

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

2 LAS VEGAS METROPOLITAN
3 POLICE DEPARTMENT; AND
4 CANNON COCHRAN MANAGEMENT
5 SERVICES, INC.,

6 Appellants,

7 v.

8 STATE OF NEVADA DEPARTMENT
9 OF BUSINESS AND INDUSTRY,
10 DIVISION OF INDUSTRIAL
11 RELATIONS; AND STATE OF
12 NEVADA BOARD FOR THE
13 ADMINISTRATION OF THE
14 SUBSEQUENT INJURY ACCOUNT
15 FOR SELF-INSURED EMPLOYERS,

16 Respondents.

Supreme Court Case No.: 83262

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District Court Case No.: A-20-821892-1
Elizabeth A. Brown
Clerk of Supreme Court

17 **APPELLANTS' OPENING BRIEF**

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a), and must be disclosed:
4

- 5 1. The Appellant, CANNON COCHRAN MANAGEMENT SERVICES, INC.,
6 states that it does not have any parent corporation, or any publicly held
7 corporation that owns 10% or more of its stock, nor any publicly held
8 corporation that has a direct financial interest in the outcome of the litigation.
9

10 NRAP 26.1(a).
11

- 12 2. The Appellant LAS VEGAS METROPOLITAN POLICE DEPARTMENT is
13 a governmental party and therefore exempt from the NRAP 26.1 disclosure
14 requirements.
15

- 16 3. DANIEL, L. SCHWARTZ, ESQ., JOEL P. REEVES, ESQ., KIM PRICE,
17 ESQ., and L. MICHAEL FRIEND, ESQ., of LEWIS BRISBOIS
18 BISGAARD & SMITH LLP are counsel of record for CANNON
19 COCHRAN MANAGEMENT SERVICES, INC. and LAS VEGAS
20 METROPOLITAN POLICE DEPARTMENT who have appeared in this
21 matter before District Court and/or at the administrative proceedings before
22 the SUBSEQUENT INJURY BOARD FOR THE SELF-INSURED
23 EMPLOYERS.
24
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1 These representations are made in order that the judges of this court may
2 evaluate possible disqualifications or recusal.
3

4 DATED this 6th day of January, 2022.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6
7

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1 I.

2 **JURISDICTIONAL STATEMENT**

3
4 Appellants timely appealed the August 19, 2020, determination of the State
5 of Nevada Board for the Administration of the Subsequent Injury Account for Self-
6 Insured Employers per NRS 616C.370, NRS 616B.557(7), and Chapter 233B of
7 the Nevada Revised Statutes which mandates that judicial review shall be the sole
8 and exclusive authorized judicial proceeding in a contested industrial insurance
9 matter.
10

11
12 On May 5, 2021, Respondents filed a motion to dismiss Appellants' petition
13 for judicial review. The district court issued an order on June 21, 2021, granting
14 Respondents' motion to dismiss. Appellants timely filed an appeal of that order
15 with this honorable court on July 19, 2021. As the order is the final judgment of
16 the district court and it aggrieved Appellants, this court has jurisdiction to hear this
17 appeal under NRS 233B.150.
18

19 II.

20 **ROUTING STATEMENT**

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22 As a petition for judicial review of a final decision of an administrative
23 agency, this case is presumptively assigned to the Court of Appeals under NRAP
24 17(b)(10).
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III.

STATEMENT OF THE ISSUES

The district court dismissed Appellants' Petition for Judicial Review of the underlying administrative agency determination. Appellants respectfully request this court to review the district court's findings to determine if dismissal was appropriate. Specifically, this court is asked to address whether Appellants had a statutory mandate under NRS 233B.131(1) to file the transcript of the underlying proceedings before the administrative agency within 45 days after the service of their petition for judicial review; and, if so, was Appellants' failure to do so proper grounds for dismissing their petition for judicial review?

IV.

STATEMENT OF THE CASE

This case concerns the dismissal of a petition for review from a determination by the Board for Administration of Subsequent Injury Account for Self-Insured Employers (hereinafter "the Board") regarding a request for reimbursement from the Subsequent Injury Account related to an industrial injury sustained by an officer with the Las Vegas Metropolitan Police Department.

The Board ultimately issued its Findings of Fact, Conclusions of Law, and Determination on August 19, 2020. Notice of the Board's Determination was issued on September 1, 2020.

1 Appellants timely filed a Petition for Judicial Review of the Board's
2 determination to the district court on September 24, 2020.

3
4 On November 9, 2020, Respondents filed a Transmittal of Record on Appeal
5 in Accordance with the Nevada Administrative Act pursuant to NRS 233B.131.

6 On April 5, 2021, Appellants filed their Opening Brief in support of their
7 petition.
8

9 On May 5, 2021, Respondent filed a motion to dismiss the petition based on
10 its contentions that Appellants never filed the transcript of the underlying
11 administrative proceedings per NRS 233B.131(1)(a) and because Appellants failed
12 to file their Opening Brief within 40 days pursuant to NRS 233B.133(1).
13

14 On June 7, 2021, Respondent's motion came o before the district court.
15

16 The Notice of Entry of Order Granting Respondent's Motion to Dismiss
17 Petition for Judicial Review was filed on June 22, 2021. The court granted the
18 motion based on Appellants' failure to transmit the transcript of the underlying
19 administrative proceeding without good cause.
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21 Appellants appealed the district court's dismissal for this court's review.
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V.

STATEMENT OF RELEVANT FACTS

On April 10, 2018, Appellants/Petitioners Las Vegas Metropolitan Police Department (“LVMPD”) and Cannon Cochran Management Services, Inc. (“CCMSI”)(collectively referred to hereinafter as “Petitioners”) submitted a formal request for reimbursement from the Subsequent Injury Account (hereinafter “SIA”) pursuant to NRS 616B.557 related to a subsequent industrial injury sustained by an officer with LVMPD. (Appellants’ Appendix p. 2.)(hereinafter “APP at ____.”)

On April 18, 2018, the Division of Industrial Relations (hereinafter “DIR”) submitted its recommendation to the Board for Administration of Subsequent Injury Account for Self-Insured Employers (hereinafter “Board”). (APP at 1-42.)

The recommendation of the DIR was heard by the Board on June 27, 2018. (APP at 63-70.)

On July 11, 2018, the Board issued a letter notifying Petitioners that it voted to approve the request for reimbursement, but for less than Petitioners had requested. (APP at 71-72.)

On August 10, 2018, Petitioners sent a letter to the Board advising that they were appealing the Board’s recommendation. (APP at 75.)

On September 28, 2018 the Board conducted a de novo hearing regarding Petitioners’ appeal. (APP at. 124.)

1 The Board ultimately issued its Findings of Fact, Conclusions of Law, and
2 Determination of the Board (hereinafter “the Board’s Determination”) on August
3
4 19, 2020. (APP at 124-130.) The Notice of the Board’s Determination was issued
5 on September 1, 2020. (APP at 131-132.)

6 Petitioners timely filed their Petition for Judicial Review of the Board’s
7
8 determination to the district court on September 24, 2020. (APP at 133-146.)

9 Respondents DIR and the Office of the Attorney General (hereinafter “AG”)
10
11 filed their intents to participate in the matter on October 13, 2020, and October 14,
12 2020, respectively. (APP at 147-153.)

13 On November 9, 2020, Respondent AG filed the Transmittal of Record on
14
15 Appeal in Accordance with the Nevada Administrative Act pursuant to NRS
16 233B.131. That document states:

17 Pursuant to NRS 233B.131, the STATE OF NEVADA
18 BOARD FOR THE ADMINISTRATION OF THE
19 SUBSEQUENT INJURY ACCOUNT FOR SELF-
20 INSURED EMPLOYERS (SIA) now files the entire
21 record of the proceedings under review by this Court as a
22 result of the Petition for Judicial Review pursuant to NRS
23 233B.130 filed by LAS VEGAS METROPOLITAN
POLICE DEPARTMENT and CANNON COCHRAN
MANAGEMENT SERVICES, INC., Respondents.

24 (APP at 154-157.)

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1 The Record on Appeal transmitted by AG consisted of 132 pages, with a
2 certification by a compliance audit investigator with the DIR “that the documents
3 submitted herewith comprise the record of the administrative proceeding, which is
4 the subject of Case No. Case No. [sic] A-20-821892-J in Department XV of the
5 Eighth Judicial District Court, in and for Clark County, Nevada, which are attached
6 hereto as Bates ROA 0001-0132.” (APP at 157, referring to APP at 1-132.)
7

8
9 On April 5, 2021, Petitioners filed their Opening Brief. (APP at 161-182.)

10 On May 5, 2021, DIR filed its Motion to Dismiss Petitioners’ Petition for
11 Judicial Review, or in the Alternative [sic] Motion to Strike “Petitioners [sic]
12 Opening Brief” and Motion to Extend Time to File Reply Memorandum of Points
13 and Authorities. (APP at 183-208.) DIR based its motion on its contentions that
14 Petitioners never filed the transcript of the underlying administrative proceedings
15 per NRS 233B.131(1)(a) and because Petitioners failed to file their Opening Brief
16 within 40 days pursuant to NRS 233B.133(1).” (APP at 183.) AG joined the
17 motion. (APP at 209-211.)
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21 Petitioners filed their opposition on May 19, 2021. (APP at 212-220.)

22 Thereafter, DIR filed its reply to which AG joined. (APP at 221-236.)
23

24 On June 7, 2021, Respondent’s motion came on for hearing. The district
25 court granted Respondent’s motion to dismiss. (APP at 237.)
26

27 . . .

1 The Notice of Entry of Order Granting Respondent's Motion to Dismiss
2 Petition for Judicial Review was filed on June 22, 2021. (APP at 244-249.) The
3 court granted the motion based on Petitioners' failure to transmit the transcript of
4 the underlying administrative proceeding. The court concluded Petitioners had not
5 established good cause for the failure to transmit the transcript as required by NRS
6 233B.131(a). (APP at 248-249.) Although the court referenced that Petitioners
7 filed their brief late, the late filing of the brief is not stated as a basis for the
8 dismissal.
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12 On July 13, 2021, Petitioners moved the district court for reconsideration,
13 attaching the transcript of the underlying proceedings as an exhibit (having
14 obtained a copy upon learning that no transcript had been produced). (APP at 250-
15 333). The district court denied reconsideration. (APP at 388-398.)
16

17 On July 19, 2021, Petitioners timely filed an appeal of the dismissal with
18 this court. (APP at 335-345.)
19

20 VI.

21 SUMMARY OF THE ARGUMENT

22 Petitioners argue that the district court's dismissal of its petition was an
23 abuse of discretion based on erroneous statutory interpretation. Specifically, the
24 district court determined Petitioner was mandated to transmit a transcript of the
25 underlying administrative proceeding within 45 days of serving their petition per
26
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1 NRS 616C.131(a)(a). The district court concluded that Petitioner’s failure to do so
2 without good cause was grounds for dismissal.
3

4 Petitioners do not dispute that they did not file the transcript within 45 days
5 of service of their petition. However, Petitioners argue that this omission is not
6 jurisdictional and does not mandate dismissal, nor was good cause the proper
7 standard of review. In support of this position, Petitioners posit they relied upon
8 certifications and representations made by Respondents that the entire record had
9 been transmitted to the district court; that equitable remedies forestall dismissal;
10 and that public policy supports hearing this case on the merits.
11
12

13 VII.

14 ARGUMENT

15 A.

16 STANDARD OF REVIEW

17 This court reviews de novo a district court’s order granting a motion to
18 dismiss. Moon v. McDonald, Carano & Wilson, LLP, 129 Nev. 547, 550, 306 P.3d
19 406, 408 (2013). At issue is the district court’s interpretation of the requirements
20 set forth in NRS 233B.131. This court also reviews issues of statutory construction
21 de novo. Liberty Mut. v. Thomasson, 130 Nev. 27, 30, 317 P.3d 831, 833
22 (2014). When interpreting a statute, the court first looks to its language, and
23 “[w]hen the language . . . is clear on its face, ‘this court will not go beyond [the]
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1 statute's plain language.'" J.E. Dunn Nw. v. Corus Constr. Venture, 127 Nev. 72,
2 79, 249 P.3d 501, 505 (2011) (second alteration in original) (quoting Great Basin
3 Water Network v. State Eng'r, 126 Nev. Adv. Rep. 20, 234 P.3d 912, 918 (2010)).
4

5 **B.**

6 **Petitioners' actions regarding the transmittal of the transcript of the**
7 **underlying administrative proceedings were in good faith and are not grounds**
8 **for dismissal of their petition**

9 The district court dismissed Petitioners' petition for judicial review based on
10 their failure to transmit the transcript of the underlying administrative proceedings
11 per NRS 233B.131(1)(a). The deadlines established by NRS 233B.131 are not
12 jurisdictional, and dismissal for failure to comply is not mandatory. NRS 233B.131
13 allows the court discretion to extend the deadlines without a showing of good
14 cause. Based on the facts before the court, the district court abused its discretion by
15 dismissing the petition for judicial review.
16
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18 The district court's findings in its order hinge solely on Petitioners' failure to
19 transmit a transcript of proceedings per NRS 233B.131(1)(a). The court held that
20 the requirement under NRS 233B.131(1)(a) is mandatory; however, it stated the
21 deadline provided in NRS 233B.131 is not jurisdictional and could be excused for
22 good cause. (Finding No. 12, APP at 248.) The court concluded Petitioners did not
23 meet their burden to show good cause under the Scrimmer factors. (Finding No. 17,
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1 APP at 249.) Scrimmer v. Eighth Judicial Dist. Court, 116 Nev. 507, 516, 998 P.2d
2 1190, 1195-1196 (2000).

3
4 NRS 233B.131 states in pertinent part:

5 1. Within 45 days after the service of the petition for
6 judicial review **or such time as is allowed by the court:**

7 (a) The party who filed the petition for judicial
8 review shall transmit to the reviewing court an original or
9 certified copy of the transcript of the evidence resulting
10 in the final decision of the agency.

11 (b) The agency that rendered the decision which is
12 the subject of the petition shall transmit to the reviewing
13 court the original or a certified copy of the remainder of
14 the record of the proceeding under review.

15 ↪The record may be shortened by stipulation of the
16 parties to the proceedings. A party unreasonably refusing
17 to stipulate to limit the record, as determined by the
18 court, may be assessed by the court any additional costs.
19 **The court may require or permit subsequent**
20 **corrections or additions to the record.** (Emphasis
21 added)

22 The court concluded the use of “shall” in NRS 233B.131(1)(a) made the
23 requirement mandatory; however, the use of “shall” is only “**presumptively**
24 **mandatory.**” (Emphasis added.) Comm'n on Ethics v. JMA/ Lucchesi, 110 Nev. 1,
25 9-10, 866 P.2d 297, 302 (1994) In the context of NRS 233B.131, “shall” is not
26 mandatory as evidenced by the statute’s plain and unambiguous giving of
27 discretion to the court to extend the time to serve the record, to correct the record,
28 or to add to the record.

...

1 The district court further erred by requiring Petitioners to show good cause
2 under the Scrimmer factors. This court has rejected the contention that the Scrimmer
3 factors apply when evaluating good cause under NRS 233B.130 (regarding service
4 a petition), as Scrimmer applied to a service deadline for a complaint in a civil
5 action. Spar Bus. Servs. v. Olson, 135 Nev. Adv. Rep. 40, FN 4, 448 P.3d 539, 543
6 (2019). Those factors included such considerations as difficulties in locating a
7 defendant, plaintiff's diligence in attempting to serve the defendant. Scrimmer, 116
8 Nev. at 516. As this case deals with transmittal of the record in an administrative
9 proceeding, Scrimmer factors are not relevant.
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13 Moreover, NRS 233B.131 does not require a showing of good cause. NRS
14 233B.130(5) regarding service of petitions mandates deadlines that “must” be
15 followed absent a showing of good cause. Likewise, NRS 233B.133(6) allows the
16 court to extend deadlines for filing briefs upon a showing of good cause. Unlike
17 those two statutes, NRS 233B.131 allows the court discretion to extend the
18 deadlines without specifying a showing of good cause.
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21 In this case, there are several reasons why Petitioners’ failure to transmit the
22 transcript of the evidence should be excused. Specifically, Petitioners relied upon
23 the certifications and representations of the DIR and AG that the entire record had
24 been transmitted, as is customary with the Department of Administration, Hearings
25 Division.
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1 Both Respondents—DIR and AG—were involved in the transmission of the
2 Record on Appeal. Respondent AG filed the Transmittal of Record on Appeal
3 stating:
4

5 Pursuant to NRS 233B.131, the STATE OF NEVADA
6 BOARD FOR THE ADMINISTRATION OF THE
7 SUBSEQUENT INJURY ACCOUNT FOR SELF-
8 INSURED EMPLOYERS (SIA) now files the entire
9 record of the proceedings under review by this Court as a
10 result of the Petition for Judicial Review pursuant to NRS
11 233B.130 filed by LAS VEGAS METROPOLITAN
12 POLICE DEPARTMENT and CANNON COCHRAN
13 MANAGEMENT SERVICES, INC., Respondents.

14 (APP at 154-157.)

15 AG specifically stated that the “entire record of the proceedings under
16 review by this Court” were filed “[p]ursuant to NRS 233B.131.” AG did not
17 submit the entire record per NRS 233B.131(2) as was asserted after the fact.
18 Likewise, DIR completed a certification of compliance that the “documents
19 submitted herewith comprise the record of the administrative proceeding.” (APP at
20 157.)

21 Note that there is no caveat in either of these declarations by the AG or DIR.
22 There is no certification that this is the “remainder” of the record save for a
23 transcript. The AG, i.e., the same party who later moved for dismissal because the
24 record was allegedly not complete, clearly states that it has transmitted “the entire
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1 record of the proceedings under review” based on the DIR’s certification. (APP at
2 154-157.)
3

4 In addition, NRS 233B.131(a) is not consistently utilized by administrative
5 agencies bound by the Nevada Industrial Insurance Act (i.e., the DIR and the Dept.
6 of Administration, Hearings Division). In fact, this is the first petition for judicial
7 review that the undersigned has seen where the state agency failed to include
8 something in the record and then alleged that the appealing party had some burden
9 to supplement what the state agency did not submit. As stated by counsel before
10 the district court and is customary practice, when *any* party files a petition for
11 judicial review of a decision by an Appeals Officer with the Department of
12 Administration, Hearings Division in a contested industrial insurance matter, the
13 Hearings Division always files the complete record on appeal, including the
14 transcript of the proceedings. Based on the representations made by both DIR and
15 AG in the transmittal that the “entire record” was being transmitted, Appellants
16 had no reason to question whether the record was complete. Appellants did not rely
17 on the transcript of the underlying proceedings to makes its arguments as set forth
18 in its Opening Brief.
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24 Even if Petitioners were required to establish good cause for their omission,
25 this court reviews a district court’s “good cause” determination for an abuse of
26 discretion. Spar Busi. Serv., 135 Nev. Ad. Op. at 448, P.3d at 543. An abuse of
27

1 discretion occurs when (a) a court makes a clearly erroneous factual determination,
2 or (b) it disregards controlling law. In this case, the district court stated Petitioners
3 did not establish good cause because NRS 233B.131 was the controlling statute
4 and it was plain and ambiguous that Petitioners were required to transmit the
5 transcript to the court. As stated above, this is a misreading of the controlling law
6 of the statutory requirements.
7

8
9 C.

10 **Respondent's motion to dismiss should be denied based on equitable remedies**
11

12 Petitioners request that this court consider equitable estoppel and waiver as
13 equitable defenses under the facts of this case. Petitioners make this request
14 because they unwittingly relied upon the actions of the DIR and AG to their
15 detriment.
16

17 The court permits the doctrines of equitable estoppel and waiver in workers'
18 compensation proceedings. Dickinson v. American Medical Response, 124 Nev.
19 460, 186 P.3d 878 (2008). Dickinson was a claimant's appeal that challenged an
20 Appeals Officer's Decision that denied PPD benefits for the cervical spine, in
21 pertinent part, because the claimant failed to appeal the exclusion of her neck from
22 her claim. The claimant argued that because the insurer authorized months of
23 physical therapy and numerous injections for the cervical spine, despite it not being
24 an accepted body part, so the doctrines of equitable estoppel or waiver should
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1 apply. The court agreed that “equitable estoppel may be invoked against a party
2 who claims a statutory right in administrative workers’ compensation proceedings,
3 when the invoking party has reasonably relied on the other party’s words or
4 conduct to her detriment.” Id. at 467, P.3d 883.

6 Petitioners relied on certifications by both the DIR and AG that the “entire
7 record” was included in its transmission (consistent with how the Hearings
8 Division operates). (See APP at 154-157.) Accordingly, Petitioners filed their
9 Opening Brief referencing the Record on Appeal. Although Petitioners brief was
10 filed late, neither the DIR, the AG, nor the district court raised this issue prior to
11 Petitioners filing their brief. In fact, the DIR did not file its motion to dismiss until
12 the date when its Answering Brief was due (i.e., 30 days after the Petitioners filed
13 their brief per NRS 233B.133(2)). Petitioners reliance upon those certifications and
14 the actions of the DIR and AG in not raising the issue of Petitioners’ late filing
15 until after filing of said brief had occurred were clearly detrimental to Petitioners
16 as their petition was dismissed.

21 Based on the facts in the case, equitable estoppel and waiver support
22 Petitioners’ position that their petition be heard on the merits.

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D.

Public policy supports hearing Petitioners' case on the merits

The underlying action is a request to the Subsequent Injury Account by LVMPD related to a subsequent injury sustained by a police officer during the course and scope of his employment. The purpose of the Subsequent Injury Account is to encourage employers to hire and retain workers with permanent impairment and to provide relief to the employer in the event of a subsequent injury. This purpose is paramount in this case because it deals with police officers who provide public safety to our community. The Nevada legislature has dedicated significant time and resources to establishing this fund.

Petitioners find it disheartening that the court would preclude its petition being heard on the merits on what basically amounts to a legally and equitably excusable technicality. Both the DIR and AG had knowledge of the appeal and both had stated their intent to participate over seven months prior to moving to dismiss the petition. Moreover, neither the DIR nor the AG moved to dismiss the petition on this technicality until *after* Petitioner had filed its brief.

The process of the Subsequent Injury Account is ongoing, and in this case, had begun in April of 2018. Under these facts, there was no harm to the DIR and AG due to any delays, yet the prejudice to the Petitioners is substantial. Public policy favors hearing this case on the merits.

1 **VIII.**

2 **CONCLUSION**

3
4 Based upon the foregoing, Appellants respectfully request this court to
5 reverse the district court's order dismissing their petition and remand for the
6 petition to continue on its merits.
7

8 Dated this 6th day of January, 2022.

9 Respectfully submitted,

10 **LEWIS, BRISBOIS, BISGAARD & SMITH, LLP**

11
12 /s/ L. Michael Friend
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2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,521 words and 632 lines of text.

• • •

• • •

• • •

1 4. I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

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

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1 **CERTIFICATE OF MAILING**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on
3 the 6th day of January, 2022, service of the attached **APPELLANTS' OPENING**
4 **BRIEF** was made this date by depositing a true copy of the same for mailing, first
5 class mail, and/or electronic service as follows:

6
7 Christopher Eccles, Esq.
8 DEPARTMENT OF BUSINESS
9 AND INDUSTRY
10 DIVISION OF INDUSTRIAL
11 RELATIONS
12 Workers' Compensation Section
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15 Division Headquarters
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17 Bernadine Welsh
18 LVMPD – Health Detail
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21 Gabriela Diaz, Claim
22 Representative
23 CANNON COCHRAN
24 MANAGEMENT SERVICES,
25 INC.
26 P. O. Box 35350
27 Las Vegas, NV 89133-5350

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Carson City, Nevada 89701

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