. They opt to teach in their spare time while maintaining their separate
23 employment at salons. There is no evidence in the record that the work performed by instructors is
24 "normally . . . carried on through employees" of beauty schools, which was an express finding in *Hays*.
25 117. Nev. at 684.

1 DIR's presumes a number of factual findings that were not made by the hearing office. It
2 assumes that IAS could not operate without licensed cosmetology instructors, which is disproven by the
3 statute DIR relies upon. See NRS 644.395 ("Each school . . . shall maintain staff of at least two licensed
4 instructors," but not excluding the owners from being considered *the two* licensed instructors). DIR
5 also presumes there is no difference between what the owners do and the instructors, which is
6 contradicted by the record. All cosmetology professionals hold themselves out to be engaged in
7 separate businesses from IAS, including having their own business licenses in their own names and/or
8 owning/renting property in furtherance of their businesses. **Ex. 3 at IAS0167 to IAS0244; Ex. 6 at**
9 **IAS0349 to IAS0572.** Further, the owners do not provide salon services, which distinguishes the
10 services that the instructors do provide for students. Accordingly, the instructors are not in the same
11 trade as the school and are not considered employees.

12 **III.**

13 **CONCLUSION**

14 In accordance with the foregoing, Petitioner, IAS, respectfully requests that the Petition for
15 Judicial Review be GRANTED.

16 **AFFIRMATION**

17 The undersigned does hereby affirm that the foregoing document filed in this matter does not
18 contain the social security number of any person.

19 DATED this 14th day of September, 2020.

20
21 
22 _____
Jason D. Guinasso, Esq.
23 Attorney for International Academy of Style
24
25

1 **CERTIFICATE OF SERVICE**

2 I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the
3 within action. My business address is 500 Damonte Ranch Parkway, Suite 980, Reno, NV 89521.

4 On September 14, 2020, I served the following:

5 **REPLY BRIEF**

6 on the following in said cause as indicated below:

7 INTERNATIONAL ACADEMY OF STYLE 8 BONNIE SCHULTZ & LONI CASTEEL 2295 MARKET STREET 9 RENO, NV 89502 (VIA U.S. MAIL)	LEGAL SECTION DIVISION OF INDUSTRIAL RELATIONS 400 WEST KING STREET, SUITE 201 CARSON CITY, NV 89703 (VIA U.S. MAIL)
10 NEVADA DEPARTMENT OF ADMIN. 11 APPEALS DIVISION 1050 E WILLIAM ST., SUITE 450 CARSON CITY, NV 89701 12 (VIA U.S. MAIL)	NEVADA DEPARTMENT OF ADMIN. PATRICK CATES, DIRECTOR 515 EAST MUSSEY ST., 3 RD FLOOR CARSON CITY, NV 89701 (VIA U.S. MAIL)
13 ATTORNEY GENERAL'S OFFICE 100 N CARSON STREET 14 CARSON CITY, NEVADA 89701 (VIA U.S. MAIL)	DIVISION OF INDUSTRIAL RELATIONS 400 WEST KING STREET, SUITE 400 CARSON CITY, NV 89703 (VIA U.S. MAIL)

15
16
17 I declare under penalty of perjury that the foregoing is true and correct. Executed on September
18 14, 2020, at Reno, Nevada.

19 
20 _____
KATRINA A. TORRES

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Case No. CV20-00445

Petitioner,

Dept. No. 8

vs.

DIVISION OF INDUSTRIAL RELATIONS, and
the NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

Respondents.

ORDER SETTING HEARING

On the record before the Court is a fully-briefed and submitted *Petition for Judicial Review*. Having reviewed the *Petition* the Court finds a hearing would be beneficial to the Court. Accordingly, and good cause appearing therefore,

IT IS ORDERED that a hearing is set for JANUARY 28, 2021, at 11:00 a.m.¹ The hearing will be held via Zoom Webinar. Please check the Second Judicial District Court website at washoecourts.com for a link to participate in the hearing.

DATED this 29th day of October, 2020.


BARRY L. BRESLOW
District Judge

¹ If the date constitutes an unavoidable conflict with Counsels' calendar, please contact the Judicial Assistant for Department Eight via e-mail at Christine.Kuhl@washoecourts.us to select an alternative date.

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CERTIFICATE OF SERVICE

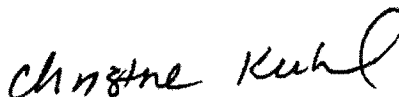
Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of October 2020, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

NONE

Further, I certify that on the 29th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

JASON GUINASSO, ESQ.

DONALD C. SMITH, ESQ.



Judicial Assistant

CASE NO. CV20-00445

INTERNATIONAL ACADEMY VS. DIVISION OF INDUS. RELATIONS

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

02/11/2021
HONORABLE
BARRY
BRESLOW
DEPT. NO. 8
A. DeGayner
(Clerk)
I. Zihn
(Reporter)

ORAL ARGUMENTS

Jason Guinasso, Esq. was present on behalf of the Plaintiff, who was not present. Donald Smith, Esq. was present on behalf of the Defendant, who was not present.

This hearing was held remotely because of the closure of the courthouse at 75 Court Street in Reno, Washoe County, Nevada due to the National and Local emergency caused by COVID-19. The Court and all the participants appeared via simultaneous audiovisual transmission. The court was physically located in Reno, Washoe County, Nevada which was the site of the court session. Counsel acknowledged receipt of Notice that the hearing was taking place pursuant to Nevada Supreme Court Rules – Part 9 relating to simultaneous audiovisual transmissions and all counsel stated they had no objection to going forward in this manner.

2:00 p.m. – Court convened with Court and respective counsel present.

PATY Guinasso addressed the Court and apologized for not appearing at the prior hearing due to a scheduling issue. PATY Guinasso argued in support of the Petition for Judicial Review to include that the appeal officer's decision was affected by clear error of law. PATY Guinasso further argued that the appeal officer's decision isn't supported by substantial evidence and, as a result, the decision is arbitrary, capricious and characterized by abuse of discretion.

DATY Smith addressed the Court and argued in opposition to the Petition for Judicial Review to include that the workers' comp definition of what an employee is includes independent contractors.

PATY Guinasso argued that not all independent contractors are deemed employees, that issue has been briefed. PATY Guinasso argued further in support of the Petition for Judicial Review. PATY Guinasso argued that credibility determinations were not actually made as to witnesses, the legal determination made by the hearing officer was clearly erroneous and should be overturned with instructions to find that the Plaintiff was not required to pay workers' comp and therefore not required to provide coverage.

DATY Smith argued that employers may not require an employee to provide their own workers' compensation coverage. DATY Smith argued further that the appeal officer's decision and order was based on substantial evidence and not affected by error. DATY Smith argued that this is not a situation wherein the Court reweighs the evidence, and workers' compensation includes independent contractors by statute. DATY Smith argued that the Petition for Judicial Review should be denied.

PATY Guinasso argued further that the Court should grant the Petition for Judicial Review and reverse the conclusions of law of the appeal officer.

COURT ORDERED: Petition for Judicial Review – UNDER SUBMISSION.

Court stood in recess.

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

HONORABLE BARRY L. BRESLOW

9

INTERNATIONAL ACADEMY OF STYLE,

10

Petitioner,

11

vs.

Case No. CV20-00445

12

DIVISION OF INDUSTRIAL RELATIONS

and the NEVADA DEPARTMENT OF

13

ADMINISTRATION APPEALS OFFICER

SHEILA MOORE,

Department No. 8

14

Respondent.

-----/

15

TRANSCRIPT OF PROCEEDINGS

16

Oral arguments on petition for judicial review

February 11, 2021

17

(Via Zoom)

18

APPEARANCES:

19

For the Petitioner:

Jason Guinasso

Attorney at law

20

Reno, Nevada

21

For the Respondent:

Donald C. Smith

Attorney at law

22

Las Vegas, Nevada

23

24

Reported by:

Isolde Zihn, CCR #87

1 RENO, NEVADA, THURSDAY, FEBRUARY 11, 2021, 2:00 P.M.

2 THE COURT: All right. Good afternoon, gentlemen.

3 We're on the record in case number civil 20-445,
4 International Academy of Style versus -- and Ms. Casteel and
5 Ms. Schultz, versus Nevada Division of Industrial Relations.

6 This is a petition for judicial review.

7 We are proceeding this afternoon, as we have in other
8 civil matters for several months, remotely, using the Zoom
9 webinar platform as allowed by Nevada Supreme Court Rule
10 Subpart 9 on simultaneous audiovisual transmission technology
11 being used for hearings and administrative orders of the
12 Second Judicial District Court, including the one that just
13 came out yesterday confirming yet again the courthouse
14 remains substantially closed to the public, to counsel, for
15 civil hearings like this; to reopen, hopefully, the first
16 week of April.

17 I am Judge Breslow, presiding judge Department 8,
18 here in Washoe County, Nevada.

19 I'm joined by court clerk, Ms. Amanda DeGayner, also
20 from Washoe County; and the Court's certified shorthand
21 reporter, Ms. Isolde Zihn, also joining from Washoe County.

22 Starting with counsel for petitioner, would you
23 please state your appearance and, as well, note the county
24 and state you're connecting from.

1 Mr. Guinasso.

2 MR. GUINASSO: Yes. Thank you, Judge.

3 Jason Guinasso, appearing on behalf of the

4 petitioner, International Academy of Style.

5 I'm appearing from Washoe County, Nevada.

6 I received a notice of this hearing, and have no

7 objection to proceeding via Zoom video.

8 Thank you.

9 THE COURT: Thank you very much.

10 Mr. Smith.

11 I believe you're on mute.

12 MR. SMITH: Does that work?

13 THE COURT: Yes.

14 MR. SMITH: I was tempted to start out with "I am not

15 a cat," Your Honor. But I apologize for that.

16 THE COURT: We've all seen that one.

17 MR. SMITH: Donald C. Smith, appearing on behalf of

18 the Division of Industrial Relations.

19 I am appearing from the better part of my kitchen in

20 beautiful Southern Nevada, Clark County.

21 I have no objection to going forward today on a Zoom

22 hearing, Your Honor.

23 THE COURT: All right. Good.

24 And if we're going to have just a moment of levity

1 before we start with the more serious matters at hand, Mr.
2 Guinasso, if you think you're going to get a slight advantage
3 by virtue of styling your beard similar to the Court's,
4 you're wrong; but nice try.

5 I would like to know what happened, though, when we
6 were supposed to have this hearing a couple weeks ago. We
7 were all dressed up with no place to go.

8 Mr. Guinasso.

9 MR. GUINASSO: Yes. Thank you, Your Honor.

10 First, I apologize to both you and counsel.

11 The notice of the hearing we got, but it got lost in
12 the e-mail. The eFlex e-mail got put into "Junk" or
13 something like that. And basically the hearing didn't get
14 put on my calendar.

15 And so when the Court and Don tried to reach out to
16 me, I was not available. I was in another meeting for that
17 whole afternoon.

18 So I just want to apologize for imposing on your time
19 that way, and thank you for the courtesy of continuing the
20 hearing a couple weeks, so that I could put it on my calendar
21 and attend.

22 THE COURT: All right. Well, look, the reality is,
23 in a non-COVID world or in the pandemic world, these things
24 happen. They've been happening more often while the

1 courthouse has been closed, and we've been proceeding
2 remotely. And so everyone gets sort of one free bite. But
3 let's work hard to make sure it doesn't happen again.

4 All right. So let's get right to it.

5 I've got a very interesting case. Not a lot at stake
6 financially, but certainly enough to fight about and enough
7 to understand the parties' rights, remedies, obligations,
8 positions going forward.

9 But I want to make sure, Mr. Guinasso -- because
10 you'll go first and argue why you think the Court should
11 grant the petition -- I want to make sure that I understand
12 the standard of review under the Nevada Administrative
13 Procedure Act. Because the petitioners here have alleged the
14 decision is erroneous; right? And they're asking the Court
15 to correct it. And unless I'm wrong, the Court is guided by
16 NRS 233B.135, Subsection (3).

17 And the Court is empowered thereunder to reverse in
18 part, reverse, set aside or do something else, if it
19 determines the substantial rights of the petitioners have
20 been prejudiced because, really, any of the following have
21 occurred. And it's listed (a) through (f).

22 That the final decision of the agency, (a), was in
23 violation of petitioner's constitutional or statutory rights
24 or provisions.

1 (B), was in excess of the statutory authority of the
2 agency.

3 Or, (c), made upon unlawful procedure.

4 Or (d), affected by other error of law. Which that's
5 a little bit subject to interpretation as to how we are to
6 construe that phrase.

7 (E), clearly erroneous in view of the reliable,
8 probative and substantial evidence on the full record.

9 Or, (f), arbitrary or capricious or characterized by
10 abuse of discretion. And we are all aware of how those terms
11 have been defined and what type of showing, demonstration,
12 understanding, conclusion a reviewing court must reach in
13 order to find that that administrative decision is arbitrary
14 or capricious, or otherwise characterized by abuse of
15 discretion.

16 So let's start at that point, Mr. Guinasso.

17 Do you agree that, for the Court to set aside the
18 decision in whole or to set aside the decision in part, the
19 Court must find that you've demonstrated on behalf of your
20 clients that one or more of (a) through (f) have occurred?

21 If the answer is no, tell me why not, and then what
22 the Court should be guided, if not that.

23 MR. GUINASSO: Yes, Your Honor, I agree with the
24 standard of review as it's stated.

1 THE COURT: Then I guess let's streamline things.
2 Not to limit or box in the petitioners, but which of these or
3 all of these do you believe the Court should at the end of
4 this hearing reach a conclusion have been met, justifying the
5 relief you seek? Is it all of them? Is it only (f)? Is it
6 (e) and (f)? I mean, which one or ones is it, please?

7 MR. GUINASSO: Yes, Your Honor. Thank you.

8 We would submit to you that the decision, first and
9 foremost, is affected by a clear error of law; that is, the
10 Appeal Officer looked at the law, misconstrued it, and then
11 misapplied it.

12 We would, secondarily, say that the decision isn't --
13 that, therefore, the decision isn't supported by substantial
14 evidence, taking into account the record that's before you,
15 and that, as a result, the decision is arbitrary, capricious,
16 and characterized by abuse of discretion.

17 THE COURT: Fair enough. So (d), (e) and (f).

18 You know, it's interesting that they sort of -- they
19 sort of interact with each other, because often, if you have
20 one, you may have another one also. It's a little unusual to
21 just have one and nothing else.

22 But you're really focusing on -- I mean, the
23 procedure, no problem with. The statutory authority to act
24 with this goal in mind that they pursued, they have that

1 right. And there's no violation of statute or Constitution.
2 It's really, as is often the case in administrative review,
3 (d), (e) and (f). Is that fair?

4 MR. GUINASSO: That's correct, Your Honor.

5 THE COURT: Mr. Smith, is that your understanding of
6 what the fight is about today?

7 Again, I think you're still on mute.

8 MR. SMITH: Sorry, Your Honor.

9 I have dogs in the background, so I try to block them
10 out. The dogs are real. So I apologize for that.

11 Yeah, I agree with that, Your Honor. (D), (e), (f)
12 is probably the major stumbling block basis for the
13 petitioner's appeal.

14 THE COURT: All right. So, thank you. Feel free to
15 mute, if you'd like.

16 Mr. Guinasso, why should the Court find that either
17 (d) or (e) or (f) or some combination exists here?

18 Know this: I have reviewed the briefs. We've looked
19 at the file. We're generally familiar. I really want you to
20 hit the high points. What do you need this Court to take
21 away from this hearing that you want to get from your view
22 into the Court's mind, impression or --

23 MR. GUINASSO: Thank you, Your Honor.

24 I appreciate you clarifying the standard of review.

1 And I know, having appeared before you several times,
2 that you read the briefs, and you understand the legal
3 arguments that are made, so I'm not going to reiterate or
4 restate those arguments.

5 It's our position that this case really presents
6 issues that expose problems in our Nevada laws regarding what
7 constitutes an employer, what constitutes an employee, what
8 constitutes an independent contractor, and under what
9 circumstances Workers' Compensation insurance must be
10 secured, and who must secure that coverage.

11 So to bring clarity on why we believe the Appeal
12 Officer erred as a matter of law and how we believe the law
13 should have been construed and applied by the Appeal Officer
14 to the facts presented, what I'd like to do is present you,
15 if you would indulge me, Your Honor, with an analogy and a
16 hypothetical.

17 The analogy is this: Just like International Academy
18 of Style, my client, the Boyd Law School, is in the education
19 business. And being in the education business, Boyd employs
20 professors to provide basic legal education to students who
21 will one day pursue careers in the law. The professors are
22 in the education business, and typically enjoy a fulfilling
23 career as professors of law, usually within some specialty.
24 They're either contract professors or court professors or the

1 like. These professors are clearly employees of Boyd Law
2 School.

3 However, Boyd also engages practicing lawyers from
4 the community from time to time to teach seminars, to provide
5 practical instruction in the classroom setting, and to serve
6 as adjunct instructors. Some of these lawyers are sole
7 practitioners; others work for firms; others work for the
8 government.

9 These lawyers are not employees of the law school.
10 They're independent contractors. These lawyers are not in
11 the same trade and business as the law school. They're in
12 the law business. They provide practical instruction that
13 primarily benefits the students, not the law school. Boyd
14 doesn't need and doesn't otherwise -- is not otherwise
15 required to retain the services of practicing lawyers to
16 deliver education to law students.

17 If Boyd decided tomorrow not to retain the services
18 of attorneys practicing law currently to provide instruction,
19 Boyd would certainly be able to deliver legal education to
20 students through the professors and employees on a full-time
21 and part-time basis.

22 So, by analogy, the record that's before you, the
23 record on appeal, establishes that the instructors that IAS
24 retains are similar to practicing lawyers who are engaged to

1 teach at law school. Some of these cosmetology professionals
2 are solo professionals; others work for established salons.
3 All of the cosmetology professionals are in the cosmetology
4 business. They're not in the education business. They
5 provide practical instruction to enrich the educational
6 experiences of the students. They are not primarily
7 responsible for delivering education.

8 IAS -- and this came out in the record before the
9 Appeal Officer in testimony, and then through the
10 documents -- IAS does not need or otherwise require the
11 services of these practicing cosmetologists to deliver
12 education to their students.

13 If IAS decided tomorrow not to retain the services of
14 any cosmetology professionals currently working in their own
15 salons or other salons, the testimony and evidence presented
16 in this record before you establishes that IAS can certainly
17 be able to deliver education to the students through
18 certified instructors that it employs on a full-time basis.

19 So, Your Honor, the foregoing analogy, really, the
20 reasons would be why we've argued that the Appeal Officer
21 erred as a matter of law when she affirmed the decisions of
22 DIR to impose premium penalties, finding that these
23 cosmetology professionals were working at the school as
24 employees, rather than independent contractors.

1 And in this regard, since 1998, every cosmetology
2 professional engaged, IAS has executed a contract recognizing
3 their independent contractor status --

4 THE COURT: Well, hold on. Let me hit the pause
5 button.

6 So, Mr. Smith, I do this from time to time, and I'm
7 going to do it now. Rather than wait for Mr. Guinasso to
8 make all the arguments and then hear your view, if you would,
9 can you respond to what he just said?

10 He said, "This is a fair analogy, and, really, that's
11 the way the Court should look at the way the cosmetologists
12 are -- their relationship to the International Academy of
13 Style. The academy can go forward with its birthright in the
14 absence of such instructors. They have their own, full-time.
15 These are people that have other jobs. These are people,
16 some come in, some come out, some teach more, some teach
17 less.

18 Why is the analogy to Boyd Law an improper one; or,
19 if it's not, why doesn't it change what should have been a
20 decision other than what was reached here?

21 MR. SMITH: Thank you, Your Honor.

22 I like the concept of responding immediately.

23 I think it's an inappropriate analogy. And there are
24 a couple of reasons. I will give you some real, real high

1 points.

2 Let's start with the big issue, which is, Workers'
3 Compensation is different from almost any other area in the
4 law, and employers are required to have Workers' Compensation
5 coverage for their employees.

6 Now, definition, by definition, "employees" includes
7 independent contractors, Your Honor. That's under NRS
8 616A.210, sub (1).

9 Let's start from that premise, and then let's go down
10 a level or two and say, "Okay. That's fine." But there are
11 also specific statutory requirements for a school of
12 cosmetology, which were laid out and reviewed by and looked
13 at by the Appeals Officer.

14 One is that they have to have -- a school of
15 cosmetology must have two instructors present at all times.
16 That's NRS 616.644; 395.

17 There's another proviso that the instructors, when
18 they're there, must -- or shall devote full-time attention to
19 the instruction, which is NAC 644.105.

20 So is it possible you could structure a school of
21 cosmetology that way? It is possible, but it's highly
22 unlikely.

23 The other thing that is a major, major catch-all --

24 THE COURT: I didn't -- you lost me with that point.

1 MR. SMITH: Okay.

2 THE COURT: Are you saying -- because the first thing
3 I think I hear you saying is, "Judge, it doesn't matter even
4 if what is happening here is aligned with what the Boyd
5 adjunct professors or outside lecturers do. They need
6 Workers' Compensation anyway."

7 Is that the point you're trying to make?

8 MR. SMITH: That's entirely possible, Your Honor,
9 unless they are an absolutely true independent contractor.
10 Personally, I do not know how you run a school without having
11 instructors.

12 THE COURT: Well, you're moving off a little.
13 Because if the Court believes that the analogy with Boyd is a
14 fair one -- now, what I hear you saying is, "That sounds
15 good, but we don't really think that's what's happening." Or
16 maybe you're not.

17 But if the analogy is a good one, they don't need
18 Workers' Compensation insurance. Would you agree with that?

19 MR. SMITH: If he is accurate, and it is a true
20 independent contractor, that's true.

21 But the issue is: Are they an independent
22 contractor? Are they in the same business or profession?

23 THE COURT: Well, that's where the rubber hits the
24 road here; right? That's where, really, what we're getting

1 down to.

2 But in terms of, if Mr. Guinasso convinces the Court
3 that these are really adjunct law professors, by his
4 analogy -- and we haven't gotten to his hypothetical yet --
5 then he might be on to something.

6 You say, "That can't be right. That can't be how
7 this business is run. That would be a hoax."

8 MR. SMITH: The requirement for Workers' Comp, Your
9 Honor, is much broader than a straightforward independent
10 contractor. You can have an independent contractor in the
11 context of many businesses under the IRS rules. A person
12 could potentially be an independent contractor under the
13 Employment Security Department rules. But those rules do not
14 apply to Workers' Comp. Workers' Comp has a much broader
15 definition of what an employee is. And employees include
16 independent contractors. That is 616A.210, sub (1).

17 THE COURT: Okay. All right. Hold that thought.

18 Mr. Guinasso, let's go back to you to respond to what
19 you just heard from Mr. Smith, and then move on to the
20 hypothetical, plus anything else you'd like to point out to
21 the Court.

22 MR. GUINASSO: Thank you, Your Honor.

23 I don't disagree with my colleague that Workers'
24 Compensation law is different, and that in some instances

1 independent contractors are deemed -- are what's called a
2 "deemed employee" under the statute. But not in all cases.
3 Not all independent contractors are deemed employees. And we
4 briefed those issues. And the Court is going to have to
5 grapple with both what the Appeal Officer said, what DIR is
6 arguing, and what we presented to you as to why these
7 independent contractors are not deemed employees. And we
8 provided that analysis in detail.

9 But returning to the analogy, I think we've heard my
10 colleague for DIR admit that there aren't -- that in this
11 analogy with Boyd that, if they are what he called true
12 independent contractors, that they would not be required
13 to -- Boyd would not be required to give them or provide them
14 Workers' Comp insurance.

15 And, so, those aren't points of disagreement. Those
16 are, with regard to what the law is, it's how the law is
17 applied. And we would submit to you -- and this goes to the
18 hypothetical. And the hypothetical is this: If DIR
19 attempted to assess fines and penalties against Boyd for
20 engaging practicing attorneys as instructors, the same legal
21 defects we've asserted in this case regarding the instructor
22 status as employees and the school's obligation to provide
23 Workers' Comp coverage in engaging cosmetology professionals
24 would apply to that case.

1 And, so, if I extend that hypothetical a little bit
2 further, I would invite you, Your Honor, to -- I could do
3 this with you, or I would just invite you to review the
4 briefing again, and look at the facts of this case and
5 substitute the word "Boyd" in each place where you see "IAS,"
6 and in each place where you see "cosmetology professional"
7 substitute "practicing attorney."

8 Now, let me be clear on one other point that my
9 colleague representing DIR presented to you, and that is
10 this: This school, IAS, has the full-time instructors
11 necessary to comply with the law to have a school for
12 cosmetology.

13 THE COURT: Well, you heard him say he finds it hard
14 to believe. He finds it hard to believe you can do what
15 they're doing with two full-time instructors.

16 You're saying, "That's their business to run. The
17 law allows it to be run that way. And it's legally
18 irrelevant if Mr. Smith is suspicious that that would be not
19 a good way to run that particular business"; right?

20 MR. GUINASSO: Yes, Your Honor.

21 Not only are they not relevant, but the record before
22 the Appeal Officer established the facts that I'm presenting
23 to you; that is, the owner, Bonnie Casteel, testified as to
24 how she satisfied the requirements of those statutes -- that

1 statute, how she provided regular instruction to the
2 students. And then she went on to explain what these
3 cosmetology professionals do to enrich the student
4 experience, much in the same way that a practicing lawyer
5 coming into the law school will enrich the student experience
6 for law students who are looking to understand the law, learn
7 the law, and, hopefully, have careers themselves in the law.

8 So, with that being said, if you engage in this
9 exercising of substituting "Boyd" for "IAS" and substituting
10 "practicing lawyer" for "cosmetology professional," the legal
11 issues in this case become abundantly clear, because what we
12 have is, you know, schools that are in the education
13 business, professionals that are in some other businesses,
14 those schools reaching out into the community to allow for
15 those professionals to come and provide practical-instruction
16 seminars.

17 I mean, the testimony that was brought before the
18 Appeal Officer was, you know, that these professionals would
19 teach things such as, you know, special techniques in
20 coloring and things like that, that are really applied
21 practical teaching, not a part of the regular curriculum
22 that's required in order for these students to ultimately
23 become cosmetology professionals themselves.

24 THE COURT: Stop right there.

1 Mr. Smith, why, if the record was so clear that that
2 was the evidence before the hearing officer, why was it
3 discounted? What is your understanding of why that was not
4 accepted in the ultimate conclusion reached, and then later
5 affirmed?

6 MR. SMITH: Your Honor, I think it comes down to the
7 factual determination the Appeals Officer made in this
8 matter.

9 In looking at the testimony and findings of fact,
10 conclusions of law, he essentially held that the testimony of
11 the owner was not credible; it was incredibly self-serving.

12 THE COURT: And the people that came in seemed to be
13 reading from a script.

14 MR. SMITH: Correct, Your Honor.

15 So, I think in our brief we refer to it as, "Witness
16 statements were also essentially not considered credible."

17 And this is a situation in a PJR where your
18 responsibility is not to re-weigh the evidence, Your Honor.

19 THE COURT: So, Mr. Guinasso, doesn't the Appeals
20 Officer have the right to weigh the credibility and make a
21 determination if what they're hearing is believable, is
22 credible, they accept it?

23 Because if they accept it the way you've just
24 explained it to the Court, we wouldn't be here right now;

1 right? They would have viewed it differently, and likely
2 gone your way. But they have the right to exercise their
3 independent discretion based on their perception of the
4 strength of what they're hearing, don't they?

5 MR. GUINASSO: Yes, Your Honor.

6 If this case pivoted on credibility determinations of
7 the witnesses, I wouldn't bring the case to you, because I
8 agree with my colleague, Mr. Smith, that the credibility
9 determinations are the responsibility of the finder of fact.

10 And the case law provides that, even if you were to
11 disagree, Your Honor, with the credibility determinations
12 made by the Appeal Officer --

13 THE COURT: It wouldn't matter; right? It wouldn't
14 matter. They're the ones that determine that. That's not my
15 role.

16 MR. GUINASSO: Exactly.

17 I'm just quickly reviewing the decision once again.
18 And I don't believe that those credibility determinations
19 were actually made. There was no passing statement that Miss
20 Casteel was not credible on what she testified to. There is
21 no passing statement with regard to the credibility of the
22 witnesses.

23 The Appeal Officer did say that Miss Casteel's
24 testimony was self-serving and appeared to be scripted, and,

1 therefore, not credible. But whose testimony is not
2 self-serving and scripted? You know, that -- with regard to
3 that determination, I don't know that that carries the day.

4 The real issue before you is whether the Appeal
5 Officer construed and applied the law correctly based on all
6 the facts that were presented.

7 I'm not asking you to re-weigh the facts with regard
8 to Miss Casteel's testimony. I'm asking you to look at the
9 law with regard to what the definition of an "employee" is,
10 what the definition of an "employer" is, what the definition
11 of an "independent contractor" is, and determine whether or
12 not, on this record, the conclusion that my client as a
13 matter of law was the statutory employer for these
14 independent contractors was the right conclusion of law.

15 And we would submit to you, based on all the reasons
16 that are in our briefing, as well as the logical reasoning
17 that I've tried to deploy in this oral argument with you both
18 and with the analogy and the hypothetical, that the legal
19 determination made by this Appeal Officer was clearly
20 erroneous, impacted -- it was clearly an erroneous decision,
21 arbitrary, capricious, and should be overturned, with
22 instructions to find that my clients were not required to pay
23 Workers' Comp, and, therefore, were not required to provide
24 coverage.

1 I would note one other thing that's in the record
2 that seemed to have been passed over by the Appeal Officer,
3 and it's an important consideration when considering whether
4 the law was applied or not. And that is, the record before
5 this Appeal Officer was that at no time in the entire period
6 was anybody without Workers' Comp coverage. The law requires
7 that Workers' Compensation coverage be provided at all times.

8 These independent contractors provided Workers'
9 Compensation coverage for a majority of the time at issue.
10 IAS began to provide comp coverage again under the threat of
11 having their school shut down pending the outcome of this
12 litigation. And so there was no time on this record where
13 Workers' Comp coverage was not provided; therefore, the
14 benefit penalty and the fines assessed were wholly
15 inappropriate.

16 Even if, Your Honor, you disagree with me on my
17 analysis on the law relative to who is an employer, who is an
18 employee, who is an independent contractor, the other legal
19 error here, even if you disagree with me on those other
20 things, is the error in finding that the penalties were
21 appropriate, when at all times relevant in this case every
22 person who was working at the school had Workers'
23 Compensation coverage.

24 THE COURT: Okay. Hold that thought.

1 Mr. Smith, let's start actually on the last thing Mr.
2 Guinasso just said: the penalties, that ilk. He says, "If
3 you do nothing else, Judge -- and, you know, we hope you see
4 it our way, but if you don't, at a minimum, that should go
5 away."

6 What is your response to that?

7 MR. SMITH: A couple of things.

8 Number one, Your Honor, employers may not require an
9 employee to provide their own Workers' Compensation coverage.
10 That's our view of what they did in this matter under the
11 contracts, under the -- quote -- independent contractor
12 agreement.

13 That's also a violation of NRS 616B.609 (1) (b),
14 which says, in the Workers' Compensation context: Any
15 contractual device modifying the liability for Workers'
16 Compensation are void in the contract. Any device is void.
17 Not voidable, not changeable, not exchangeable; void.

18 So we have employees that -- if you take his
19 argument, we have employees that they're forcing to buy their
20 own coverage, which is not allowed by statute, and under
21 their -- quote -- independent contractor agreement requiring
22 them to do it, and the statute that says that provision is
23 void in the State of Nevada.

24 THE COURT: Well, again, it's void if you're

1 requiring your own employees to procure their own Workers'
2 Compensation; right? But it's not void, though, as I
3 understand the law, if an independent contractor has their
4 own, and you require that as a condition of being affiliated
5 with your business.

6 Now, I might have that wrong. But that's the way I
7 understood the law.

8 Do I have it right, Mr. Smith?

9 MR. SMITH: You do. But here's the thing.

10 THE COURT: I understand that's not what happened
11 here.

12 MR. SMITH: No. Because I believe these instructors
13 were required to be there full-time because -- and you have
14 to look at the cosmetology licenses -- they have to have two
15 full-time instructors there present at any point in time. I
16 believe it's for each 25 students. Don't quote me on that
17 one.

18 THE COURT: Okay.

19 MR. SMITH: And that they have to be able to devote
20 their full time and attention to what they're doing there.

21 Most of the instructors, if I remember the record
22 correctly, were putting in 20 to 40 hours a week solely at
23 the International Academy of Style. They were not having
24 independently. They did not do anything else. They spent

1 all their time, effort and energy at that school.

2 The other thing, Your Honor, is, if you look at and
3 break down what is an independent contract, and whether or
4 not it's in the same business or profession, there's an old
5 case called Cotton versus Meers. And what essentially
6 happened is that developed the normal work test. It was out
7 of favor with our Nevada Supreme Court for a while. But
8 guess what. They cleaned it up and brought it back.

9 And the bottom line is: Do we have these people that
10 are -- that claim they're independent instructors -- I don't
11 know how they are -- they are the faculty, they are the
12 teachers that the school is required to have, by statute,
13 NRS; otherwise, they don't have their valid license.

14 And is this in the same business or profession?
15 Absolutely, Your Honor. It's kind of like: How do you drive
16 a truck without having a truck driver? I don't know how you
17 do.

18 THE COURT: That's -- I like the analogy of Boyd Law.
19 That's a little strong, but that's not lost on me, either.

20 Hold your thought for a minute, Mr. Smith.

21 By the way, let me just comment. It's an absolute
22 pleasure to have argument from two lawyers that know their
23 stuff as thoroughly as you both do and are polite and
24 professional. I don't get that every day. However this

1 shakes out, you have the Court's appreciation.

2 All right. Mr. Guinasso, how would you like to
3 respond to what Mr. Smith just said? And then I'm going to
4 let him say anything else he'd like. And then I'll finish up
5 with you.

6 So, Mr. Guinasso, at this point, what you just heard
7 from Mr. Smith, what else would you like to say?

8 MR. GUINASSO: Yes, Your Honor.

9 I think there's a disagreement between Mr. Smith and
10 I as to what the record actually states.

11 And in that regard, the record does not establish
12 that the instructors were required to be there full-time. In
13 fact, the record establishes the opposite: that they had no
14 schedules; they weren't required to be there at any
15 particular times; they could come and go as they pleased.
16 They oftentimes crafted their schedules around what the
17 students' availability was outside of their normal course
18 work.

19 So with regard to fulfilling the requirements of law
20 to have instructors there on a full-time basis, Loni Casteel
21 testified that that occurred both through her and her
22 business partner, who both own the school.

23 The analogy I gave you about Boyd may be a little bit
24 off in this one key fact, and that is, this cosmetology

1 school is a small school. It's not a big school, like the
2 UNLV School of Law. A very small number of students at any
3 given time. And, so, having, you know, two full-time
4 instructors, with these cosmetology professionals coming in
5 to provide, you know, some enrichment to the student
6 experience is, you know, a part of their normal business, and
7 supported by the record and the testimony that's presented to
8 you.

9 So then the question really becomes, you know: Were
10 these individuals that Miss Casteel was engaging to come and
11 provide practical instruction to students, you know, were
12 these people independent contractors?

13 We provided independent contractor agreements going
14 back from 1998. We provided their statements, you know,
15 with -- statements of one, two, three, four, five, six,
16 seven, seven different cosmetology professionals, who all
17 supported the idea that they were independent contractors,
18 not employees, and what they were required to do on a
19 day-to-day basis. You can certainly look at that.

20 Again, I'm not asking you to re-weigh the evidence.
21 I'm just asking you to look at this record and to
22 decide: Was the Appeal Officer correct in concluding that
23 these individuals were deemed employees?

24 THE COURT: Okay. Hold that.

1 So, Mr. Smith -- I'm going to come back to you in a
2 minute, Mr. Guinasso -- so, Mr. Smith, please respond to what
3 you just heard, and then make any final argument you'd like
4 to the Court, before I give Mr. Guinasso the floor to make
5 final argument, because he has the burden here.

6 MR. SMITH: It's my last shot.

7 THE COURT: Your last shot, yes.

8 MR. SMITH: Okay. All due respect to Mr. Guinasso, I
9 don't have the full record in front of me, but my
10 recollection disagrees from his recollection in terms of the
11 terms of the contracts themselves.

12 My recollection is that the contracts essentially
13 have schedules that a particular person filled out in
14 advance.

15 For instance -- and I'm just making this one up by
16 analogy -- I will be there from 2:00 to 6:00 every Monday,
17 Wednesday, Friday. But I think it's a little broader than
18 that. So it is not that they can come and go freely as they
19 wanted. They can show up anytime they want to, to do some
20 teaching or not do some teaching. They had set schedules
21 when they needed to be in the facility. And I suspect,
22 although I can't prove it, that that was to require the
23 possibility of school licensing requirements.

24 And that's with all due respect to Mr. Guinasso. If

1 I have that wrong, I'll apologize to him. I've done enough
2 of these cases, sometimes facts blend.

3 THE COURT: The reality is -- I'm just trying to go
4 back in time here. This hearing was going to be a couple
5 months ago. And I think somebody got ill or had something
6 going on in their personal or professional life, so it got
7 moved out a little bit. So I reviewed it very, very
8 carefully in advance of that. It's gotten a little rusty.
9 I've sort of gone back to freshen it, but not with the depth
10 from the first time.

11 So, like you, Mr. Smith, I have my own vision of what
12 the record said, but I might be conflating it with something.

13 All right. What else would you like me to know?
14 Then I am going to hear from Mr. Guinasso.

15 MR. SMITH: Your Honor, a quick summary on my points.

16 This is a petition for judicial review. We do not
17 believe there was any error made. This is not a situation
18 where you re-weigh the evidence. The Appeals Officer did
19 that. The Appeals Officer has done that.

20 This is not a situation -- strike that.

21 And the other thing is just the arguments I've
22 already made, Your Honor, which is, you know, Work Comp
23 employees includes independent contractors by statute, in
24 616A.210.

1 The requirements that schools of cosmetology having
2 licensed instructors on the facilities, I've already beat
3 that one to death, Your Honor.

4 And the final one being 616B.609, which makes any
5 device in a contract modifying the liabilities and --

6 THE COURT: -- void.

7 MR. SMITH: -- void.

8 THE COURT: All right.

9 MR. SMITH: And we think the petition ought to be
10 denied.

11 Thank you.

12 THE COURT: Thank you.

13 Mr. Guinasso, final thoughts, please.

14 MR. GUINASSO: Thank you, Your Honor.

15 Just to refresh counsel's memory, and for your
16 edification, Your Honor, if you wanted to look at the record
17 on appeal at 299 through 376, on appeal at 495 through 719,
18 you'll find copies of the agreements with the cosmetology
19 professionals.

20 THE COURT: I've looked at them. I've looked at
21 every one. As I'm sitting here now, I have to go back and
22 look, because I'm starting to -- it's getting rusty, as I
23 said. Tell me what you think they show.

24 MR. GUINASSO: And so I would just conclude with this

1 because, again, I don't want to take the Court's time of
2 reiterating a lot of arguments that are fully briefed. But I
3 would say this. Look at those agreements again, and
4 substitute "Boyd" for "ISA," substitute "cosmetology" --

5 THE COURT: -- with "legal practitioners."

6 MR. GUINASSO: Yeah. Just look at the contract like
7 that. If you look at the contract like that, you would see,
8 you know, the clear issue we have with the application of law
9 in this situation.

10 If the Court concludes otherwise on this record with
11 the law as it currently is stated, then there really isn't
12 going to be any situation where, you know, people from the
13 community come into schools to teach would not -- there would
14 be no situation where they would be independent contractors.

15 This record --

16 THE COURT: Well, that's a pretty broad brush. I
17 mean, I don't know if I would agree with the affirmation here
18 that would lead to concern that if I, I guess, discourage
19 or -- well, the interests of people with skills to help
20 mentor and teach others, because it might somehow -- there
21 might be prohibitively expensive or other impediments to
22 that. I don't know. That seems like a pretty broad
23 statement.

24 MR. GUINASSO: Probably a strong statement. But let

1 me put it this way, Your Honor. Maybe this will be a little
2 bit more conservative of a statement.

3 The business model of this school, not unlike other
4 schools, really is about providing instruction to their
5 students. And they provide that instruction through their
6 regular instructors that are employees. We have employees
7 and/or owners who are instructors. That is supplemented by
8 these people from the community who come in and provide
9 additional instruction.

10 If the ruling on this record, on this law, is that
11 those individuals coming into schools are now going to be
12 employees, and Workers' Comp coverage is going to need to be
13 provided, it will cause this school, in particular -- I
14 believe Miss Casteel testified to this fact -- they will have
15 to reconsider those sorts of engagements, and that students
16 will have to get those practical experiences on their own by
17 going into the community and soliciting those.

18 So the school is really doing a service to the
19 student by inviting these cosmetology professionals to come
20 in and provide some practical applied instruction to
21 complement the regular course of study that they deliver on a
22 weekly basis.

23 So for all those reasons and all the reasons
24 contained in our brief, we would ask you to grant our

1 petition and reverse the conclusions of law of this Appeal
2 Officer.

3 Thank you.

4 THE COURT: Thank you.

5 All right. The matter is submitted.

6 Excellent argument. Well-written briefs for both
7 sides.

8 I've already commented on your professionalism. It's
9 a pleasure to work with you.

10 I will have a decision out promptly, with just the
11 facts. What does "promptly" mean? It means as soon as I can
12 get to it after handling several other matters that the Court
13 has to deal with.

14 So we will go off the record.

15 (Recess.)

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1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3

4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Thursday, February 11, 2021, at the
9 hour of 1:30 p.m. of said day, and took verbatim stenotype
10 notes of the proceedings had upon the matter of INTERNATIONAL
11 ACADEMY OF STYLE, Petitioner, versus DIVISION OF INDUSTRIAL
12 RELATIONS, Respondent, Case No. CV20-00445, and thereafter
13 reduced to writing by means of computer-assisted
14 transcription as herein appears;

15 That the foregoing transcript, consisting of pages 1
16 through 34, all inclusive, contains a full, true and complete
17 transcript of my said stenotype notes, and is a full, true
18 and correct record of the proceedings had at said time and
19 place.

20 Dated at Reno, Nevada, this 24th day of June, 2021.

21

22

23 /s/ Isolde Zihn
Isolde Zihn, CCR #87

24

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Case No. CV20-00445

Petitioner,

vs.

Dept. No. 8

DIVISION OF INDUSTRIAL RELATIONS, and the
NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Before the Court is a Petition for Judicial Review of a decision issued after the underlying worker's compensation matter was heard before Appeals Officer Sheila Moore on November 6, 2018. Petitioner International Academy of Style ("Petitioner" or "International Academy") filed its *Petition for Judicial Review* on March 6, 2020, and its *Opening Brief* on June 1, 2020. Respondent State of Nevada, Department of Business and Industry, Division of Industrial Relations ("Respondent" or the "Division") filed an *Answering Brief* on August 13, 2020, to which Petitioner replied on September 14, 2020. A hearing was held on February 11, 2021, in which the parties had the opportunity to address all issues.

Having reviewed the record, briefs, the parties' arguments, and applicable authority, the Court **DENIES** the *Petition for Judicial Review*. Thus, the Court **AFFIRMS** the Appeals Officer's *Decision and Order* filed on February 20, 2020.

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BACKGROUND

Based upon the record, the briefings of parties, and other documentary evidence submitted, the Court is aware of the following facts:

In 2014, the Attorney General of the State of Nevada filed a criminal complaint against International Academy for failing to maintain workers compensation insurance for its employees for the period of December 21, 2010 through September 2, 2015, a misdemeanor violation of NRS 616D.200(3)(a). International Academy then completed the terms of a deferred prosecution agreement on March 17, 2016, and the charges were dismissed on October 19, 2016.

As part of the deferred prosecution agreement, International Academy obtained workers' compensation insurance for the business effective December 1, 2015. However, International Academy apparently failed to renew the policy once the charges were dismissed, effective December 1, 2016. The Division notified International Academy of its obligation to maintain workers' compensation and warned that failure to provide evidence the business was closed or had no employees would result in further action taken by the state. A new workers' compensation policy was obtained, effective December 31, 2016.

The Division issued a determination on March 14, 2017, therein imposing two premium penalties in the amounts of: (1) \$251.10 for the lapse of coverage from December 1, 2016, through December 30, 2016; and (2) \$16,390.94 for the prior lapse of coverage from December 21, 2010 through November 30, 2015. International Academy appealed the determination on March 20, 2017. On June 9, 2017, the \$16,390.94 premium penalty was amended to \$16,190.15.

After an evidentiary hearing on or about November 6, 2018, and a closing argument hearing on or about August 1, 2019, the Appeals Officer found against International Academy. In particular, in its *Decision and Order* filed February 20, 2020, the Appeals Officer concluded the instructors were employees, and International Academy was required to, but failed to maintain workers' compensation coverage for these employees. Additionally, the Appeals Officer found both premium penalties, as amended, were properly calculated using the correct class codes for each individual instructor and staff. More specifically, the Appeals Officer concluded: (1) the instructors of International Academy are not exempt from the employee classification under Nevada law; (2) the

instructors are not engaged in an independent enterprise pursuant to the applicable statute; (3) the instructors do not meet the legal criteria to qualify as independent contractors; and (4) the asserted defenses are inapplicable.

Thereafter, International Academy filed the instant petition for judicial review. The Court now addresses the instant *Petition for Judicial Review* and finds the following.

STANDARD OF REVIEW

When a party of record in an administrative proceeding is aggrieved by a final decision in a contested case, it may file a petition for judicial review. NRS 233B.130(1). Judicial review of agency decisions is governed by the Administrative Procedure Act, codified in NRS Chapter 233B: The Nevada Administrative Procedure Act. *Liberty Mut. v. Thomasson*, 130 Nev. 27, 30, 317 P.3d 831, 834 (2014). Pursuant to NRS 233B.135(1), judicial review of a final decision of an agency must be conducted by the Court without a jury and confined to the record. The reviewing court may remand, affirm or set the decision aside in whole or in part, if the 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.

NRS 233B.135(3)(a)-(f); *See North Las Vegas v. Pub. Serv. Comm’n*, 83 Nev. 278, 281, 429 P.2d 66, 67–68 (1967); *see also Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (clarifying that NRS 223B.135 outlines a standard of review and not a standard of proof).

Legal questions are reviewed de novo. *Southern Nevada Operating Engineers v. Labor Commissioner*, 121 Nev. 523, 527–28, 119 P.3d 720, 724 (2005) (citing *State, Dep’t of Bus. & Indus., Office of Labor Com’r v. Granite Const. Co.*, 118 Nev. 83, 86, 40 P.3d 423, 425 (2002)). However, the final decision of the agency, i.e. the appeals officer, is deemed reasonable and lawful until it is reversed or set aside (in whole or in part) by the court. NRS 223B.135(2).

Moreover, in assessing a final agency decision, great deference is afforded to the fact-based conclusions of law made by an appeal officer and his decision will not be overturned if it is supported by substantial evidence. *Grover C. Dils. Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Review of an administrative agency’s decision is limited to the determination of whether the record contains substantial evidence to support the agency’s decision. *See Taylor v. State Dep’t of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013); *State, Dep’t. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991) (citing *State Dep’t of Motor Vehicles v. Jenkins*, 99 Nev. 460, 462, 663 P.2d 1186, 1188 (1983)). In this case, “substantial evidence” is evidence which a reasonable mind might accept as adequate to support a conclusion. NRS 233B.135(4). This standard of review thus refers to the quality and quantity of the evidence necessary to support factual determinations. *Nassiri*, 130 Nev. at 249–50, 327 P.3d at 490. “It contemplates deference to those determinations on review, asking only whether the facts found by the administrative factfinder are reasonably supported by sufficient, worthy evidence in the record.” *Id.*

The inquiry is confined to a search for an abuse of discretion, clear error, or an arbitrary and capricious decision. *See Taylor*, 129 Nev. at 930, 314 P.3d at 951; *see also Employment Security Dep’t v. Holmes*, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996) (“...[the Court] must review the evidence presented to the administrative body and ascertain whether the body acted arbitrarily or capriciously, thus abusing its discretion.”). “[A]n abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor’s rightful prerogatives...” *Falline v. GNLV Corporation*, 107 Nev. 1004, 1009–10 n.3, 823 P.2d 888, 892 n.3 (1991). A decision is arbitrary and capricious when the administrative agency disregards the facts and circumstances involved. *Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police Dep’t*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (citing *State v. Ford*, 110 Wash.2d 827, 830, 755 P.2d 806, 808 (1988)). In addition, “although statutory construction is generally a question of law reviewed de novo, this court defer[s] to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor*, 129 Nev. at 930, 314 P.3d at 951 (citing

1 *Dutchess Bus. Serv., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165
2 (2008) (internal quotations omitted)).

3 **DISCUSSION**

4 In evaluating the arguments made by both International Academy and the Division, the
5 Court has considered the record in its entirety, supporting documentation, parties' arguments, and
6 the pleadings. In doing so, it finds that the Appeals Officer's *Decision and Order* filed on
7 February 20, 2020, is not in violation of constitutional or statutory provisions, affected by error of
8 law, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole
9 record. Further, International Academy was not arbitrary or capricious or characterized by abuse of
10 discretion nor did it exceed the Appeals Officer's authority. Rather, the Court finds that there was
11 substantial evidence to support the Appeals Officer's final order under review by this Court.

12 In reaching this conclusion, the Court finds as follows:

13 **A. The Record Supports the Employee Classification Finding**

14 The Appeals Officer found NRS 616A.110(9) to be inapplicable to exempt instructors from
15 the employee classification pursuant to NRS 616A.105. International Academy challenges this, and
16 argues the Appeals Officer erred as a matter of law in finding NRS 616A.110(9) inapplicable. More
17 specifically, International Academy contends NRS 616A.110(9) applies because, *inter alia*, the
18 instructors perform services pursuant to a written agreement, which provides that instructors are not
19 employees for the purposes of NRS 616A.

20 A review of the statute advises the Appeals Officer properly determined NRS 616A.110(9)
21 inapplicable. Nevada Revised Statute 616A.110(9) provides that a person who meets the following
22 criteria is exempt from the definition of employee:

- 23 (a) Directly sells or solicits the sale of products, in person or by
24 telephone;
- 25 (2) To another person from his or her home or place other than a
26 retail store;
- 26 (b) Receives compensation or remuneration based on sales to
27 customers rather than for the number of hours that the person
28 works; **and**
- (c) Performs pursuant to a written agreement with the person for
whom the services are performed which provides that the person

1 who performs the services is not an employee for the purposes of
2 this chapter.

3 Based upon the Court’s observation, it is clear the Appeals Officer adequately analyzed the
4 statute as evidenced in finding that “...the instructors do not solicit or sell products and do not
5 receive remuneration based on sale, NRS 616A.110(9) does not apply to exclude the instructors as
6 employees...” And while International Academy maintains the Appeals Officer erred with respect
7 to NRS 616A.110(9), this Court finds the contrary. Instead, this Court determines that by presence
8 of the term “**and**,” NRS 616A.110(9) requires all three prongs to be met for a person to be excluded
9 from the definition of employee. Furthermore, a review of the record depicts the Appeals Officer
10 had substantial evidence to conclude NRS 616A.110(9) inapplicable because the instructors failed
11 to meet subsection (b), i.e., receiving compensation or remuneration based on sales rather than for
12 the number of hours worked. Therefore, the Court concludes the Appeals Officer did not err as a
13 matter of law, and its decision is supported by substantial evidence. Thus, this Court is unwilling to
14 disturb the Appeals Officer’s findings.

15 **B. The Record Supports Independent Enterprise Finding**

16 Next, International Academy contends its instructors are an independent enterprise pursuant
17 to NRS 616B.603. The Appeals Officer found:

18 [T]he instructors are clearly furthering the operation of business of the
19 school by providing the instruction necessary to qualify as a
20 cosmetology school. The instructors are clearly in the same trade
 business, occupation or profession as Ms. Casteel and Ms. Schultz.

21 International Academy maintains that because the instructors are not in the same trade, they
22 are an independent enterprise under NRS 616B.603. Additionally, International Academy argues, it
23 can operate without any of the instructors.

24 Nevada Revised Statute 616B.603 provides that a person is not an employer if:

- 25 (a) The person enters into a contract with another person or business
26 which is an independent enterprise; and
27 (b) The person is not in the same trade, business, profession or
28 occupation as the independent enterprise.
 2. ... “independent enterprise” means a person who holds himself or
 herself out as being engaged in a separate business and:

- 1 (a) Holds a business or occupational license in his or her own name;
2 or
3 (b) Owns, rents or leases property used in furtherance of the business.

4 Furthermore, the Nevada Supreme Court has held that “[i]f a principal contractor is not a
5 licensed contractor, it will be the statutory employer only if it can show that it is in the “same trade”
6 under the *Meers* test. *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1349 (1995). The *Meers*
7 test “is not one of whether the subcontractor’s activity is useful, necessary, or even absolutely
8 indispensable to the statutory employer’s business.... The test is whether that indispensable activity
9 is, in that business, normally carried on through employees rather than independent contractors.”
10 *Meers v. Haughton Elevator*, 101 Nev. 283, 286 (1985).

11 The record suggests the Appeals Officer had substantial evidence to conclude that the
12 instructors were not engaged in an independent enterprise. For instance, NRS 616B.6039(1)(a)
13 requires both parties to enter into a contract. However, International Academy did not have any
14 written agreements in place prior to 2013. Thus, International Academy failed to meet the statutory
15 requirement for the period from 2010 to 2013. Moreover, the fact that International Academy
16 requires instructors to pay “chair rental fees” or “choose at his or her own discretion to teach other
17 general classes in lieu of the rental fee,” fails to meet the criteria under NRS 616B.6039(2)(b) since
18 the original agreements did not include any mention of rental chairs or booths. The Court concludes
19 the Appeals Officer’s decision is supported by substantial evidence, and thus it is unwilling to
20 disturb the Appeals Officer’s findings.

21 **C. The Record Supports the Independent Contractor Finding**

22 International Academy’s next contention is that the Appeals Officer erred in finding the
23 instructors were not independent contractors pursuant to NRS 616A.255 and the five-part “control
24 test” enunciated by the Nevada Supreme Court in *Clark Cty. v. State Indus. Ins. Sys.*

25 Nevada Revised Statute 616A.255 defines an “Independent contractor” as a “person who
26 renders service for a specified recompense for a specified result, under the control of the person’s
27 principal as to the result of the person’s work only and not as to the means by which such result is
28 accomplished.” Furthermore, in determining whether an employer-employee relationship exist,
courts apply the following five-part “control test”:

- (1) the degree of supervision;
- (2) the source of wages;
- (3) the existence of a right to hire and fire;
- (4) the right to control the hours and location of employment; and
- (5) the extent to which the workers' activities further the general business concerns of the alleged employer.

Clark Cty. v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986).

A review of the record depicts the Appeals Officer had substantial evidence to conclude that the control test weighed against the International Academy. Consider, for example, the following:

First, the Appeals Officer found International Academy "must ensure that instructors are providing instruction according to the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary." The record illustrates multiple instances of supervision, including: (1) one specific contract requires the instructor to record grades and attendance; (2) statements from Ms. Casteel's to the Attorney General's investigator in which she explained International Academy terminated an instructor because the instructor required a student to bring her food. Conduct which Ms. Casteel deemed unacceptable; (3) termination clauses in later agreements which provided International Academy "may terminate this agreement at any time "for cause," the grounds for which are defined below." Those grounds include "C. Instructor fails to perform his or her services in a competent manner" and "G. Instructor fails to perform the terms and conditions as agreed upon under this Agreement." The Court notes some degree of supervision is required to determine whether an instructor was performing pursuant to the terms of the agreement and providing competent instruction in accordance with the professional standards.

Second, the Appeals Officer found the source of the instructors' wages derives from International Academy. While International Academy appears to maintain that it is not the source of wages because it has designated a specific account for wages, the Appeals Officer considered this evidence by finding that "simply designating a specific account does not negate this fact," and drawing the following analogy: "A certain amount of money is set aside from students tuition to provide for compensation to the instructors similar in fashion to corporation setting aside a certain amount profit for compensation of employees."

1 Third, the Appeals Officer found “[c]learly, [International Academy] has the right to sever a
2 relationship with an instructor that is not teaching according to the guidelines of the Board of
3 Cosmetology.” This Court again notes Ms. Casteel’s statements regarding the termination of an
4 instructor for requiring a student to bring her food. The instructor ultimately filed a successful
5 unemployment claim with the Department of Employment, Training and Rehabilitation against
6 International Academy, giving further credence to this factor.

7 Fourth, the Appeals Officer found that International Academy “controls the location of
8 employment since the instruction must be done at the school. The instructor is not allowed to
9 provide the instruction at a salon or residence. The hours are controlled by the school as two
10 instructors are required to be present at all times.” This Court notes each agreement contains a
11 schedule during which the instructor is to work between Tuesday and Saturday with hours ranging
12 from 8:45 a.m. to 10:30 p.m. Thus, suggesting control of the hours and location of employment.

13 Fifth, the Appeals Officer found “obviously the instructors are furthering the business
14 concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz who also
15 both instruct students.” The record does not suggest otherwise.

16 Finally, the Appeals Officer found the testimony of Ms. Casteel to be self-serving, noted that
17 it appeared to be scripted and therefore not found to be credible. Additionally, the Appeals Officer
18 also found the witness statements introduced by International Academy to be “nearly verbatim and
19 obviously prepared by the same individual and therefore were given no weight.”

20 Based upon the Court’s observation of the persuasive evidence above, as well as the record
21 as a whole, it is clear the Appeals Officer adequately analyzed both the law and the specific factual
22 allegations which were lodged against International Academy. And while International Academy
23 contends that the evidence in the record depicts that the Appeals Officer’s decision was “clearly
24 erroneous,” this Court finds quite the contrary. Instead, this Court determines that there was
25 virtually overwhelming evidence from which the Appeals Officer concluded the instructors did not
26 meet the independent contractor classification. Further, the Court concludes the Appeals Officer did
27 not violate NRS 233B.135(3), and thus it is unwilling to disturb the Appeals Officer’s findings.

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NONE

JASON GUINASSO, ESQ.

Chinese Kuhl

Judicial Assistant

1 **CODE: 2540**

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2 Nevada Bar No. 8478

Hutchison & Steffen, PLLC

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Alexander R. Velto, Esq.

4 Nevada Bar No. 14961

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5 500 Damonte Ranch Parkway, Suite 980

Reno, NV 89521

6 *Attorney for International Academy of Style*

7
8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 INTERNATIONAL ACADEMY OF
11 STYLE,

12 Petitioner,

13 vs.

14 DIVISION OF INDUSTRIAL
15 RELATIONS, and the NEVADA
16 DEPARTMENT OF ADMINISTRATION,
17 APPEALS OFFICER SHEILA MOORE,

Respondents.

Case No.: CV20-00445

Dept. No.: 8

18 **NOTICE OF ENTRY OF ORDER**

19 PLEASE TAKE NOTICE that an Order Denying Petition for Judicial Review was entered on
20 March 1, 2021, a copy of which is attached as **Exhibit "1."**

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Hutchinson & Steffen, and that on the 31 day of March, 2021, I electronically filed a true and correct copy of the **NOTICE OF ENTRY OF ORDER**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Donald Smith, Esq.
400 West King Street, Suite 400
Carson City, Nv 89703
Attorney for Division Of Industrial Relations

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law Firm, and that on the 31 day of March, 2021, I deposited for mailing in Reno, Nevada a true and correct copy of the **NOTICE OF ENTRY OF ORDER**, addressed to:


International Academy of Style
Bonnie Schultz & Loni Casteel
2295 Market Street
Reno, NV 89502

Nevada Department of Admin.
Appeals Division
1050 E William St., Suite 450
Carson City, NV 89701

Attorney General's Office
100 N Carson Street
Carson City, NV 89701

Legal Section
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, NV 89703

Nevada Department of Admin.
Director
515 East Musser St., 3rd Floor
Carson City, NV 89701



Ga'Brieala Mitchell

EXHIBIT LIST

Exhibit #	Description	Pages
Exhibit "1"	Order Denying Petition for Judicial Review	11

Exhibit “1”

Exhibit “1”

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Case No. CV20-00445

Petitioner, Dept. No. 8
vs.

DIVISION OF INDUSTRIAL RELATIONS, and the
NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Before the Court is a Petition for Judicial Review of a decision issued after the underlying worker's compensation matter was heard before Appeals Officer Sheila Moore on November 6, 2018. Petitioner International Academy of Style ("Petitioner" or "International Academy") filed its *Petition for Judicial Review* on March 6, 2020, and its *Opening Brief* on June 1, 2020. Respondent State of Nevada, Department of Business and Industry, Division of Industrial Relations ("Respondent" or the "Division") filed an *Answering Brief* on August 13, 2020, to which Petitioner replied on September 14, 2020. A hearing was held on February 11, 2021, in which the parties had the opportunity to address all issues.

Having reviewed the record, briefs, the parties' arguments, and applicable authority, the Court **DENIES** the *Petition for Judicial Review*. Thus, the Court **AFFIRMS** the Appeals Officer's *Decision and Order* filed on February 20, 2020.

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1 **BACKGROUND**

2 Based upon the record, the briefings of parties, and other documentary evidence submitted,
3 the Court is aware of the following facts:

4 In 2014, the Attorney General of the State of Nevada filed a criminal complaint against
5 International Academy for failing to maintain workers compensation insurance for its employees for
6 the period of December 21, 2010 through September 2, 2015, a misdemeanor violation of
7 NRS 616D.200(3)(a). International Academy then completed the terms of a deferred prosecution
8 agreement on March 17, 2016, and the charges were dismissed on October 19, 2016.

9 As part of the deferred prosecution agreement, International Academy obtained workers'
10 compensation insurance for the business effective December 1, 2015. However, International
11 Academy apparently failed to renew the policy once the charges were dismissed, effective
12 December 1, 2016. The Division notified International Academy of its obligation to maintain
13 workers' compensation and warned that failure to provide evidence the business was closed or had
14 no employees would result in further action taken by the state. A new workers' compensation policy
15 was obtained, effective December 31, 2016.

16 The Division issued a determination on March 14, 2017, therein imposing two premium
17 penalties in the amounts of: (1) \$251.10 for the lapse of coverage from December 1, 2016, through
18 December 30, 2016; and (2) \$16,390.94 for the prior lapse of coverage from December 21, 2010
19 through November 30, 2015. International Academy appealed the determination on March 20,
20 2017. On June 9, 2017, the \$16,390.94 premium penalty was amended to \$16,190.15.

21 After an evidentiary hearing on or about November 6, 2018, and a closing argument hearing
22 on or about August 1, 2019, the Appeals Officer found against International Academy. In particular,
23 in its *Decision and Order* filed February 20, 2020, the Appeals Officer concluded the instructors
24 were employees, and International Academy was required to, but failed to maintain workers'
25 compensation coverage for these employees. Additionally, the Appeals Officer found both premium
26 penalties, as amended, were properly calculated using the correct class codes for each individual
27 instructor and staff. More specifically, the Appeals Officer concluded: (1) the instructors of
28 International Academy are not exempt from the employee classification under Nevada law; (2) the

Moreover, in assessing a final agency decision, great deference is afforded to the fact-based conclusions of law made by an appeal officer and his decision will not be overturned if it is supported by substantial evidence. *Grover C. Dils. Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Review of an administrative agency's decision is limited to the determination of whether the record contains substantial evidence to support the agency's decision. *See Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013); *State, Dep't. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991) (citing *State Dep't of Motor Vehicles v. Jenkins*, 99 Nev. 460, 462, 663 P.2d 1186, 1188 (1983)). In this case, "substantial evidence" is evidence which a reasonable mind might accept as adequate to support a conclusion. NRS 233B.135(4). This standard of review thus refers to the quality and quantity of the evidence necessary to support factual determinations. *Nassiri*, 130 Nev. at 249–50, 327 P.3d at 490. "It contemplates deference to those determinations on review, asking only whether the facts found by the administrative factfinder are reasonably supported by sufficient, worthy evidence in the record." *Id.*

The inquiry is confined to a search for an abuse of discretion, clear error, or an arbitrary and capricious decision. *See Taylor*, 129 Nev. at 930, 314 P.3d at 951; *see also Employment Security Dep't v. Holmes*, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996) ("...[the Court] must review the evidence presented to the administrative body and ascertain whether the body acted arbitrarily or capriciously, thus abusing its discretion."). "[A]n abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives..." *Falline v. GNLV Corporation*, 107 Nev. 1004, 1009–10 n.3, 823 P.2d 888, 892 n.3 (1991). A decision is arbitrary and capricious when the administrative agency disregards the facts and circumstances involved. *Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police Dep't*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (citing *State v. Ford*, 110 Wash.2d 827, 830, 755 P.2d 806, 808 (1988)). In addition, "although statutory construction is generally a question of law reviewed de novo, this court defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at 951 (citing

1 *Dutchess Bus. Serv., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165
2 (2008) (internal quotations omitted)).

3 DISCUSSION

4 In evaluating the arguments made by both International Academy and the Division, the
5 Court has considered the record in its entirety, supporting documentation, parties' arguments, and
6 the pleadings. In doing so, it finds that the Appeals Officer's *Decision and Order* filed on
7 February 20, 2020, is not in violation of constitutional or statutory provisions, affected by error of
8 law, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole
9 record. Further, International Academy was not arbitrary or capricious or characterized by abuse of
10 discretion nor did it exceed the Appeals Officer's authority. Rather, the Court finds that there was
11 substantial evidence to support the Appeals Officer's final order under review by this Court.

12 In reaching this conclusion, the Court finds as follows:

13 A. The Record Supports the Employee Classification Finding

14 The Appeals Officer found NRS 616A.110(9) to be inapplicable to exempt instructors from
15 the employee classification pursuant to NRS 616A.105. International Academy challenges this, and
16 argues the Appeals Officer erred as a matter of law in finding NRS 616A.110(9) inapplicable. More
17 specifically, International Academy contends NRS 616A.110(9) applies because, *inter alia*, the
18 instructors perform services pursuant to a written agreement, which provides that instructors are not
19 employees for the purposes of NRS 616A.

20 A review of the statute advises the Appeals Officer properly determined NRS 616A.110(9)
21 inapplicable. Nevada Revised Statute 616A.110(9) provides that a person who meets the following
22 criteria is exempt from the definition of employee:

23 (a) Directly sells or solicits the sale of products, in person or by
24 telephone:

25 (2) To another person from his or her home or place other than a
26 retail store;

26 (b) Receives compensation or remuneration based on sales to
27 customers rather than for the number of hours that the person
28 works; **and**

(c) Performs pursuant to a written agreement with the person for
whom the services are performed which provides that the person

1 who performs the services is not an employee for the purposes of
2 this chapter.

3 Based upon the Court's observation, it is clear the Appeals Officer adequately analyzed the
4 statute as evidenced in finding that "...the instructors do not solicit or sell products and do not
5 receive remuneration based on sale, NRS 616A.110(9) does not apply to exclude the instructors as
6 employees..." And while International Academy maintains the Appeals Officer erred with respect
7 to NRS 616A.110(9), this Court finds the contrary. Instead, this Court determines that by presence
8 of the term "and," NRS 616A.110(9) requires all three prongs to be met for a person to be excluded
9 from the definition of employee. Furthermore, a review of the record depicts the Appeals Officer
10 had substantial evidence to conclude NRS 616A.110(9) inapplicable because the instructors failed
11 to meet subsection (b), i.e., receiving compensation or remuneration based on sales rather than for
12 the number of hours worked. Therefore, the Court concludes the Appeals Officer did not err as a
13 matter of law, and its decision is supported by substantial evidence. Thus, this Court is unwilling to
14 disturb the Appeals Officer's findings.

15 **B. The Record Supports Independent Enterprise Finding**

16 Next, International Academy contends its instructors are an independent enterprise pursuant
17 to NRS 616B.603. The Appeals Officer found:

18 [T]he instructors are clearly furthering the operation of business of the
19 school by providing the instruction necessary to qualify as a
20 cosmetology school. The instructors are clearly in the same trade
 business, occupation or profession as Ms. Casteel and Ms. Schultz.

21 International Academy maintains that because the instructors are not in the same trade, they
22 are an independent enterprise under NRS 616B.603. Additionally, International Academy argues, it
23 can operate without any of the instructors.

24 Nevada Revised Statute 616B.603 provides that a person is not an employer if:

- 25 (a) The person enters into a contract with another person or business
26 which is an independent enterprise; and
27 (b) The person is not in the same trade, business, profession or
28 occupation as the independent enterprise.
 2. ... "independent enterprise" means a person who holds himself or
 herself out as being engaged in a separate business and:

- 1 (a) Holds a business or occupational license in his or her own name;
2 or
3 (b) Owns, rents or leases property used in furtherance of the business.

4 Furthermore, the Nevada Supreme Court has held that “[i]f a principal contractor is not a
5 licensed contractor, it will be the statutory employer only if it can show that it is in the “same trade”
6 under the *Meers* test. *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1349 (1995). The *Meers*
7 test “is not one of whether the subcontractor’s activity is useful, necessary, or even absolutely
8 indispensable to the statutory employer’s business.... The test is whether that indispensable activity
9 is, in that business, normally carried on through employees rather than independent contractors.”
10 *Meers v. Haughton Elevator*, 101 Nev. 283, 286 (1985).

11 The record suggests the Appeals Officer had substantial evidence to conclude that the
12 instructors were not engaged in an independent enterprise. For instance, NRS 616B.6039(1)(a)
13 requires both parties to enter into a contract. However, International Academy did not have any
14 written agreements in place prior to 2013. Thus, International Academy failed to meet the statutory
15 requirement for the period from 2010 to 2013. Moreover, the fact that International Academy
16 requires instructors to pay “chair rental fees” or “choose at his or her own discretion to teach other
17 general classes in lieu of the rental fee,” fails to meet the criteria under NRS 616B.6039(2)(b) since
18 the original agreements did not include any mention of rental chairs or booths. The Court concludes
19 the Appeals Officer’s decision is supported by substantial evidence, and thus it is unwilling to
20 disturb the Appeals Officer’s findings.

21 **C. The Record Supports the Independent Contractor Finding**

22 International Academy’s next contention is that the Appeals Officer erred in finding the
23 instructors were not independent contractors pursuant to NRS 616A.255 and the five-part “control
24 test” enunciated by the Nevada Supreme Court in *Clark Cty. v. State Indus. Ins. Sys.*

25 Nevada Revised Statute 616A.255 defines an “Independent contractor” as a “person who
26 renders service for a specified recompense for a specified result, under the control of the person’s
27 principal as to the result of the person’s work only and not as to the means by which such result is
28 accomplished.” Furthermore, in determining whether an employer-employee relationship exist,
courts apply the following five-part “control test”:

- (1) the degree of supervision;
- (2) the source of wages;
- (3) the existence of a right to hire and fire;
- (4) the right to control the hours and location of employment; and
- (5) the extent to which the workers' activities further the general business concerns of the alleged employer.

Clark Cty. v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986).

A review of the record depicts the Appeals Officer had substantial evidence to conclude that the control test weighed against the International Academy. Consider, for example, the following:

First, the Appeals Officer found International Academy "must ensure that instructors are providing instruction according to the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary." The record illustrates multiple instances of supervision, including: (1) one specific contract requires the instructor to record grades and attendance; (2) statements from Ms. Casteel's to the Attorney General's investigator in which she explained International Academy terminated an instructor because the instructor required a student to bring her food. Conduct which Ms. Casteel deemed unacceptable; (3) termination clauses in later agreements which provided International Academy "may terminate this agreement at any time "for cause," the grounds for which are defined below." Those grounds include "C. Instructor fails to perform his or her services in a competent manner" and "G. Instructor fails to perform the terms and conditions as agreed upon under this Agreement." The Court notes some degree of supervision is required to determine whether an instructor was performing pursuant to the terms of the agreement and providing competent instruction in accordance with the professional standards.

Second, the Appeals Officer found the source of the instructors' wages derives from International Academy. While International Academy appears to maintain that it is not the source of wages because it has designated a specific account for wages, the Appeals Officer considered this evidence by finding that "simply designating a specific account does not negate this fact," and drawing the following analogy: "A certain amount of money is set aside from students tuition to provide for compensation to the instructors similar in fashion to corporation setting aside a certain amount profit for compensation of employees."

1 Third, the Appeals Officer found “[c]learly, [International Academy] has the right to sever a
2 relationship with an instructor that is not teaching according to the guidelines of the Board of
3 Cosmetology.” This Court again notes Ms. Casteel’s statements regarding the termination of an
4 instructor for requiring a student to bring her food. The instructor ultimately filed a successful
5 unemployment claim with the Department of Employment, Training and Rehabilitation against
6 International Academy, giving further credence to this factor.

7 Fourth, the Appeals Officer found that International Academy “controls the location of
8 employment since the instruction must be done at the school. The instructor is not allowed to
9 provide the instruction at a salon or residence. The hours are controlled by the school as two
10 instructors are required to be present at all times.” This Court notes each agreement contains a
11 schedule during which the instructor is to work between Tuesday and Saturday with hours ranging
12 from 8:45 a.m. to 10:30 p.m. Thus, suggesting control of the hours and location of employment.

13 Fifth, the Appeals Officer found “obviously the instructors are furthering the business
14 concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz who also
15 both instruct students.” The record does not suggest otherwise.

16 Finally, the Appeals Officer found the testimony of Ms. Casteel to be self-serving, noted that
17 it appeared to be scripted and therefore not found to be credible. Additionally, the Appeals Officer
18 also found the witness statements introduced by International Academy to be “nearly verbatim and
19 obviously prepared by the same individual and therefore were given no weight.”

20 Based upon the Court’s observation of the persuasive evidence above, as well as the record
21 as a whole, it is clear the Appeals Officer adequately analyzed both the law and the specific factual
22 allegations which were lodged against International Academy. And while International Academy
23 contends that the evidence in the record depicts that the Appeals Officer’s decision was “clearly
24 erroneous,” this Court finds quite the contrary. Instead, this Court determines that there was
25 virtually overwhelming evidence from which the Appeals Officer concluded the instructors did not
26 meet the independent contractor classification. Further, the Court concludes the Appeals Officer did
27 not violate NRS 233B.135(3), and thus it is unwilling to disturb the Appeals Officer’s findings.

28 //

1 **D. The Record Supports the Defenses Finding**

2 Finally, the Appeals Officer found the doctrine of *res judicata*, laches, and equitable
3 estoppel did not apply. International Academy challenges these findings. The Court notes that *res*
4 *judicata* requires identical issues and parties. However, as the Appeals Officer points out, the
5 Division was not a party to the prosecutorial action taken by the Attorney General. Moreover,
6 laches requires International Academy to be disadvantaged by the period of 15-months leading up
7 to the penalties, in which the investigation was taking place. There is no evidence in the record to
8 suggest International Academy was disadvantaged. Additionally, equitable estoppel requires
9 International Academy to be ignorant of the true state of the facts in the matter. The record suggests
10 quite the contrary as International Academy was put on notice by the Attorney General after it
11 failed to renew the policy once the initial charges were dismissed. Thus, the Court can perceive of
12 no basis for a violation of NRS 233B.135(3).

13 **CONCLUSION**

14 Based on the aforementioned reasons, IT IS HEREBY ORDERED that International
15 Academy's Petition for Judicial Review is **DENIED** and the Appeals Officer's *Decision and Order*
16 filed February 20, 2020 is **AFFIRMED**.

17 **IT IS SO ORDERED.**

18 **DATED** this 1 day of March, 2021.



19 BARRY L. BRESLOW
20 District Judge

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NONE

DONALD C. SMITH, ESQ.

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Judicial Assistant

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Attorney for International Academy of Style

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF
STYLE,

Petitioner,

vs.

DIVISION OF INDUSTRIAL
RELATIONS, and the NEVADA
DEPARTMENT OF ADMINISTRATION,
APPEALS OFFICER SHEILA MOORE,

Respondents.

Case No.: CV20-00445

Dept. No.: 8

CASE APPEAL STATEMENT

COMES NOW, Petitioner, INTERNATIONAL ACADEMY OF STYLE ("IAS"), by and
through his attorney of record, JASON D. GUINASSO, ESQ. of HUTCHISON & STEFFEN, PLLC,
pursuant to NRAP 3(f), hereby submits to the Court Appellant's Case Appeal Statement:

1. Name of appellant filing this case appeal statement:

International Academy of Style

1 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

2 The Honorable District Court Judge, Barry Breslow - Case No. CV20-00445

3 **3. Identify each appellant and the name and address of counsel for each appellant:**

4 IAS is represented by Jason D. Guinasso, Esq. and Alexander R. Velto, Esq.

- 5 ○ Appellate Counsel: Jason D. Guinasso, Esq.
- 6 ○ Trial Counsel: Jason D. Guinasso, Esq.
- 7 ○ Address: Hutchison & Steffen, PLLC: 500 Damonte Ranch Parkway, Suite 980,
- 8 Reno, NV 89521

9 **4. Identify each respondent and the name and address of appellate counsel, if known, for**
10 **each respondent (if the name of the respondent's appellate counsel is unknown, indicate as much**
11 **and provide the name and address of that respondent's trial counsel):**

12 Department of Business and Industry Division of Industrial Relations, Senior Division Counsel

- 13 ○ Appellate Counsel: Donald Smith, Esq.
- 14 ○ Respondent, Division of Industrial Relations
- 15 ○ Trial Counsel: Donald Smith, Esq.
- 16 ○ Address: 400 West King Street, Suite 400, Carson City, NV 89703
- 17 ○ Mailing Address: Same as Address

17 Nevada Department of Admin.

- 18 ○ Appeals Division
- 19 ○ Address: 1050 E William St., Suite 450, Carson City, NV 89701

20 Attorney General's Office

- 21 ○ Address: 100 N Carson Street, Carson City, NV 89701

22 Division of Industrial Relations

- 23 ○ Legal Section
- 23 ○ Address: 400 West King Street, Suite 201, Carson City, NV 89703

24 Nevada Department of Admin.

- 25 ○ Director

1 ○ Address: 515 East Musser St., 3rd Floor, Carson City, NV 89701

2 **5. Indicate whether any attorney identified above in response to question 3 or 4 is not**
3 **licensed to practice law in Nevada and, if so, whether the district court granted that attorney**
4 **permission to appear under SCR 42 (attach a copy of any district court order granting such**
5 **permission):**

6 Not applicable.

7 **6. Indicate whether appellant was represented by, appointed or retained counsel in the**
8 **District Court:**

9 The Appellant was represented by retained counsel in the Department of Business and Industry
10 Division of Industrial Relations, Senior Division Counsel.

11 **7. Indicate whether appellant is represented by appointed or retained counsel on appeal:**

12 The Appellant is represented by retained counsel on appeal.

13 **8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date**
14 **of entry of the district court order granting such leave:**

15 Not applicable.

16 **9. Indicate the date the proceedings commenced in district court:**

17 March 6, 2020

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

21 International Academy of Style “IAS” is a small for-profit institution located in Reno, Nevada
22 offering licensure in Cosmetology, Hair Design, Esthetician, and Nail Technician. Since 1998, every
23 cosmetology professional engaged by IAS executed a contract with IAS recognizing them as
24 independent contractors working with the school. These contracts constitute written agreements
25 between IAS and cosmetology professionals, expressly providing that cosmetology professionals

1 performing services under the Agreement are not employees under the Nevada Industrial Insurance Act
2 (“NIIA”). Out of caution and based on an agreement with the State of Nevada, each Independent
3 Contractor planning to work with IAS obtained a Certificate of Liability Insurance for 2017, signing an
4 Independent Instructor Agreement in the process, and acquiring a Sole Proprietor Business License in
5 the state of Nevada. Meanwhile, IAS also obtained workers’ compensation insurance for 2016 and
6 2017.

7 Simply, the Division of Industrial Relations (“DIR”) has misclassified the cosmetology
8 professionals who contract with IAS. IAS is not the “Employer” of the cosmetology professionals they
9 contract with. Instead, cosmetology professionals who contract with IAS are “Independent
10 Contractors” and “Independent Enterprises” under Nevada Law. They are not in the “same trade or
11 business” as IAS.

12 The March 14, 2017, DIR determinations assessing a premium penalty in the amount of
13 \$251.10 for the period of December 1 to December 30, 2016, and a premium penalty in the amount of
14 \$16,390.94 for the period of December 21, 2010, to November 30, 2015, against IAS are not supported
15 by the evidence or Nevada law. Every cosmetology professional who contracted with IAS had
16 workers’ compensation coverage either through their own coverage or through coverage provided by
17 IAS during the relevant period of inquiry, December 1 to December 30, 2016. Moreover, the premium
18 penalties for the period December 21, 2010 to November 30, 2015 were unlawfully assessed against
19 IAS and should have been barred by the Appeals Officer under the Doctrine of Res Judicata, the
20 Doctrine of Laches, and the Doctrine of Equitable Estoppel from asserting claims for premium
21 penalties.

22 In this regard, the Appeals Officer has abused her discretion in affirming the determinations of
23 DIR to impose premium penalties. IAS seeks this appeal to review the Appeals Officer’s findings of
24 fact and conclusions of law under NRS 233B.135(3) because the final decision of the Appeals Officer
25 has prejudiced its rights under the Nevada Industrial Insurance Act (“NIIA”), has been affected by

1 other grievous errors of law, is clearly erroneous in view of the reliable, probative, and substantial
2 evidence on the whole record, and is otherwise arbitrary, capricious, or characterized by abuse of
3 discretion.

4 In IAS's Petition for Judicial Review, filed on March 6, 2020, IAS requested that the Decision
5 and Order be reviewed because: (1) the Appeals Officer erred as a matter of law by concluding the
6 instructors of IAS should not be excluded from the definition of "Employee" under Nevada law. (2)
7 The Appeals Officer erred as a matter of law by concluding that IAS is the "Employer" of the
8 cosmetology professionals they contract with under Nevada law. (3) The Appeals Officer erred as a
9 matter of law by concluding the cosmetology professionals who contract with IAS are not "Independent
10 Contractors" under Nevada law. (4) The Appeals Officer erred as a matter of law by concluding the
11 cosmetology professionals who contract with IAS are not "Independent Enterprises." (5) The Appeals
12 Officer erred as a matter of law by concluding the cosmetology professionals who contract with IAS
13 are in the "Same Trade" as IAS. (6) The Appeals Officer erred as a matter of law in concluding that
14 despite the fact that all cosmetology professionals had workers' compensation coverage either through
15 their own coverage or through coverage provided by IAS, the Division of Industrial Relations ("DIR")
16 determinations issued on March 14, 2017, and assessing a premium penalty in the amount of \$251.10
17 for the period of December 1 to December 30, 2016, and a premium penalty in the amount of
18 \$16,390.94 for the period of December 21, 2010, to November 30, 2015, were supported by the
19 evidence presented and Nevada law. (7) The Appeals Officer erred as a matter of law in concluding
20 DIR is not barred by Res Judicata, the Doctrine of Laches, and the Doctrine of Equitable Estoppel from
21 asserting claims for premium penalties for the period December 21, 2010 to November 30, 2015.

22 Oral Arguments were heard before the District Court on February 11, 2021.

23 On March 1, 2021, the District Court issued an Order Denying Petition for Judicial Review. The
24 Court's Order and consequential holding is now the subject of this appeal.

25 ///

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

No, the case is not currently the subject of an appeal.

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

No, the appeal does not involve child custody or visitation.

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

Yes, the issues on appeal involve the possibility of settlement.

AFFIRMATION

The undersigned does hereby affirm that the preceding document, **CASE APPEAL STATEMENT**, filed in the Second Judicial District Court of the State of Nevada, County of Washoe, does not contain the social security number of any person.

DATED this 30 day of April, 2021.

HUTCHINSON & STEFFEN

By: 

Jason D. Guinasso, Esq.

Nevada Bar No. 8478

Alexander R. Velto, Esq.

Nevada Bar No. 14961

Tyson D. League, Esq.

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500 Damonte Ranch Parkway, Suite 980

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Attorney for International Academy of Style

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Hutchinson & Steffen, and that on the 30 day of April, 2021, I electronically filed a true and correct copy of the **CASE APPEAL STATEMENT**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Donald Smith, Esq.
400 West King Street, Suite 400
Carson City, NV 89703
Attorney for Division Of Industrial Relations

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Gunderson Law Firm, and that on the 30 day of April, 2021, I deposited for mailing in Reno, Nevada a true and correct copy of the **CASE APPEAL STATEMENT**, addressed to:

International Academy of Style
Bonnie Schultz & Loni Casteel
2295 Market Street
Reno, NV 89502

Nevada Department of Admin.
Appeals Division
1050 E William St., Suite 450
Carson City, NV 89701

Attorney General's Office
100 N Carson Street
Carson City, NV 89701

Legal Section
Division of Industrial Relations
400 West King Street, Suite 201
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Nevada Department of Admin.
Director
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500 Damonte Ranch Parkway, Suite 980

7 Reno, NV 89521

Attorney for International Academy of Style

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 *****

12 INTERNATIONAL ACADEMY OF
13 STYLE,

14 Petitioner,

15 vs.

16 DIVISION OF INDUSTRIAL
17 RELATIONS, and the NEVADA
DEPARTMENT OF ADMINISTRATION,
APPEALS OFFICER SHEILA MOORE,

18 Respondents.

Case No.: CV20-00445

Dept. No.: 8

19 **NOTICE OF APPEAL**

20 **NOTICE IS HEREBY GIVEN THAT:** INTERNATIONAL ACADEMY OF STYLE,
21 Petitioner above named, by and through their counsel of record Jason D. Guinasso, Esq. hereby appeals
22 to the SUPREME COURT OF NEVADA the final judgment from the *Order Denying Petition for*

23 ///

24 ///

25 ///

1 *Judicial Review*, entered in this action on March 1, 2021, attached hereto and incorporated herein as
2 **Exhibit "1"**.

3 **AFFIRMATION**

4 The undersigned does hereby affirm that the preceding document, **NOTICE OF APPEAL**,
5 filed in the Second Judicial District Court of the State of Nevada, County of Washoe, does not contain
6 the social security number of any person.

7 DATED this 30 day of April, 2021.

8 HUTCHINSON & STEFFEN

9
10 By:



11 Jason D. Guinasso, Esq.
12 Nevada Bar No. 8478
13 Alexander R. Velto, Esq.
14 Nevada Bar No. 14961
15 Tyson D. League, Esq.
16 Nevada Bar No. 13366
17 500 Damonte Ranch Parkway, Suite 980
18 Reno, NV 89521
19 *Attorney for International Academy of Style*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Hutchinson & Steffen, and that on the 30 day of April, 2021, I electronically filed a true and correct copy of the **NOTICE OF APPEAL**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

Donald Smith, Esq.
400 West King Street, Suite 400
Carson City, Nv 89703
Attorney for Division Of Industrial Relations

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Appeals Division
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Carson City, NV 89703

Nevada Department of Admin.
Director
515 East Musser St., 3rd Floor
Carson City, NV 89701



Ga'Briela Mitchell

EXHIBIT LIST

Exhibit #	Description	Pages
Exhibit "1"	Order Denying Petition for Judicial Review	11

Exhibit “1”

Exhibit “1”

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE, Case No. CV20-00445

Petitioner, Dept. No. 8
vs.

DIVISION OF INDUSTRIAL RELATIONS, and the
NEVADA DEPARTMENT OF
ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

Before the Court is a Petition for Judicial Review of a decision issued after the underlying worker's compensation matter was heard before Appeals Officer Sheila Moore on November 6, 2018. Petitioner International Academy of Style ("Petitioner" or "International Academy") filed its *Petition for Judicial Review* on March 6, 2020, and its *Opening Brief* on June 1, 2020. Respondent State of Nevada, Department of Business and Industry, Division of Industrial Relations ("Respondent" or the "Division") filed an *Answering Brief* on August 13, 2020, to which Petitioner replied on September 14, 2020. A hearing was held on February 11, 2021, in which the parties had the opportunity to address all issues.

Having reviewed the record, briefs, the parties' arguments, and applicable authority, the Court **DENIES** the *Petition for Judicial Review*. Thus, the Court **AFFIRMS** the Appeals Officer's *Decision and Order* filed on February 20, 2020.

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1 **BACKGROUND**

2 Based upon the record, the briefings of parties, and other documentary evidence submitted,
3 the Court is aware of the following facts:

4 In 2014, the Attorney General of the State of Nevada filed a criminal complaint against
5 International Academy for failing to maintain workers compensation insurance for its employees for
6 the period of December 21, 2010 through September 2, 2015, a misdemeanor violation of
7 NRS 616D.200(3)(a). International Academy then completed the terms of a deferred prosecution
8 agreement on March 17, 2016, and the charges were dismissed on October 19, 2016.

9 As part of the deferred prosecution agreement, International Academy obtained workers'
10 compensation insurance for the business effective December 1, 2015. However, International
11 Academy apparently failed to renew the policy once the charges were dismissed, effective
12 December 1, 2016. The Division notified International Academy of its obligation to maintain
13 workers' compensation and warned that failure to provide evidence the business was closed or had
14 no employees would result in further action taken by the state. A new workers' compensation policy
15 was obtained, effective December 31, 2016.

16 The Division issued a determination on March 14, 2017, therein imposing two premium
17 penalties in the amounts of: (1) \$251.10 for the lapse of coverage from December 1, 2016, through
18 December 30, 2016; and (2) \$16,390.94 for the prior lapse of coverage from December 21, 2010
19 through November 30, 2015. International Academy appealed the determination on March 20,
20 2017. On June 9, 2017, the \$16,390.94 premium penalty was amended to \$16,190.15.

21 After an evidentiary hearing on or about November 6, 2018, and a closing argument hearing
22 on or about August 1, 2019, the Appeals Officer found against International Academy. In particular,
23 in its *Decision and Order* filed February 20, 2020, the Appeals Officer concluded the instructors
24 were employees, and International Academy was required to, but failed to maintain workers'
25 compensation coverage for these employees. Additionally, the Appeals Officer found both premium
26 penalties, as amended, were properly calculated using the correct class codes for each individual
27 instructor and staff. More specifically, the Appeals Officer concluded: (1) the instructors of
28 International Academy are not exempt from the employee classification under Nevada law; (2) the

instructors are not engaged in an independent enterprise pursuant to the applicable statute; (3) the instructors do not meet the legal criteria to qualify as independent contractors; and (4) the asserted defenses are inapplicable.

Thereafter, International Academy filed the instant petition for judicial review. The Court now addresses the instant *Petition for Judicial Review* and finds the following.

STANDARD OF REVIEW

When a party of record in an administrative proceeding is aggrieved by a final decision in a contested case, it may file a petition for judicial review. NRS 233B.130(1). Judicial review of agency decisions is governed by the Administrative Procedure Act, codified in NRS Chapter 233B: The Nevada Administrative Procedure Act. *Liberty Mut. v. Thomasson*, 130 Nev. 27, 30, 317 P.3d 831, 834 (2014). Pursuant to NRS 233B.135(1), judicial review of a final decision of an agency must be conducted by the Court without a jury and confined to the record. The reviewing court may remand, affirm or set the decision aside in whole or in part, if the 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.

NRS 233B.135(3)(a)-(f); *See North Las Vegas v. Pub. Serv. Comm’n*, 83 Nev. 278, 281, 429 P.2d 66, 67–68 (1967); *see also Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (clarifying that NRS 223B.135 outlines a standard of review and not a standard of proof).

Legal questions are reviewed de novo. *Southern Nevada Operating Engineers v. Labor Commissioner*, 121 Nev. 523, 527–28, 119 P.3d 720, 724 (2005) (citing *State, Dep’t of Bus. & Indus., Office of Labor Com’r v. Granite Const. Co.*, 118 Nev. 83, 86, 40 P.3d 423, 425 (2002)). However, the final decision of the agency, i.e. the appeals officer, is deemed reasonable and lawful until it is reversed or set aside (in whole or in part) by the court. NRS 223B.135(2).

Moreover, in assessing a final agency decision, great deference is afforded to the fact-based conclusions of law made by an appeal officer and his decision will not be overturned if it is supported by substantial evidence. *Grover C. Dils. Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Review of an administrative agency's decision is limited to the determination of whether the record contains substantial evidence to support the agency's decision. *See Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013); *State, Dep't. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991) (citing *State Dep't of Motor Vehicles v. Jenkins*, 99 Nev. 460, 462, 663 P.2d 1186, 1188 (1983)). In this case, "substantial evidence" is evidence which a reasonable mind might accept as adequate to support a conclusion. NRS 233B.135(4). This standard of review thus refers to the quality and quantity of the evidence necessary to support factual determinations. *Nassiri*, 130 Nev. at 249–50, 327 P.3d at 490. "It contemplates deference to those determinations on review, asking only whether the facts found by the administrative factfinder are reasonably supported by sufficient, worthy evidence in the record." *Id.*

The inquiry is confined to a search for an abuse of discretion, clear error, or an arbitrary and capricious decision. *See Taylor*, 129 Nev. at 930, 314 P.3d at 951; *see also Employment Security Dep't v. Holmes*, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996) ("...[the Court] must review the evidence presented to the administrative body and ascertain whether the body acted arbitrarily or capriciously, thus abusing its discretion."). "[A]n abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives..." *Falline v. GNLV Corporation*, 107 Nev. 1004, 1009–10 n.3, 823 P.2d 888, 892 n.3 (1991). A decision is arbitrary and capricious when the administrative agency disregards the facts and circumstances involved. *Meadow v. Civil Serv. Bd. of Las Vegas Metro. Police Dep't*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989) (citing *State v. Ford*, 110 Wash.2d 827, 830, 755 P.2d 806, 808 (1988)). In addition, "although statutory construction is generally a question of law reviewed de novo, this court defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at 951 (citing

1 *Dutchess Bus. Serv., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165
2 (2008) (internal quotations omitted)).

3 DISCUSSION

4 In evaluating the arguments made by both International Academy and the Division, the
5 Court has considered the record in its entirety, supporting documentation, parties' arguments, and
6 the pleadings. In doing so, it finds that the Appeals Officer's *Decision and Order* filed on
7 February 20, 2020, is not in violation of constitutional or statutory provisions, affected by error of
8 law, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole
9 record. Further, International Academy was not arbitrary or capricious or characterized by abuse of
10 discretion nor did it exceed the Appeals Officer's authority. Rather, the Court finds that there was
11 substantial evidence to support the Appeals Officer's final order under review by this Court.

12 In reaching this conclusion, the Court finds as follows:

13 A. The Record Supports the Employee Classification Finding

14 The Appeals Officer found NRS 616A.110(9) to be inapplicable to exempt instructors from
15 the employee classification pursuant to NRS 616A.105. International Academy challenges this, and
16 argues the Appeals Officer erred as a matter of law in finding NRS 616A.110(9) inapplicable. More
17 specifically, International Academy contends NRS 616A.110(9) applies because, *inter alia*, the
18 instructors perform services pursuant to a written agreement, which provides that instructors are not
19 employees for the purposes of NRS 616A.

20 A review of the statute advises the Appeals Officer properly determined NRS 616A.110(9)
21 inapplicable. Nevada Revised Statute 616A.110(9) provides that a person who meets the following
22 criteria is exempt from the definition of employee:

23 (a) Directly sells or solicits the sale of products, in person or by
24 telephone;

25 (2) To another person from his or her home or place other than a
26 retail store;

26 (b) Receives compensation or remuneration based on sales to
27 customers rather than for the number of hours that the person
28 works; **and**

(c) Performs pursuant to a written agreement with the person for
whom the services are performed which provides that the person

1 who performs the services is not an employee for the purposes of
2 this chapter.

3 Based upon the Court's observation, it is clear the Appeals Officer adequately analyzed the
4 statute as evidenced in finding that "...the instructors do not solicit or sell products and do not
5 receive remuneration based on sale, NRS 616A.110(9) does not apply to exclude the instructors as
6 employees..." And while International Academy maintains the Appeals Officer erred with respect
7 to NRS 616A.110(9), this Court finds the contrary. Instead, this Court determines that by presence
8 of the term "and," NRS 616A.110(9) requires all three prongs to be met for a person to be excluded
9 from the definition of employee. Furthermore, a review of the record depicts the Appeals Officer
10 had substantial evidence to conclude NRS 616A.110(9) inapplicable because the instructors failed
11 to meet subsection (b), i.e., receiving compensation or remuneration based on sales rather than for
12 the number of hours worked. Therefore, the Court concludes the Appeals Officer did not err as a
13 matter of law, and its decision is supported by substantial evidence. Thus, this Court is unwilling to
14 disturb the Appeals Officer's findings.

15 **B. The Record Supports Independent Enterprise Finding**

16 Next, International Academy contends its instructors are an independent enterprise pursuant
17 to NRS 616B.603. The Appeals Officer found:

18 [T]he instructors are clearly furthering the operation of business of the
19 school by providing the instruction necessary to qualify as a
20 cosmetology school. The instructors are clearly in the same trade
 business, occupation or profession as Ms. Casteel and Ms. Schultz.

21 International Academy maintains that because the instructors are not in the same trade, they
22 are an independent enterprise under NRS 616B.603. Additionally, International Academy argues, it
23 can operate without any of the instructors.

24 Nevada Revised Statute 616B.603 provides that a person is not an employer if:

- 25 (a) The person enters into a contract with another person or business
26 which is an independent enterprise; and
27 (b) The person is not in the same trade, business, profession or
28 occupation as the independent enterprise.
 2. ... "independent enterprise" means a person who holds himself or
 herself out as being engaged in a separate business and:

- 1 (a) Holds a business or occupational license in his or her own name;
2 or
3 (b) Owns, rents or leases property used in furtherance of the business.

4 Furthermore, the Nevada Supreme Court has held that “[i]f a principal contractor is not a
5 licensed contractor, it will be the statutory employer only if it can show that it is in the “same trade”
6 under the *Meers* test. *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1349 (1995). The *Meers*
7 test “is not one of whether the subcontractor’s activity is useful, necessary, or even absolutely
8 indispensable to the statutory employer’s business.... The test is whether that indispensable activity
9 is, in that business, normally carried on through employees rather than independent contractors.”
10 *Meers v. Haughton Elevator*, 101 Nev. 283, 286 (1985).

11 The record suggests the Appeals Officer had substantial evidence to conclude that the
12 instructors were not engaged in an independent enterprise. For instance, NRS 616B.6039(1)(a)
13 requires both parties to enter into a contract. However, International Academy did not have any
14 written agreements in place prior to 2013. Thus, International Academy failed to meet the statutory
15 requirement for the period from 2010 to 2013. Moreover, the fact that International Academy
16 requires instructors to pay “chair rental fees” or “choose at his or her own discretion to teach other
17 general classes in lieu of the rental fee,” fails to meet the criteria under NRS 616B.6039(2)(b) since
18 the original agreements did not include any mention of rental chairs or booths. The Court concludes
19 the Appeals Officer’s decision is supported by substantial evidence, and thus it is unwilling to
20 disturb the Appeals Officer’s findings.

21 **C. The Record Supports the Independent Contractor Finding**

22 International Academy’s next contention is that the Appeals Officer erred in finding the
23 instructors were not independent contractors pursuant to NRS 616A.255 and the five-part “control
24 test” enunciated by the Nevada Supreme Court in *Clark Cty. v. State Indus. Ins. Sys.*

25 Nevada Revised Statute 616A.255 defines an “Independent contractor” as a “person who
26 renders service for a specified recompense for a specified result, under the control of the person’s
27 principal as to the result of the person’s work only and not as to the means by which such result is
28 accomplished.” Furthermore, in determining whether an employer-employee relationship exist,
courts apply the following five-part “control test”:

- (1) the degree of supervision;
- (2) the source of wages;
- (3) the existence of a right to hire and fire;
- (4) the right to control the hours and location of employment; and
- (5) the extent to which the workers' activities further the general business concerns of the alleged employer.

Clark Cty. v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986).

A review of the record depicts the Appeals Officer had substantial evidence to conclude that the control test weighed against the International Academy. Consider, for example, the following:

First, the Appeals Officer found International Academy "must ensure that instructors are providing instruction according to the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary." The record illustrates multiple instances of supervision, including: (1) one specific contract requires the instructor to record grades and attendance; (2) statements from Ms. Casteel's to the Attorney General's investigator in which she explained International Academy terminated an instructor because the instructor required a student to bring her food. Conduct which Ms. Casteel deemed unacceptable; (3) termination clauses in later agreements which provided International Academy "may terminate this agreement at any time "for cause," the grounds for which are defined below." Those grounds include "C. Instructor fails to perform his or her services in a competent manner" and "G. Instructor fails to perform the terms and conditions as agreed upon under this Agreement." The Court notes some degree of supervision is required to determine whether an instructor was performing pursuant to the terms of the agreement and providing competent instruction in accordance with the professional standards.

Second, the Appeals Officer found the source of the instructors' wages derives from International Academy. While International Academy appears to maintain that it is not the source of wages because it has designated a specific account for wages, the Appeals Officer considered this evidence by finding that "simply designating a specific account does not negate this fact," and drawing the following analogy: "A certain amount of money is set aside from students tuition to provide for compensation to the instructors similar in fashion to corporation setting aside a certain amount profit for compensation of employees."

1 Third, the Appeals Officer found “[c]learly, [International Academy] has the right to sever a
2 relationship with an instructor that is not teaching according to the guidelines of the Board of
3 Cosmetology.” This Court again notes Ms. Casteel’s statements regarding the termination of an
4 instructor for requiring a student to bring her food. The instructor ultimately filed a successful
5 unemployment claim with the Department of Employment, Training and Rehabilitation against
6 International Academy, giving further credence to this factor.

7 Fourth, the Appeals Officer found that International Academy “controls the location of
8 employment since the instruction must be done at the school. The instructor is not allowed to
9 provide the instruction at a salon or residence. The hours are controlled by the school as two
10 instructors are required to be present at all times.” This Court notes each agreement contains a
11 schedule during which the instructor is to work between Tuesday and Saturday with hours ranging
12 from 8:45 a.m. to 10:30 p.m. Thus, suggesting control of the hours and location of employment.

13 Fifth, the Appeals Officer found “obviously the instructors are furthering the business
14 concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz who also
15 both instruct students.” The record does not suggest otherwise.

16 Finally, the Appeals Officer found the testimony of Ms. Casteel to be self-serving, noted that
17 it appeared to be scripted and therefore not found to be credible. Additionally, the Appeals Officer
18 also found the witness statements introduced by International Academy to be “nearly verbatim and
19 obviously prepared by the same individual and therefore were given no weight.”

20 Based upon the Court’s observation of the persuasive evidence above, as well as the record
21 as a whole, it is clear the Appeals Officer adequately analyzed both the law and the specific factual
22 allegations which were lodged against International Academy. And while International Academy
23 contends that the evidence in the record depicts that the Appeals Officer’s decision was “clearly
24 erroneous,” this Court finds quite the contrary. Instead, this Court determines that there was
25 virtually overwhelming evidence from which the Appeals Officer concluded the instructors did not
26 meet the independent contractor classification. Further, the Court concludes the Appeals Officer did
27 not violate NRS 233B.135(3), and thus it is unwilling to disturb the Appeals Officer’s findings.

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NONE

JASON GUINASSO, ESQ.

DONALD C. SMITH, ESQ.

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Judicial Assistant

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ACADEMY OF STYLE,

Case No. CV20-00445

Petitioner,

Dept. No. 8

vs.

DIVISION OF INDUSTRIAL RELATIONS, and the
NEVADA DEPARTMENT OF ADMINISTRATION,
APPEALS OFFICER SHEILA MOORE,

Respondents.

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 3rd day of May, 2021, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 3rd day of May, 2021.

Alicia Lerud, Interim

Clerk of the Court

By /s/YViloria

YViloria

Deputy Clerk