# IN THE SUPREME COURT OF THE STATE OF NEVADA

**INDICATE FULL CAPTION:**

THOMAS ENGEL,
Appellant,
vs.
BOULDER CITY; PUBLIC AGENCY COMPENSATION TRUST; AND ALTERNATIVE SERVICE CONCEPTS, LLC,
Respondents.

No. 78334

Electronically Filed
Apr 05 2019 04:27 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**DOCKETING STATEMENT**
**CIVIL APPEALS**

## GENERAL INFORMATION

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

## WARNING

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

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

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



Docket 78334 Document 2019-15020

1. Judicial District Eighth Department XXXI

County Clark Judge Hon. Joanna S. Kishner

District Ct. Case No. A-16-730103-J

**2. Attorney filing this docketing statement:**

Attorney Evan Beavers, Esq. Telephone (775) 684-7555

Firm NEVADA ATTORNEY FOR INJURED WORKERS

Address 1000 East William Street
Suite 208
Carson City, Nevada 89701

Client(s) Thomas Engel

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

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

Attorney Robert F. Balkenbush, Esq. Telephone (775) 786 2882

Firm Thorndal, Armstrong, Delk, Balkenbush & Eisinger

Address 6590 S. McCarran Blvd.
Suite B
Reno, Nevada 89509

Client(s) Boulder City, Employer; Public Agency Compensation Trust, Insurer; and Alternative Service Concepts, LLC, Third Party Administrator

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

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

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☒ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

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

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

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

None.

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

*In the Matter of the Contested Industrial Insurance Claim of Thomas Engel; Appeal Nos. 1406317-GK/1406547-GK;

Dept. of Administration, Appeals Office; December 10, 2015.

*Boulder City, Public Agency Compensation Trust, Alternative Service Concepts, LLC, Petitioners, vs. Thomas Engel, and the Nevada Department of Administration Appeals Officer Gregory A. Krohn, Respondents; Case No. A-16-730103-J; District Court, County of Clark, Nevada.

*Eighth Judicial District Court's Order Granting Petition for Judicial Review, Reversing Appeals Officer Decision and Remanding for Further Proceedings; February 7, 2019.

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

Department of Administration appeals officer filed Decision and Order 12/14/2015 finding that Thomas Engel proved a compensable workers' compensation claim against his employer, Boulder City. The employer, along with its insurer (Public Agency Compensation Trust) and claims administrator (Alternative Service Concepts) petitioned district court for judicial review. PACT failed to properly serve its petition. Engel moved to dismiss the petition for lack of jurisdiction resulting from the improper service. The district court denied the motion to dismiss and ultimately granted the petition with remand to the appeals officer.

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

NRS 233B.130(2) required service of the petition upon the Attorney General and the Director of the Department of Administration. PACT timely served the Attorney General. PACT initially served a supervising appeals officer and did not serve the Director until immediately prior to the hearing on Engel's motion to dismiss for improper service, sixteen months after filing the petition.

NRS 233B.130(5) requires service within 45 days of filing the petition, absent a showing of good cause. The issue presented on appeal is whether good cause existed for the district court to excuse the late service of PACT's petition for judicial review.

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

None.

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

☐ N/A

☐ Yes

☒ No

If not, explain:

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

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

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

☐ A substantial issue of first impression

☐ An issue of public policy

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

☐ A ballot question

If so, explain:

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

This matter is presumptively assigned to the Court of Appeals under NRAP 17(b)(10).

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

Was it a bench or jury trial? Neither a bench trial nor a jury trial

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

No motion for recusal or disqualification anticipated.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** February 7, 2019

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

**17. Date written notice of entry of judgment or order was served** February 8, 2019

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

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

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

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

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** March 8, 2019

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

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

NRAP 4(a)(1)

## SUBSTANTIVE APPEALABILITY

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

(a)

| | |
|---|---|
| ☐ NRAP 3A(b)(1) | ☐ NRS 38.205 |
| ☐ NRAP 3A(b)(2) | ☒ NRS 233B.150 |
| ☐ NRAP 3A(b)(3) | ☐ NRS 703.376 |
| ☐ Other (specify) | |

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

The original action was heard by an administrative appeals officer with the Department of Administration. Review of the resulting decision was sought in district court pursuant to NRS 233B.130. Appellant here sought dismissal for lack of jurisdiction. The district court issued a minute order June 22, 2018, remanding the matter to the appeals officer to allow the deposition of a particular witness. The district court entered its written order September 20, 2018, denying the respondent's motion to dismiss the petition for judicial review for lack of jurisdiction. NRS 233B.150 allows an aggrieved party to obtain review of a final judgment of the district court by appeal to the appellate court of competent jurisdiction. The respondent below, the appellant here, is aggrieved in that the district court lacked jurisdiction to review the appeals officer's decision and the district court's denial of the motion to dismiss based upon that lack of jurisdiction is a final judgment on jurisdiction.

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

(a) Parties:

Thomas Engel
Boulder City
Public Agency Compensation Trust
Alternative Service Concepts

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

NRS 233B.130(2) mandates the petition for judicial review of the administrative decision name the agency as a respondent. The Department of Administration was named and served in the district court proceedings but did not enter an appearance in district court. See NRS 233B.130(3).

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

Boulder City, PACT and ASC sought review of the appeals officer's decision. Engel opposed judicial review of the decision. The district court granted the petition by order filed 2/7/2019.

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

☐ Yes

☒ No

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

(a) Specify the claims remaining pending below:

The district court remanded the matter back to the appeals officer to permit the deposition of a medical expert whose opinion the appeals officer relied upon in his original decision and to conduct further proceedings.

(b) Specify the parties remaining below:

None in district court.

In the administrative proceedings upon remand:

Thomas Engel vs. Boulder City, Public Agency Compensation Trust and Alternative Service Concepts, LLC

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

☐ Yes

☒ No

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

☐ Yes

☒ No

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

NRAP 3A(b)(1). The Order Granting Petition for Judicial Review, Reversing Appeals Officer Decision and Remanding for Further Proceedings is final judgment in that there are no proceedings or issues remaining in district court.

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

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

## VERIFICATION

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

Thomas Engel
Name of appellant

04/05/2019
Date

Evan Beavers, Esq.
Name of counsel of record

Signature of counsel of record

Nevada, Carson City
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2019, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Robert F. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509

Dated this 5th day of April, 2019

Signature

Electronically Filed
01/12/2016 09:49:00 AM

CLERK OF THE COURT

PET
Robert F. Balkenbush, Esq.
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Tel.: (775) 786-2882
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Attorneys for: City of Boulder City, Employer,
Public Agency Compensation Trust, Insurer, and
Alternative Service Concepts, LLC., Third Party Administrator

**DISTRICT COURT**

**COUNTY OF CLARK, NEVADA**

CITY OF BOULDER CITY; ALTERNATIVE SERVICE CONCEPTS, LLC.; and PUBLIC AGENCY COMPENSATION TRUST,

Petitioners,

vs.

THOMAS J. ENGEL and the NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER GREGORY KROHN

Respondents.

/

CASE NO. A-16-730103-J

DEPT. NO. X

**PETITION FOR JUDICIAL REVIEW**

Petitioners, CITY OF BOULDER CITY, ALTERNATIVE SERVICE CONCEPTS, LLC. and PUBLIC AGENCY COMPENSATION TRUST, hereby request the Eighth Judicial District Court of the State of Nevada to review the decision of Appeals Officer Gregory Krohn, entered on December 10, 2015, in the case officially designated "In the Matter of the Contested Industrial Insurance Claim of Thomas J. Engel, Appeal Numbers 1406317-GK & 1406547-GK." A copy of this Decision is attached hereto as Exhibit A.

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CITY OF BOULDER CITY, ALTERNATIVE SERVICE CONCEPTS, LLC. and PUBLIC AGENCY COMPENSATION TRUST aver that substantial rights of the Petitioners have been prejudiced because the decision of the Appeals Officer is in violation of statutory provisions, and affected by other error of law.

CITY OF BOULDER CITY, ALTERNATIVE SERVICE CONCEPTS, LLC. and PUBLIC AGENCY COMPENSATION further aver that the decision of the Appeals Officer is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and otherwise characterized by an abuse of discretion.

**AFFIRMATION**
**Pursuant to NRS 239B.030**

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 12th day of January, 2016.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By */s/ Robert F. Balkenbush*
ROBERT F. BALKENBUSH, ESQ.
6590 S. McCarran Blvd., Suite B
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Tel.: (775) 786-2882
Fax.: (775) 786-8004
Attorneys for: City of Boulder City; Alternative Service Concepts, LLC. and Public Agency Compensation Trust

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing PETITION FOR JUDICIAL REVIEW to be served on all parties to this action by:

__xx__ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

__xx__ Eighth Judicial District Court Eflex ECF (Electronic Case Filing)

_____ personal delivery

_____ facsimile (fax)

_____ Federal Express/UPS or other overnight delivery

Fully addressed as follows:

Persi Mishel, Esq.
Nevada Attorney for Injured Workers
2200 South Rancho Drive, Suite 230
Las Vegas, Nevada 89102

Senior Appeals Officer Bryan Nix
2200 S. Rancho Drive, Suite 220
Las Vegas, NV 89102

**Carson City Office**
**Office of the Attorney General**
100 North Carson Street
Carson City, NV 89701

DATED this 12th day of January, 2016.

*/s/ Natalie Steinhardt*
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

# EXHIBIT
# A

# EXHIBIT
# A

RECEIVED
DEC 14 2015
THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
RECEIVED
DEC 10 2015
APPEALS OFFICE

NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

| | | |
|---|---|---|
| In the Matter of the Industrial Insurance Claim of THOMAS J ENGEL. | Claim No.: | C143-10-05211-01 |
| | Hearing Nos.: | 1404280-SE<br>1404281-SE |
| | Appeal Nos.: | 1406317-GK<br>1406547-GK |

DECISION AND ORDER

This matter came regularly for hearing on April 21, 2014, and a final argument on October 8, 2015, pursuant to NRS Chapters 616A-D and 233B. The Claimant, Thomas J. Engel, was present and was represented by his attorney, Persi J. Mishel, Esq., Deputy Nevada Attorney for Injured Workers. The Employer, City of Boulder City, and its Insurer, Alternative Services Concepts, were represented by Robert F. Balkenbush, Esq.

There are two consolidated appeals with the following issues:

1. Appeal No. 1406317-GK: This is the Employer and its Insurer's appeal of the Hearing Officer's Decision and Order dated December 5, 2013. The Hearing Officer reversed the Insurer's determination letter of September 6, 2013, and ordered the Insurer to authorize a surgery in the form of a left hip replacement on the Claimant's left hip. The Hearing Officer further held that the issue of additional surgery on the Claimant's hernia shall be addressed by a determination letter after the Claimant is healed from his left hip surgery.

. . .

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2. Appeal No. 1406547-GK: This is a duplicate appeal by the Employer and its Insurer of the Hearing Officer's Decision and Order of December 5, 2013.

On January 24, 2014, the Appeals Officer entered an order consolidating the above-referred appeals.

The following exhibits were admitted into evidence:

Claimant Exhibit 1, containing 5 pages.

Employer and Insurer's Exhibit A, containing 9 pages.

Employer and Insurer's Exhibit B, containing 7 pages

Employer and Insurer's Exhibit C, containing 202 pages.

Employer and Insurer's Exhibit D, containing 17 pages.

Employer and Insurer's Exhibit E, containing 2 pages.

Employer and Insurer's Exhibit F, containing 19 pages.

Employer and Insurer's Exhibit G, containing 10 pages.

Employer and Insurer's Exhibit H, containing 5 pages.

Employer and Insurer's Exhibit I, containing 4 pages.

Employer and Insurer's Exhibit J, containing 2 pages.

Employer and Insurer's Exhibit K, containing 2 pages.

Employer and Insurer's Exhibit L, containing 3 pages.

After consideration of all the evidence, and the Claimant's testimony, the Appeals Officer finds and decides as follows:

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. . .

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. . .

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## FINDINGS OF FACT

1. The Claimant was hired by the City of Boulder City in 2008 as a laborer/maintenance worker. Exhibit C, p. 1. On August 11, 2010, he was required to pick up garbage bags that had been left on the side of the road and had to step up in and out of a trailer lifting and loading the bags all day. Id. He described them as 50 gallon trash bags full of brush and rock, weighing up to 100 pounds. Id.

2. The Claimant testified that there were numerous bags lined up along the roadside for eight tenths of a mile that he had to pick up and load onto the trailer and that this caused pain in his left hip.

3. He sought medical treatment with Warren Smith, M.D., and was diagnosed with a left hip strain. Id. On the Claim for Compensation (C-4) form, Dr. Smith indicated the condition was job incurred and that he knew of no prior injury or disease contributing to the condition. Id.

4. On September 8, 2010, the Insurer issued a determination letter accepting the claim for a left hip strain.[1]

5. The Claimant came under the care of Dr. Poindexter and was referred for an MRI of his left hip, which revealed mild osteoarthritis of the hip joints bilaterally with bone edema in the left acetabulum only, and minimal subcortical cyst formation in the posterolateral aspect of the acetabulum. Exhibit C, pp. 29, 31. The radiologist indicated the findings may reflect a femoral acetabular impingement syndrome. Id.

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[1] This determination letter is not contained in any of the exhibits. There is a reference to such a determination letter in the Insurer's and Employer's Motion for Stay at page 4.

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6. Dr. Poindexter performed two intraarticular injections to the left hip that provided temporary relief. Exhibit C, pp. 40-42, 44-45.

7. The Claimant was evaluated by Dr. Gabriel on September 1, 2011, to determine if his symptoms could be due to a hernia. Exhibit C, p. 55. Although the diagnostic testing performed did not confirm the diagnosis, Dr. Gabriel opined that it was likely the Claimant suffered a left inguinal hernia that needed repair. Id.

8. The Insurer authorized the surgery and on October 7, 2011, Dr. Gabriel performed the surgery on the Claimant's left inguinal hernia. Exhibit C, pp. 63-65.

9. Due to persistent pain in the left hip area, on November 28, 2011, Dr. Rosen examined the Claimant and assessed a left hip pre-existing osteoarthritis with exacerbation secondary to his required work activities a year ago. Exhibit C, pp. 76-78. Dr. Rosen suggested a total hip replacement if the condition worsened, but commented that it should be done on a non-industrial basis as he felt the Claimant did not suffer any trauma and the condition was just a natural progression of the osteoarthritis. Id.

10. On October 31, 2012, Dr. Tait examined the Claimant and also recommended a hip replacement surgery. Exhibit C, pp. 134-137. He noted a work injury after lifting heavy trash bags that seemed somewhat trivial initially. Id. However, following a long history of conservative treatment, the hip symptoms persisted. Id. Dr. Tait stated that this represents a young man hip arthritis that initially developed from a torn

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labrum and progressively worsened. Id. This set in motion a chain of events which has now led to the degenerative process. Id.

11. Physicians also explored the possibility that the Claimant's persistent pain might be related to complications from the industrial hernia surgery. Exhibit C, p. 178. Further surgery was recommended to remove the mesh inserts. Id.

12. On September 6, 2013, the Insurer issued a determination letter denying further surgery on the Claimant's hernia and regarding left hip replacement surgery "[f]urther determination will be rendered following completion of these inquiries." Exhibit C, p. 192.

13. As noted above, the Claimant timely appealed the Insurer's determination letter of September 6, 2013, which on December 5, 2013, the Hearing Officer reversed.

14. In a deposition dated June 25, 2013, Dr. Tait stated that although the diagnostic testing did not confirm a labral tear, his clinical evaluation and experience suggested such a condition. Exhibit D. This would not be confirmed until the actual surgery was performed. Id. at p. 12. Dr. Tait further indicated that labral tears can develop both traumatically and degeneratively and that the Claimant's work activities would be sufficient to qualify as traumatic. Id. at p. 13. He disagreed with Dr. Rosen's comment regarding there being no trauma in this case. Id. at p. 14. Dr. Tait further differentiated between age-related arthritis and a traumatic-based arthritis. Id. at pp. 7-8. He described the age-related version wherein weight bearing forces would wear on the top and

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bottom portions of a joint. Id. at p. 7. Whereas, the Claimant had osteophytes around the edges, which would not be consistent with age related degeneration. Id. at p. 8. Dr. Tait further stated that the Claimant had an exacerbation or worsening of the natural progression of the osteoarthritis in the hip. Id. at p. 16. He went on to say that this accelerated the need for the hip replacement surgery, but could not predict at what point the surgery may have been needed without the exacerbating event. Id. at p. 16.

15. The Appeals Officer has carefully reviewed the evidence and has considered the Claimant's testimony. The Appeals Officer finds the Claimant's description of his work activities of August 11, 2010, to be credible and persuasive. Pursuant to NRS 616C.175(1)[2] and NRS 617.366(1)[3], the resulting

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[2] NRS 616C.175(1) provides:
The resulting condition of an employee who:
(a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
(b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition, shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

[3] NRS 617.366(1) provides:
The resulting condition of an employee who:
(a) Has a preexisting condition from a cause or origin that did not arise out of and in the course of the employee's current or past employment; and
(b) Subsequently contracts an occupational disease which aggravates, precipitates or accelerates the preexisting condition, shall be deemed to be an occupational disease that is compensable pursuant to the provisions of chapters 616A to 617, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the occupational disease is not a substantial contributing cause of the resulting condition.

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condition of an employee who has a pre-existing, non-industrial condition, and subsequently sustains injuries arising out of and in the course of his employment that aggravates, precipitates, or accelerates the preexisting condition, is compensable unless a preponderance of the evidence shows that the industrial accident is not a substantial contributing cause of the resulting condition. In light of the evidence presented, pursuant to NRS 616C.360(3)(a)[4] the Appeals Officer found a medical question and on June 5, 2014, he entered an Interim Order for an independent medical evaluation (IME).

16. The parties agreed on Dr. Swanson to perform the IME.

17. After additional diagnostic testing and procedures, Dr. Swanson concluded that the Claimant's hip pain was due, at least in part, to a small labral tear and moderate arthritic changes that would benefit from a total hip replacement. Exhibit L. With regard to causation, Dr. Swanson noted that the Claimant likely had some element of arthritis in his left hip at the time of the work-related injury, but the impact of the work-related injury aggravated or exacerbated his condition, causing him to be symptomatic. Id. There is no

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[4] NRS 616C.360(3) provides in part:
If there is a medical question or dispute concerning an injured employee's condition or concerning the necessity of treatment for which authorization for payment has been denied, the appeals officer may:
(a) Order an independent medical examination and refer the employee to a physician or chiropractor of his or her choice who has demonstrated special competence to treat the particular medical condition of the employee, whether or not the physician or chiropractor is on the insurer's panel of providers of health care.

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evidence showing the Claimant was symptomatic or needed any medical treatment for his left hip prior to his work-related injury. Id. The Appeals Officer finds Dr. Swanson's conclusions persuasive in this matter. The preponderance of the credible and persuasive evidence supports a left hip replacement procedure under the worker's compensation claim.

18. Under NRS 616C.175(1)(b) and NRS 617.366(1)(b), the burden of proof shifts on the Insurer to show by a preponderance of evidence that the work-related injury or occupational disease is not a substantial contributing cause of the resulting condition. The Appeals Officer finds that the Insurer has failed to meet its burden of proof to show the Claimant's work activities of August 11, 2010, were not a substantial contributing cause of his resulting condition and the need for his left hip replacement surgery. The Appeals Officer does not find Dr. Rosen's comments that there was no trauma and that this was simply a natural progression of a pre-existing condition to be persuasive or consistent with the credible evidence presented in this matter. Thus, the Appeals Officer has given more weight to Dr. Swanson's opinion than that of Dr. Rosen.

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

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NEVADA ATTORNEY FOR INJURED WORKERS
1000 East William Street, Suite 208
Carson City, NV 89701 (775) 684-7555
2200 South Rancho Drive, Suite 230
Las Vegas, NV 89102 (702) 486-2830

## CONCLUSIONS OF LAW

1. There is substantial, credible, and persuasive evidence showing the Claimant has met his burden of proof by a preponderance of evidence to show that the need for his hip replacement surgery is caused by his work-related activities of August 11, 2010. There is no credible and persuasive evidence showing the Claimant's work activities of August 11, 2010, were not a substantial contributing cause of his resulting condition and the need for his left hip replacement surgery. NRS 616C.175(1). NRS 617.366(1).

## O R D E R

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Hearing Officer's Decision and Order dated December 5, 2013, is AFFIRMED. The Employer and Insurer shall authorize the Claimant to undergo a left hip replacement. Once the Claimant has the hip replacement surgery, he shall be reassessed by physicians with regard to the proposed procedures to correct the prior hernia repair, and a new determination shall be issued by the Insurer.

DATED this 9 day of December, 2015.

APPEALS OFFICER

GREGORY A. KROHN, ESQ.

Submitted by:

NEVADA ATTORNEY FOR INJURED WORKERS

Persi J. Mishel, Esq., Deputy
Attorney for Claimant

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

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing DECISION AND ORDER was duly mailed, postage prepaid to the following:

PERSI J. MISHEL, ESQ., DEPUTY
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CITY OF BOULDER CITY
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DATED: December 10, 2015

SIGNED: Christina L. Green

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Attorneys for: Boulder City, Employer, Alternative Service Concepts, LLC, Third Party Administrator, and Public Agency Compensation Trust, Insurer

**DISTRICT COURT**

**COUNTY OF CLARK, NEVADA**

| | |
|---|---|
| BOULDER CITY, PUBLIC AGENCY COMPENSATION TRUST, ALTERNATIVE SERVICE CONCEPTS, LLC<br>Petitioners,<br><br>vs.<br><br>THOMAS ENGEL, and the NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER GREGORY A. KROHN,<br><br>Respondents.<br>_____/ | Case No. A-16-730103-J<br><br>Dept. No. XXXI |

**ORDER DENYING RESPONDENT ENGEL'S MOTION FOR RECONSIDERATION AND AMENDED ORDER DENYING RESPONDENT ENGEL'S AMENDED MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

☐ Voluntary Dismissal
☐ Involuntary Dismissal
☐ Stipulated Dismissal
☐ Motion to Dismiss by Deft(s)
☒ Summary Judgment
☐ Stipulated Judgment
☐ Default Judgment
☐ Judgment of Arbitration

## I. Introduction

The instant matter comes before the Court pursuant to a January 12, 2016, Petition for Judicial Review, filed in respect of a December 10, 2015, Decision and Order issued by Appeals Officer Gregory Krohn in Appeal Nos. 1406317-GK and 1406547-GK. In short, the underlying matter involves a contested workers' compensation claim. In the underlying contested workers' compensation claim, the claimant or injured employee is Respondent Thomas Engel (hereinafter "Engel"), the employer is Boulder City, the insurer is the Public Agency Compensation Trust

SEP 10 '18 PM01:10

(hereinafter, "PACT"), and the insurer's third party claim administrator is Alternative Service Concepts, LLC. (hereinafter, "ASC").

By amended motion to dismiss, Engel has moved the Court to dismiss the Petition, based on an assertion of improper service of the Petition and the resultant absence of subject matter jurisdiction. Specifically, Engel argues that Petitioners failed to strictly comply with the year 2015 service requirement set forth in NRS 233B.130(2)(c)(2), when they served the Petition on, *inter alia*, Bryan Nix, as opposed to Patrick Cates. Mr. Nix is the Senior Appeals Officer of the Hearings Division of the Nevada Department of Administration (hereinafter "NDA"), and is tasked with overseeing petitions for judicial review of decisions made by Appeals Officers in contested workers' compensation cases. Mr. Cates is the Director of the NDA, which is comprised of ten (10) divisions (one of which is the Hearings Division) and each division is overseen by an administrator appointed by the Director (Senior Appeals Officer Nix is the supervising administrator of the Hearings Division).

After initial argument on Engel's amended motion to dismiss, the parties agreed that an evidentiary hearing would assist the Court in deciding the motion. Accordingly, on May 25, 2017, a date mutually agreed upon by the parties, the Court held an evidentiary hearing on the motion to dismiss. The only witness called to testify was Bryan Nix, and his testimony was taken by telephone. Mr. Nix was called to testify as to how petitions for judicial review, of decisions made by Appeals Officers in contested workers' compensation claims, are processed by the NDA.

Mr. Nix's testified that he is the Senior Appeals Officer of the Hearings Division of the Nevada Department of Administration (hereinafter "NDA"), and has been in this position for over 25 years and is tasked with overseeing petitions for judicial review of decisions made by Appeals Officers in contested workers' compensation cases. Concerning the year 2015 agency service requirement set forth in NRS 233B.130(2)(c)(2), Mr. Nix testified that many petitioners are currently confused as to whom at the NDA is the intended person to be served with the petition. Mr. Nix testified that some petitions are being served twice, both on his office in southern Nevada and Mr. Cates' office in Carson City, because it is unclear in the statute as to

whom at the NDA is to be served with the petitions. According to Mr. Nix, any petitions served on Director Cates at the NDA in Carson City are just forwarded to Mr. Nix, and nothing is substantively done on the petitions at Director Cates' office. In brief, Mr. Nix testified that regardless of where and upon whom the petitions are served at the NDA, the petitions all eventually end up in the hands of Mr. Nix, who is the official at the NDA who directly supervises the appeals process in southern Nevada (Clark County) and northern Nevada. Mr. Nix also testified that he needs to receive service of a petitions for judicial review, because as the supervisor of the Hearings Division, he is responsible for creating and implementing the time-limited process for preparation of the record on appeal and the filing of this record with the District Court. *See*, NRS 233B.131. Lastly, Mr. Nix testified that neither the NDA nor the actual Appeals Officer in the Hearings Division that decides the underlying contested workers' compensation case ever appears as a party before the District Court for the briefing and argument of a filed petition for judicial review.

Before the evidentiary hearing on the motion to dismiss was conducted, Petitioners served the Petition upon Mr. Cates. At the evidentiary hearing conducted on May 25, 2017, citing NRS 233B.130(5), Petitioners asked this Court to find the existence of good cause for extension of the time for service of the Petition, namely ambiguity in the statutory subsection (NRS 233B.130(2)(c)(2)); and specifically ambiguity as to whom at the NDA is the intended person to be served with the petition.

Based upon the applicable record before the Court, including the testimony of Mr. Nix, and evidence presented at the evidentiary hearings, as well as briefing of the motion, by minute order entered on June 2, 2017, the Court denied Engel's amended motion to dismiss. Thereafter, by written order filed March 28, 2018, this Court formally denied Engel's amended motion to dismiss.

On April 16, 2018, Engel filed a motion for reconsideration of this Court's March 28, 2018, order denying Engel's amended motion to dismiss the petition for judicial review. In connection with this motion, Engel requested that the motion be heard on an order shortening time. On April 20, 2018, Boulder City, PACT and ASC filed their brief in opposition to the

motion for reconsideration. On April 26, 2018, the Court conducted a hearing on the motion for reconsideration, and now the Court finds and concludes as follows.

**II. Decision**

In *Washoe County. v. Otto*, the Nevada Supreme Court held that in order to invoke a district court's jurisdiction to consider a petition for judicial review, a petitioner must strictly comply with the procedural requirements of the Nevada Administrative Procedure Act (hereinafter "NAPA"). *Washoe County v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012). The Court further held that non-compliance with the NAPA's procedural requirements is grounds for dismissal, because a court exercises "special statutory jurisdiction" when reviewing an administrative determination. *Otto*, 128 Nev. at 432, 282 P.3d at 725 (citing *Ultsch v. Ill. Mun. Retirement Fund*, 226 Ill. 2d 169, 874 N.E.2d 1, 7 (2007).

The jurisdictional procedural requirements of the NAPA are located within NRS 233B.130(2), which provides as follows:

> Petitions for judicial review must:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred;
>
> (c) Be served upon:
>
> (1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and
>
> (2) The person serving in the office of administrative head of the named agency; and
>
> (d) Be filed within 30 days after service of the final decision of the agency. Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

Subparagraphs (1) and (2) of paragraph (c) of subsection 2 of NRS 233B.130 were enacted in year 2015 after the Nevada Supreme Court's decision in *Otto*. On June 2, 2017, when this Court entered its minute order denying Engel's amended motion to dismiss, neither the Nevada Supreme Court nor the Nevada Court of Appeals had expressly interpreted these newly enacted

subparagraphs. By March 28, 2018, however, when the written order formerly denying Engel's amended motion to dismiss was filed, and as a matter of first impression, the Nevada Supreme Court had expressly interpreted subparagraph (1), not subparagraph (2), of paragraph (c) of subsection 2 of NRS 233B.130. See, *Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. Adv. Rep. 1, 408 P.3d 156 (January 4, 2018)[1]. In the case, however, subparagraph (2), not subparagraph (1), of paragraph © of subsection 2 of NRS 233B.130 is at issue. In this regard, as previously noted, in *Heat & Frost Insulators*, the Supreme Court did not expressly interpret subparagraph (2), much less hold that there was no ambiguity in subparagraph (2) of paragraph © of subsection 2 NRS 233B.130.[2] Moreover, and consistent with this Court's March 28, 2018 order, the Supreme Court specifically held in *Heat & Frost Insulators* that subsection 5 of NRS 233B.130 permits a District Court, upon a showing of good cause, to extend the time for service of a petition for judicial review beyond the 45-day period after the

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[1] While it was an error for this Court to conclude in its formal March 28, 2018, order denying Engel's amended motion to dismiss the petition for judicial review that neither the Supreme Court nor the Court of Appeals had expressly interpreted subparagraph (1) of paragraph (c) of subsection 2 of NRS 233B.130, ultimately, the holding in the *Heat & Frost Insulators* decision has no effect on the ruling made by this Court in it March 28, 2018 order. Indeed, in the *Heat & Frost Insulators* decision, the Supreme Court interpreted subparagraph 1 of paragraph (c) of subsection 2 of NRS 233B.130 consistent with this Court's interpretation of subparagraph 1 in its March 28, 2018 order, namely that service of a petition for judicial review upon the Attorney General is mandatory and jurisdictional. In this regard, however, it is uncontroverted that Petitioners timely served the Attorney General with the petition.

[2] Hence, the holding in the *Heat & Frost Insulators'* decision does not conflict at all with this Court's March 28, 2018 order, which concluded, *inter alia*, that subparagraph (2) of paragraph (c) of subsection 2 of NRS 233B.130 was ambiguous, and permitted or allowed the petition for judicial review to be served upon the Senior Appeals Officer Bryan Nix, who was the administrative head of the Hearings Division of the Nevada Department of Administration and the official tasked with supervision of petitions for judicial review of decisions made by Appeals Officers in contested workers' compensation cases. *See, March 28, 2018 Order Denying Engel's Amended Motion to Dismiss at pp. 2-3, 4-7.* Concerning such petitions, as noted in this Court's March 28, 2018 order, the duties of Mr. Nix included, but were not limited to the duty of timely preparation and filing the record on appeal with the district court. *Id.*

filing of the petition.[3]

Turning now to the matter of the interpretation of subparagraph (2) of paragraph © of subsection 2 of NRS 233B.130, when the language of a statute is plain and unambiguous, a court should give the language its ordinary meaning and not go beyond it. *Nev. Dept. of Corrections v. York Claims Services*, 131 Nev. Adv. Op. 25, 348 P.3d 1010, 1013 (Nev. 2015). Here, however, upon reviewing subparagraph (2) of paragraph © of subsection 2 of NRS 233B.130, the Court finds the provision to be ambiguous on its face. The statute is also ambiguous in that it is unclear whether the phrase "person serving in the office of administrative head of the named agency" means any official who supervises the administrative activities at issue, or just the Director of the entire agency himself. Engel argues that the phrase must be strictly construed to mean that only the Director of the agency is to be served.[4] Petitioners argue that the phrase means has a broader

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[3] Indeed, in *Heat & Frost Insulators*, the Nevada Supreme Court stated that a motion to extend the time for service may be filed by a party with the District Court either before or after the 45-day period has expired. On this point, and following the evidentiary hearing conducted in this case on May 28, 2017, this Court concluded in its minute order of June 2, 2017, and in its formal written order filed March 28, 2018, that even if Patrick Cates, not Bryan Nix, was the proper recipient of service of the petition, good cause existed to extend the time to serve the petition upon Mr. Cates. Mr. Cates is Director of the Nevada Department of Administration (NDA), and the NDA consists of 10 divisions, and each division has an administrator appointed by Mr. Cates. *See, March 28, 2018 Order Denying Engel's Amended Motion to Dismiss at pp. 4-5 & note 1.* While his title is Senior Appeals Officer, Mr. Nix is the appointed administrator of the Hearings Division of the NDA. *See, March 28, 2018 Order Denying Engel's Amended Motion to Dismiss at pp. 2-3, 4-7.* Lastly, in its March 28, 2018 order, this Court noted that Mr. Cates had been served with the petition before it ruled on Engel's amended motion to dismiss. *Id.; see also June 2, 2017 Minute Order.*

[4] Patrick Cates is the Director Cates of the NDA, which is comprised of ten (10) divisions. *See, Exhibit 3 to Engel's Amended Motion to Dismiss.* Mr. Cates, however, has appointed administrators over each of the 10 divisions within the NDA. *See generally, Id.* These administrators include: (1) Evan Dale, Administrative Services; (2) Shanna Rahming, Enterprise IT Services; (3) Keith Wells, Fleet Services; (4) Bryan Nix, Hearings and Appeals; (5) Peter Long, Human Resource Management; (6) Jeff Haag, Public Works, (7) Gus Nunez, Purchasing; (8) Ana Andrews, Risk Management; (9) Jeff Kintop, State Library, Archives and Public Records; (10) and Connie Lucido, Office of Grant Procurement. It is thus clear that Senior Appeals Officer Nix is the appointed "administrator" of workers' compensation hearings and appeals.

interpretation and means the official who supervises the administrative activities at issue and which meets the practical needs of the parties.[5] *See generally*, NRS 233B.131.The Court finds that both of the parties' viewpoints are reasonable interpretations of the statute and, therefore, the statute is ambiguous.

Nevada precedent provides that if a statute is open to more than one reasonable interpretation, it is ambiguous, and a court may look to its legislative history to ascertain the legislature's intent. *York Claims Services*, 131 Nev. Adv. Op. 25, 348 P.3d at 1013. The legislative history of NRS 233B.130(c)(2) shows that the intent of adding NRS 233B.130(c)(2) was partially to ensure that petitions for judicial review were being properly served upon the State to ensure due process rights of litigants (which would include pro se litigants).[6] In light of this goal, the Court finds that the legislative intent behind NRS 233B.130(2)(c)(2) is better served by interpreting the phrase "person serving in the office of administrative head of the named agency" to mean an official who supervises the actual administrative activities in the

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[5] In accordance with NRS 232.215 and NAC 616C.260(3), the Senior Appeals Officer has been officially designated to "supervise the administrative, technical and procedural activities of the [Hearings] Division." Logically, as the supervisor of all "administrative, technical and procedural activities" of the Division, it is reasonable to view Senior Appeals Officer Nix as the person serving in the "office of administrative head" of the Hearings Division for purposes of NRS 233B.130(2)(c)(2). Furthermore, it is reasonable to conclude that accepting service of process is an activity that clearly falls within the "administrative, technical and procedural activities"of the Hearings Division. Moreover, and arguably, in the case at bar "office of administrative head" means the official charged with directly supervising the administrative activities of the Hearings Division of the NDA. *See generally*, Black's Law Dictionary 1438 (6th Ed.1990) (defining "supervisor" as "one having authority over others, to superintend and direct").

[6] As herein previously noted, however, Mr. Nix testified that neither the NDA nor the actual Appeals Officer in the Hearings Division that decides the underlying contested workers' compensation case ever appear as a party before the District Court and participate in the briefing and argument of the filed petition for judicial review. Mr. Nix also testified that he needs to receive service of a petition for judicial review, because as the supervisor of the Hearings Division, he is responsible for creating and implementing the time-limited process for preparation of the record on appeal and the filing of this record with the District Court. *See*, NRS 233B.131.

locale where the matter is pending, such as Mr. Nix; rather than this phrase being interpreted to solely mean the appointed Director of the NDA who oversees many different areas of operation through individuals such as Mr. Nix.

Further, it is apparent from Mr. Nix's testimony at the May 25, 2017, hearing that many petitioners are confused as to who is the intended person at the NDA to be served with the petition. Mr. Nix testified that some petitions are being served twice, both on his office and Mr. Cates' office, because the statute is unclear as to whom at the NDA is to be served with the petitions. Mr. Nix's testimony also shows that it is more reasonable to allow petitions for judicial review to be served upon Mr. Nix, as the official at the NDA who supervises the handling of the administrative activities associated with the petition. In this regard, requiring petitions for judicial review to be solely served upon the Director of NDA is impractical, because according to Mr. Nix any petitions that are served on Mr. Cates are just forwarded to Mr. Nix, and nothing substantively is done on the petitions at the Director's office level. In short, regardless of where and upon whom the petitions are served at the NDA, the petitions eventually end up in the hands of the official who directly supervises the appeals process both in southern Nevada (Clark County) and northern Nevada, namely Mr. Nix. If the Court were to interpret the phrase "person serving in the office of administrative head of the named agency" to mean only Mr. Cates as the Director of the NDA, this would mean that petitions for judicial review relating to Clark County matters (which are oftentimes filed by pro se litigants) would need to be served in Carson City upon the office of Mr. Cates (or whomever is the appointed Director of the NDA) and then these same petitions would just be sent right back to Clark County to be reviewed and handled by Mr. Nix, as the supervising official of such appeals. This Court believes that the Nevada Legislature did not intend such an absurd result which could cause pro se litigants unnecessary time and expense. An interpretation of NRS 233B.130(2)(c)(2) that allows petitions for judicial review to be served upon an official who actually supervises this administrative activity, such as Mr. Nix, is consistent with the language of this statute, promotes efficiency, appears to best achieve the legislature's intent, and facilitates timely preparation and filing of the record on appeal.

The foregoing reading or interpretation of NRS 233B.130(2)(c)(2) is also consistent with

a reading of subparagraph one of this cited provision. Specifically, NRS 233B.130(2)(c)(1) designates a specific person, the Attorney General, and thereafter lists other alternative specific individuals upon whom service of the petition is to be made. If the Legislature intended subsection 2 to have that same specificity, the legislature could easily have set forth similar language in that subsection. Instead subsection 2 merely states a "person serving in the office of administrative head" of the named agency.

Lastly, even if Mr. Nix was not the proper recipient of service of the Petition, Mr. Cates was served with the Petition in this case. NRS 233B.130(5) requires a petition for judicial review to be served upon the agency and every party within 45 days of the filing of the petition. However, subsection 5 also gives the district court discretion to extend the time for service upon a showing of good cause. In this case, the Court finds good cause exists to grant an extension of time for service of the Petition, due to the ambiguity in the statute and the procedural issues that exist in the present case, as well as to allow the case to be heard on the merits consistent with case law.

**III. Order**

Concerning Engel's motion for reconsideration, it was an error for this Court to conclude in its formal March 28, 2018, order denying Engel's amended motion to dismiss the petition for judicial review that neither the Supreme Court nor the Court of Appeals had expressly interpreted subparagraph (1) of paragraph (c) of subsection 2 of NRS 233B.130. Ultimately, however, the holding in the *Heat & Frost Insulators* decision has no adverse effect on the ruling made by this Court in it March 28, 2018 order. Indeed, Engels' motion for reconsideration truly raised no new issues of fact or law to support a ruling contrary to the March 28, 2018 order already filed denying Engel's amended motion to dismiss. *See, Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for re-hearing be granted"). Moreover, Engel's motion for reconsideration did not demonstrate that this Court's March 28, 2018 order denying his amended motion to dismiss was clearly erroneous. *See, generally, Masonry & Tile Contractors v. Jolley, Urga & Wirth Ass'n*, 113 Nev.737, 941 P.2d

486 (1987). Hence, apart from the error herein previously noted, Engel's motion for reconsideration is hereby denied.

Furthermore, and for all of the foregoing reasons, the Court hereby again affirms its March 28, 2018 order which GRANTED Petitioners' request pursuant to NRS 233B.130(5) for an extension of time for service of the petition. Further, because Petitioners had already served Mr. Cates with the Petition before the evidentiary hearing on Engel's amended motion to dismiss, the Court hereby again affirms the finding and conclusion in its March 28, 2018 order that compliance with NRS 233B.130(5) has occurred.

This Court also again affirms its March 28, 2018 order that Engel's amended motion to dismiss the petition for judicial review is DENIED without prejudice.

Dated this 13 day of September, 2018

JOANNA S. KISHNER

DISTRICT COURT JUDGE
JOANNA S. KISHNER

Submitted by:
THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: _____
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Approved as to form:

NEVADA ATTORNEY FOR INJURED WORKERS

By: _____
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Attorneys for Respondent *Thomas Engel*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing ORDER DENYING RESPONDENT THOMAS ENGEL'S AMENDED MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW to be served on all parties to this action by:

__xx__ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

__xx__ Eighth Judicial District Court Eflex ECF (Electronic Case Filing)

Fully addressed as follows:

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Robin Chase, Esq.
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Senior Appeals Officer Michelle Morgando
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Patrick Cates
Director, Nevada Department of Administration
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Carson City Office
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

DATED this 20th day of September, 2018.

*/s/ Natalie Steinhardt*
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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Attorneys for: Boulder City, Employer, Alternative Service Concepts, LLC, Third Party Administrator, and Public Agency Compensation Trust, Insurer

DISTRICT COURT

COUNTY OF CLARK, NEVADA

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|---|---|
| BOULDER CITY, PUBLIC AGENCY COMPENSATION TRUST, ALTERNATIVE SERVICE CONCEPTS, LLC<br>Petitioners,<br>vs.<br>THOMAS ENGEL, and the NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER GREGORY A. KROHN,<br>Respondents.<br>/ | Case No. A-16-730103-J<br>Dept. No. XXXI |

**ORDER GRANTING PETITION FOR JUDICIAL REVIEW, REVERSING APPEALS OFFICER DECISION AND REMANDING FOR FURTHER PROCEEDINGS**

## I. INTRODUCTION

The instant matter comes before the Court pursuant to a January 12, 2016, Petition for Judicial Review, filed in respect of a December 10, 2015, Decision and Order issued by Appeals Officer Gregory Krohn in Appeal Nos. 1406317-GK and 1406547-GK. In brief, the underlying matter involves a contested workers' compensation claim. In the underlying contested workers' compensation claim, the claimant or injured employee is Respondent Thomas Engel (hereinafter "Engel"), the employer is Boulder City, and the insurer is the Public Agency Compensation Trust (hereinafter, "PACT"). The third party claim administrator of Engel's workers' compensation claim herein at issue is Alternative Service Concepts, LLC. (hereinafter, "ASC").

## II. PROCEDURAL HISTORY OF UNDERLYING CASE

On December 28, 2012, ASC issued a determination to Engel declining authorization of a total hip replacement surgery. *ROA 653-654.* Engel disagreed with that determination and requested a hearing on the determination before a Hearing Officer, and Hearing No. 1306875-MB was assigned to his appeal. *ROA 656.* By written order dated April 4, 2013, the Hearing Officer remanded ASC's determination for further medical investigation, namely to clarify the opinion of the physician recommending the surgery (Robert Tait, M.D.) on the matter whether the medical condition in Engel's left hip for which surgery was recommended was caused by the year 2010 work-related incident that serves as the basis of Engel's workers' compensation claim. *ROA 658-659.* Accordingly, Dr. Tait's deposition was subsequently taken. *ROA 661-677.* Following the deposition, and by written determination dated August 28, 2013, ASC again declined to authorize a total hip replacement surgery under the umbrella of Engel's workers' compensation claim. *ROA 679-680.* Engel disagreed with this determination and, therefore, he requested a hearing on this determination before a Hearing Officer, and Hearing No. 1404281-SE was assigned to his appeal.[1] *See*, ROA 682.

After stating that all of the medical opinions under the claim indicated that the total hip replacement surgery was due to the progression of Engel's pre-existing degenerative arthritis, nevertheless, and by written order dated December 5, 2013, Hearing Officer Steven Evans held the Employer (Boulder City) and Insurer (PACT) liable for the total hip replacement surgery.[2] *ROA 572-574.*

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[1] On September 6, 2013, ASC issued a determination letter also declining to authorize an additional hernia surgery under Engel's claim. *ROA 684.* Engel disagreed with this determination and, therefore, he also requested a hearing on this determination before a Hearing Officer, and Hearing No. 1404280-SE was assigned to his appeal. *ROA 686.* Though the appeals were separate, involving different determinations and different subjects, Hearing Nos. 1404281-SE and 1404280-SE were set to be heard together, and a hearing of both appeals was held on November 19, 2013. *ROA 572-574.*

[2] The order further noted that any additional hernia surgery should be postponed until after the total hip replacement surgery was performed or completed. *ROA 572-574.* The medical condition known as a hernia and surgery for the hernia are not relevant to the disposition of this petition, and will either be not further referenced or only minimally referenced in this order.

Boulder City and the PACT disagreed with the December 5, 2013, decision made by the Hearing Officer and, therefore, filed an appeal from the decision with an Appeals Officer, and Appeal Nos. 1406317-GK and 1406547-GK were assigned to the appeal. *ROA 642-643 and 912-913.* Boulder City and the PACT also obtained a pre-hearing order from the Appeals Officer that stayed enforcement of the Hearing Officer's decision. *ROA 610-611.*

A hearing on both appeals herein before referenced (Appeal Nos. 1406317-GK & 1406547-GK) was held before Appeals Officer Gregory Krohn. At the hearing, the parties presented documentary evidence and Engel testified. *ROA 237-240.* By interim order dated and served by mail on the parties on June 6, 2014, Appeals Officer Krohn stated that the medical causation opinions from both Engel's treating orthopedic surgeon (Dr. Tait) and another independent orthopedic surgeon (Dr. Rosen), "create a medical question and pursuant to NRS 616C.360(3), the Appeals Officer orders" various steps toward collecting further medical evidence.[3] *Id.* The Appeals Officer further ordered that the Insurer arrange and pay for a medical evaluation by yet a third orthopedic surgeon and, in his order, the Appeals Officer himself solicited "yes/no" type answers to questions which were phrased directly from the language appearing in statutes in Nevada's workers' compensation act.[4] *Id.*; *see also*, NRS 616C.175; NRS 617.366.

Boulder City and the PACT respectfully filed an appeal to this District Court from the Appeals Officer's Interim Order (Clark County District Court Case No. A-14-703455-J) to

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[3] In this case Boulder City and the PACT argued persuasively based upon evidence in the record on appeal that the Appeals Officer abused his discretion in finding the existence of a medical question, because the medical causation opinions of Dr. Tait and Dr. Rosen were not contradictory, but legally sufficient and consistent, and established that the recommended total hip replacement surgery was to remedy Engel's pre-existing left hip osteoarthritis, a condition not caused nor materially changed by the August 11, 2010 work-related duties underlying Engel claim for workers' compensation. Notwithstanding, the Court is deciding this case on a different basis as later set forth in this order.

[4] In this case, Boulder City and the PACT also argued persuasively based upon evidence in the record on appeal that this aspect of the Appeals Officer decision demonstrated that the questions which the Appeals Officer had were legal, not medical, in nature, and that physicians are not competent to answer such questions which, in turn, creates the inference that Engel had not carried his burden of proof in the case. *See generally, Day v. Washoe County School District*, 121 Nev. 387, 390 & n. 7, 116 P.3d 68, 70 & n.7(2005)(where physician is in effect making legal conclusions, the Nevada Supreme Court has questioned whether such "medical-legal" opinions are even admissible under NRS 233B.123(1) and NRS 50.275. Nevertheless, as stated in the previous note, the Court is deciding this case on a different basis as later set forth in this order.

address these legal errors. *See, Notes 3 & 4 supra.* By order filed on November 19, 2014, however, this Court dismissed the appeal because the order appealed was an interim order, not a final decision by the Appeals Officer and, therefore, the Court concluded it did not have subject matter jurisdiction to hear and decide the appeal. *Id.*

Pursuant to the Appeals Officer's interim order, a third orthopedic surgeon evaluation was obtained at the expense of the insurer (PACT), and this physician (Dr. Todd Swanson) described the August 11, 2010 work-related incident as a relatively minor traumatic incident, and initially opined to a degree of reasonable medical probability that Engel did not need a left hip replacement and that Engel's symptoms were not related to anything within the left hip joint. *ROA 184-193 and 197-201.* Later, Dr. Swanson opined that Engel needed a total left hip replacement surgery and that his left hip symptoms were the result of the year 2010 work-related incident forming the basis of Engel's workers' compensation claim. *ROA 160-164, 167-168, and 176-179.* In this regard, Dr. Swanson "believed" Engel's left hip pain "may be" due in part to moderate arthritic changes in the left hip joint that pre-existed the occurrence of the year 2010 work-related incident, and in part due to a small labral tear, despite the fact that a left hip MRI obtained in December 2010 did not demonstrate a left hip labral tear and a left hip MRI obtained in December 2014 at Dr. Swanson's request noted labral degeneration but no discrete tear.[3] *ROA 162-164; ROA 176-179 and 725.* Thereafter, the Appeals Officer rejected the request of the PACT and Boulder City to take the deposition of Dr. Swanson. Indeed, and in turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of Dr. Swanson persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *ROA 3-12.*

Therefore, Boulder City and the PACT filed with this Court a petition for judicial review

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[3] Moreover, even if a labral tear existed in the left hip, the medical causation opinion of the third orthopedic physician (Dr. Swanson) utterly failed to take into consideration that such a tear was likely due to a native (congenital) slight loss of anteversion (forward tipping) of the acetabulum (hip socket) which predisposed Engel to such a labral tear; and that such a tear lead to Engel's left hip osteoarthritis. *ROA 162-164 and 825-828.* Unfortunately, the Appeals Officer denied the request of Boulder City and the PACT to depose Dr. Swanson on this point and many others relevant to the disposition of this case.

of the Appeals Officer's December 10, 2015 decision.

## III. FACTS RELEVANT TO THE DISPOSITION OF THIS PETITION[6]

Thomas Engel was a fifty-four (54) year old male working as a laborer with Boulder City at the time of the year 2010 incident forming the basis of his claim. *ROA 692-693*. A claim for workers' compensation (Form C-4) dated August 17, 2010, indicated Engel experienced a gradual onset of pain after working on August 11, 2010, and his work at that time involved picking up bags full of brush and rocks, and loading these bags into a trailer. *Id.* The diagnosis on the Form C-4 was left hip strain. *Id.*.

On September 1, 2010, an x-ray of Engel's pelvis, ordered by a Dr. Smith, was normal. *ROA 696*.

On September 8, 2010, ASC wrote a determination letter to Engel which granted insurance coverage of Engel's claim, but limited the scope of coverage under the claim to a left hip strain.

Dr. Curtis Poindexter completed his initial consultation of Engel on September 21, 2010. *ROA 704-706*. At that time, Dr. Poindexter's medical record noted that on August 11, 2010, Engel was stepping-in and stepping-out of a trailer and picking up trash bags all day. *Id.* There was no immediate pain, however, later in the day/evening Engel had increased pain. *Id.* By November 23, 2010, Dr. Poindexter's medical impression of Engel's condition included a history of left groin strain/iliopsoas tendon strain due to work on August 11, 2010; chronic left hip pain and left groin pain with obvious decreased mobility. *See*, ROA 719-721.

An MRI of Engel's left hip was completed on December 15, 2010. *ROA 725*. The medical impression from that MRI at that time was osteoarthritis of the hip joints bilaterally. *Id.* An x-ray of the left hip was also performed on this same date. *ROA 726*. The medical impression from that x-ray indicated no fracture or other acute pathology and bony hypertrophy at the junctions of the femoral heads and necks bilaterally. *Id.*

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[6] The only facts relevant to the disposition of this petition relate to Engel's left hip. Hence, though the record on appeal contains other facts, including facts related to Engel's inguinal hernia, these other facts will not be recited or referenced.

In a medical report dated December 21, 2010, Dr. Poindexter noted the herein previously referenced MRI and x-ray results and recommended cancellation of an orthopedic evaluation, but requested authorization for an intra-articular left hip injection. *ROA 727-729.* On January 14, 2011, a fluoroscopic-guided joint injection of the left hip was completed. *ROA 730.* A second injection was completed on March 18, 2011. *ROA 734.*

On June 16, 2011, Dr. Ronald Koe made an assessment of bursitis/tendonitis in Engel's left hip. *ROA 737-738.*

On November 17, 2011, Engel wrote a letter to ASC requesting to see a hip specialist. *ROA 765.* In his letter, Engel stated he was still having consistent pain in his left hip. *Id.*

On December 1, 2011, Engel was evaluated by orthopedic surgeon Mark Rosen, M.D., with a chief complaint of left groin pain. *ROA 766-768.* Dr. Rosen found pre-existing osteoarthritis in Engel's hips bilaterally. Dr. Rosen noted that Engel might be in need of a total left hip replacement if his symptoms worsened, but that the need for such a surgery would be related to the natural progression of the pre-existing osteoarthritis, as Engel did not suffer any type of traumatic injury to his left hip during the performance of his work duties on August 11, 2010, that would cause or require a total hip replacement. *Id.* Dr. Rosen further noted that with regards to any orthopedic injury to his left hip caused by the performance of his work duties on August 11, 2010, Engel was stable, and had not suffered any impairment. *Id.* Dr. Rosen also noted that Engel did not require any work restrictions with regard to any industrial injury (or work-related injury) to his left hip. *Id.*

Following the medical evaluation by Dr. Rosen, ASC filed a request with the Nevada Division of Industrial Relations (DIR) to assign a permanent impairment rating physician or chiropractor from its official rotating list, and DIR assigned Larry Tarno, D.O. On January 20, 2012, a permanent partial disability (PPD) evaluation was performed by Dr. Tarno. *ROA 773-775.* The result of the evaluation was a zero percent (0%) whole person impairment for work-related injuries arising from the performance of work activities on August 11, 2010. *Id.* On January 30, 2012, ASC wrote a determination letter to Engel advising him of claim closure with a 0% permanent partial disability (PPD). *ROA 776.*

Engel was again evaluated by Dr. Poindexter on March 1, 2012. *ROA 777-779.* Dr. Poindexter's medical impression at that time was hip joint degenerative joint disease and hip pain with a history of groin strain. Dr. Poindexter recommended reopening of Engel's workers' compensation claim. *Id.*

On April 1, 2012, Engel requested a hearing before a Hearing officer regarding the January 30, 2012, claim closure determination letter from ASC, and Hearing No. 96030-TH was assigned to his appeal. *ROA 782-783.* Following a hearing, and by written decision dated May 4, 2012, made under Hearing No. 96030-TH, a Hearing Officer directed ASC to set aside the issue of claim closure.[7] *ROA 784.*

On October 4, 2012, Engel's employer, Boulder City, wrote a letter to Engel, discontinuing his light duty work, and indicating that Boulder City felt he might be aggravating his work-related injury and elongating his recovery with the modified duty he had been performing. *ROA 824.*

Engel then went to an orthopedic surgeon of his own choice on October 31, 2012, for an assessment of his left hip. *ROA 825-828.* This referenced evaluation was performed by Dr. Robert Tait from the Orthopaedic Institute of Henderson, Nevada. *Id.* Dr. Tait found moderate joint space narrowing in Engel's left and right hips with circumferential osteophytes present, and concluded or diagnosed that Engel had moderate hip osteoarthritis bilaterally and to remedy the osteoarthritis in the left hip, he recommended a total left hip replacement surgery. *Id.*; *see also*, ROA 335 (depo. pp. 43-44); ROA 336 (depo. pp. 48-49); ROA 329 (depo. pp. 20-21); and ROA 339 (depo. p. 59). In this regard, Dr. Tait admitted in his deposition that he could not state that the work-activities in August 2010 caused Engel's left hip osteoarthritis and need for a total hip joint replacement surgery.[8] ROA 335 (depo. p. 44). Moreover, and as a general point of orthopedics, Dr. Tait opined that Engel's hip osteoarthritis likely developed initially from a torn

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[7] The Hearing Officer ordered that an evaluation be scheduled with the treating surgeon in order to assess Engel's hernia condition. Again, the hernia condition is not relevant to the disposition of this petition.

[8] In the History of Present Illness section of his October 31, 2012 initial medical consultation, Dr. Tait describes Engel's left hip injury as one of overuse or repetitive motion. ROA 825.

labrum that progressively worsened; and that Engel was predisposed to a labral tear as a result of native (congenital) slight loss of anteversion (forward tipping) of the acetabulum (hip socket).[9] *Id.* In discussing this latter statement in his subsequent deposition, however, Dr. Tait admitted that he actually could not state whether Engel had a torn labrum and, even if a tear did exist there was no way he could "backtrack" and identify that tear as traumatic versus degenerative in nature. *ROA 331-332 (depo. pp. 27-30); ROA 332-333 (depo. pp. 33-34); ROA 334 (depo. pp. 40-41).*

Pursuant to the Appeals Officer's June 6, 2014, interim order, orthopedic surgeon Dr. Todd Swanson initially evaluated Engel on September 24, 2014, at the expense of the insurer (PACT), and this physician described the August 2010 work-related activities forming the basis of Engel's claim[10] as a relatively minor traumatic incident, and initially opined to a degree of reasonable medical probability that Engel did not need a left hip replacement and that Engel's symptoms were not related to anything within the left hip joint. *See*, ROA 162-164, 180-181, 184-193, 197-201, and 241-259. This determination by Dr. Swanson was made following a records review, physical, examination, and intra-articular injection of an anesthetic agent into Engel's left hip joint that did not provide even short-term significant relief of his symptoms. Notwithstanding, Dr. Swanson then requested an updated MRI of Engel's left hip and pelvis to look for and rule soft tissue lesions or abnormalities which may be the cause of Engel's symptoms; and, therefore, in his second interim order dated December 9, 2014, entered after the trial of the contested cases, the Appeals Officer ordered the insurer to arrange and pay for an updated MRI of Engel's left hip and pelvis MRI. ROA 180-181; ROA 184-193. The Appeals Officer further ordered that Dr. Swanson be asked to review the results of the updated MRI of

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[9] Engel argued that Dr. Tait was stating by means of his report that work-related activities in August 2010 caused the torn labrum.

[10] During the medical evaluation, which occurred some four (4) years after the work-related incident forming the basis of the claim, Engel asserted that what injured him in August 2010 was a single instance of jumping out of a five foot (5') high trailer, whereas initially Engel asserted that what injured him was moving trash bags full of debris into a trailer. *See*, ROA 191, 197, 692-693, and 704. Notwithstanding, Dr. Swanson described the work activities as a relatively minor traumatic incident. *See*, ROA 191, 197.

Engel's left and pelvis and provide an addendum to his initial medical causation opinion, and in the addendum state whether information from the updated MRI changed his initial medical causation opinion or offered any new insight as to the cause of Engel's symptoms. ROA 180-181. The updated MRI of Engel's left hip and pelvis was obtained on December 22, 2014, and paid for by the PACT. ROA 177-179. According to radiologist Dr. Patrick Boland. M.D., the updated MRI showed three medical conditions in Engel's left hip: (1) Degenerative changes within the left hip; (2) Mild iliopsoas bursitis; and (3) Labral degeneration without discrete labral tear. *Id. at 178.* After the updated MRI was obtained, however, and by means of a clinical evaluation of Engel conducted on March 4, 2015, Dr. Swanson was able to rule out the existence of iliopsoas bursitis, meaning only the following medical conditions remained assessed by the updated MRI: (1) Degenerative changes within the left hip; and (2) Labral degeneration without discrete labral tear. ROA 167-168. Notwithstanding, Dr. Swanson requested yet one more diagnostic test be performed, namely another intra-articular injection of an anesthetic agent into Engel's left hip under fluoroscopic guidance to be certain the that the anesthetic agent entered the joint.[1] ROA 167-168. Hence, on May 15, 2015, on the heels of this request by Dr. Swanson, the Appeals Officer entered a third interim order after the trial of the contested cases, and ordered the PACT (insurer) to provide this additional intra-articular injection and Dr. Swanson to provide a final addendum medical causation report as to whether information discovered by this injection changed his previous medical causation opinions or offered any insight as to the cause of Engel's symptoms. ROA 169-172. Thereafter, Dr. Swanson performed the additional intra-articular injection of an anesthetic agent into Engel's left hip under fluoroscopic guidance, and then opined that Engel needed a left hip replacement, and that his symptoms were the result of the year 2010 work-related incident forming the basis of Engel's workers' compensation claim. *See,* ROA 160-164, 167-168, and 176-179. In this regard, this third orthopedic physician "believed"

[1] As herein previously related, on September 24, 2014, Dr. Swanson provided an intra-articular injection of an anesthetic agent into Engel's left hip joint (not under fluoroscopic guidance) but Engel related the anesthetic agent did not significantly relieve his symptoms. ROA 191-192.

Engel's left hip pain "may be" due in part to moderate arthritic changes in the left hip joint, and in part due to a small labral tear, despite the fact a left hip MRI obtained in December 2010 did not demonstrate a left hip labral tear and a left hip MRI obtained in December 2014 only noted labral degeneration but no discrete tear. *See,* ROA 160-164, 176-179, and 725.

The Appeals Officer rejected the request of the PACT and Boulder City to take the deposition of Dr. Swanson. *See,* Exhibit 2 to Opening Brief filed by Boulder city and PACT. In turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of this third orthopedic physician persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *See,* ROA 3-12.

## IV. LAW RELEVANT TO THE DISPOSITION OF THIS PETITION

### A. Standard of Review

The parameters of judicial review are established by statute. *See,* NRS 233B.135. Judicial review of a final decision of an agency must be conducted by the Court without a jury and confined to the record. *Id.*. The burden of proof is on the party attacking the decision to show that the final decision is invalid. *Id.* A reviewing Court may remand or affirm the final decision or set it aside in whole or in part only if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

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

NRS 233B.135(3).[12]

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[12] To avoid arbitrary applications of the mere definition of "substantial evidence", there are two (2) steps in the long-established methodology for applying the substantial evidence standard set forth in the NRS 233B.135(3)(e)-(f). First, identify the law which governs the contested issue, as such law establishes what facts had to be proven, and how

As noted by the Nevada Supreme Court, due process guarantees of fundamental fairness still apply to administrative proceedings. *See generally, Dutchess Bus. Servs. v. Nev. State Bd. of Pharm.*, 124 Nev. 701, 714, 191 P.3d 1159, 1168 (2008). Our Nevada Supreme Court has held that due process in the administrative forum is supposed to be flexible and call for such procedural protections as the situation demands. *Minton v. Bd. of Medical Examrs*, 110 Nev. 1060, 1082-83, 881 P.2d 1329, 1354-55 (1994). In *Minton*, the Court cited with approval *Bivens Constr. v. State Contractors Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991) for the principle that cross-examination in administrative proceedings may not be curtailed. As hereafter discussed, cross-examination of Dr. Swanson was improperly curtailed in this case.

**B. Decision**

In this case, instead of serving as an impartial adjudicator, the Appeals Officer became a partial advocate and improperly shouldered the statutory burden of proof placed upon Engel as the claimant by NRS 616C.150 and NRS 616C.175(1). The three (3) sequential interim orders entered by the Appeals Officer in the underlying contested cases make it clear that the Appeals Officer effectively solicited his own expert causation opinion from Dr. Swanson[1] and foreclosed any challenge to the questions he posed, as well as the opinions or conclusions made by his

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such facts had to be proven. *United Exposition Service Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423 (1993); *Horne v. State Indus. Sys.*, 113 Nev. 532, 936 P.2d 839 (1997); *State Emp. Sec. Div. v. Reliable Health Care Servs.*, 115 Nev. 253, 983 P.2d 414 (1999); *Langman v. Nev. Admr's, Inc.*, 114 Nev. 203, 955 P.2d 188 (1998); *Gubber v. Independence Mining Co.*, 112 Nev. 190, 192, 911 P.2d 1191 (1996); *Installation & Dismantle v. State Indus. Ins. Sys.*, 110 Nev. 930, 879 P.2d 58 (1994); *Titanium Metals Corp. v. Clark County*, 99 Nev. 397, 399, 663 P.2d 355 (1983). Second, review the record on appeal and determine whether the record contains both that quantity and quality of factual evidence which a reasonable man could accept as adequate proof of what the governing law requires. *Id.* If the record on appeal does not contain both that quantity and quality of factual evidence which a reasonable man could accept as adequate proof of what the governing law requires, then the decision of the Appeals Officer in this case) may be deemed by the Court to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS 233B.135(3).

[1] The Appeals Officer ordered the parties to agree on a hip expert. ROA 237-40, 238 at lines 10-17. In other words, the IME conducted by Dr. Swanson was not voluntary. *Id.* Boulder City and the PACT disagreed with the Appeals Officer's use of medical question authority to obtain an independent medical evaluation (IME) by a hip expert that was designed to determine whether the compensability standard under NRS 616C.175(1) had been satisfied in this case. *See, Exhibit 1 to Opening Brief.* Indeed, Boulder City and the PACT filed a petition for judicial review with this Court to challenge the Appeals Officer's use of medical question authority to obtain this IME. *Id.* The petition was dismissed by this Court because the interim order was deemed not a final administrative decision. *Id.*

expert[14], and then found his expert's opinions persuasive and dispositive of the case, demonstrating not merely advocacy, instead of impartial adjudication, but unfair advocacy. As noted in Exhibit 2 to the Petitioner's Opening Brief, following entry of the Appeals Officer's third interim order post-trial of the contested cases, and the submission of the final supplemental IME report from Dr. Swanson dated June 24, 2015, Boulder City and the PACT asked permission from the Appeals Officer to depose Dr. Swanson. This request was denied. *Id.* In turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of this third orthopedic physician persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *See*, ROA 3-12. As herein previously related, our Nevada Supreme Court has held that due process in the administrative forum is supposed to be flexible and call for such procedural protections as the situation demands. *Minton v. Bd. of Medical Examrs*, 110 Nev. 1060, 1082-83, 881 P.2d 1329, 1354-55 (1994). In *Minton*, the Court cited with approval *Bivens Constr. v. State Contractors Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991) for the principle that cross-examination in administrative proceedings may not be curtailed. Cross-examination of Dr. Swanson was improperly curtailed by the Appeals Officer in this case. The Nevada Administrative Procedures Act (NAPA) provides for judicial reversal of agency decisions made upon unlawful procedure. *See*, NRS 233B.135(3).

In accordance with the foregoing, the decision made by the Appeals Officer is hereby

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[14] Courts, not physicians, are charged with the responsibility of interpreting statutes, and for good reason. As the Court in *Mendillo* noted, opining physicians are more concerned with symptomatology than causation and, hence, use the terms aggravation, exacerbation, etcetera, differently than courts when assessing legal causation. *Grover C. Dils Medical Center v. Mendillo*, 121 Nev. 278, 287-88 & nn. 23-27 112 P.3d 1093, 1100 & nn. 23-27 (2005). Hence, in determining liability in industrial insurance cases, "aggravation" (as well as "precipitation" and "acceleration") must be distinguished in the legal sense, not just the medical sense. *Id.* In this case, the Appeals Officer impermissibly placed interpretation of the legal causation standard in NRS 616C.175(1) in the hands of Dr. Swanson by requesting that he answer the legal causation questions of NRS 616C.175(1); in turn, the Appeals Officer found Dr. Swanson's interpretation of that legal causation standard persuasive to the substantial prejudice of Boulder City and PACT. In this regard, and even assuming arguendo that the August 2010 work activities resulted in Engel suffering symptoms in his left hip from pre-existing osteoarthritis in that hip, Dr. Swanson's opinion to this effect relates only to the legal issue whether the symptoms arose in the course of employment, not whether the symptoms arose out of employment. Moreover, where a physician is in effect making legal conclusions, the Nevada Supreme Court has properly questioned whether such "medical-legal" opinions are admissible under NRS 233B.123(1) and NRS 50.275. *See generally, Day v. Washoe County School District*, 121 Nev. 387, 390 & n. 7, 116 P.3d 68, 70 & n. 7 (2005).

reversed, and this case is hereby remanded to the Appeals Officer; and the Appeals Officer is hereby ordered to permit Boulder City and the PACT to take the deposition of Dr. Swanson.

Moreover, after the deposition of Dr. Swanson is obtained, further proceedings before the Appeals Officer in this matter will be facilitated by the legal principles hereafter set forth in the context of the hereafter recited uncontested facts in the record.

An injury arises out of employment when there is a causal connection between the employee's work injury and the nature of the work or workplace. *See, Wood v. Safeway Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005); *Balguen v. Harrah's Las Vegas*, LLC, 2018 Nev. LEXIS 70, 134 Nev. Adv. Rep. 71 (Nev. Sup. Ct. September 13, 2018). Merely being at work and suffering an injury is insufficient to show that the injury arose out of employment.[13] *See, Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997). *Balguen v. Harrah's Las Vegas, supra*; Rather, the employee must show that the origin of the injury is related to some risk involved within the scope of employment. *Balguen v. Harrah's Las Vegas, supra.*; *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2005). If the injury is not fairly traceable to the nature of the employment or workplace environment, then the injury cannot be said to arise out of employment. *Id.* Concerning risks, our Nevada Supreme Court has previously held and recently reaffirmed the principle that personal risks do not arise out of employment. *See, Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 351, 240 P.3d 2, 6 (2005); *Balguen v. Harrah's Las Vegas*, LLC, 2018 Nev. LEXIS 70, 134 Nev. Adv. Rep. 71 (Nev. Sup. Ct. September 13, 2018). Personal risks include injuries caused by personal conditions and illnesses, and include the effects of a disease or internal weakness. *Balguen v. Harrah's Las Vegas, supra.* Employment risks arise out of employment and are solely related to the employment. *Id.* Classic employment risks include machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears, excavations caving in, and so on, as well as occupational diseases. *Id.* Under certain circumstances, the risk may be mixed. *Balguen v. Harrah's Las Vegas, supra.* A mixed risk is a personal cause and an employment

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[13] Merely being at work and suffering an injury might be sufficient to show that the injury arose in the course of employment.

cause combining to produce the harm. *Id.* A classic example of an injury from a mixed risk is a person with a weak heart who dies because of strain occasioned by the employment. *Id.* A mixed risk arises out of employment if the employment risk was a contributing factor in the injury. *Id.* Finally, under NRS 616C.175(1), which is referenced in the Nevada Industrial Insurance Act (NIIA) as addressing the subject of compensability of employment-related aggravations of pre-existing conditions which are not employment related, the legislature requires that an injury from a work-related accident be at a minimum identifiable, and a significant and measurable cause of the resulting medical condition that requires medical treatment, and which condition results in any disability.

As herein previously discussed, the record on appeal reveals that Dr. Swanson issued three (3) sequential reports, but not one of them contained medical proof that the August 2010 work activities caused Engel's left hip osteoarthritis which is the medical condition to be remedied by the total hip replacement surgery. Indeed, Engel had osteoarthritis in his left hip before the August 2010 work activities and after these work activities. Moreover, the very existence of left hip osteoarthritis presents the risk of symptoms from this condition. Further the record contains no evidence proving that the August 2010 work activities broke any bones, tore any ligaments, ruptured any tendons, or caused any vascular or nerve injury in Engel's left hip. Indeed, an MRI of the left hip obtained in December 2010 and a second MRI of the left hip obtained four (4) years later in December 2014 did not reveal even a torn labrum in the left hip. Further, while the medical evidence in the record on appeal supports the finding that the August 2010 work activities caused a left hip strain, no consulting or treating physician opined to a degree of reasonable medical probability that the remedial treatment for Engel's left hip strain was a total left hip joint replacement surgery, nor that this injury had any medical effect on the pre-existing arthritis. Finally, there is no medical evidence in the record on appeal that proves a total left hip replacement surgery would have been required absent the presence of osteoarthritis in Engel's left hip before he performed the August 2010 work activities.

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C. Order

Cross-examination of Dr. Swanson was improperly curtailed in this case. The Nevada Administrative Procedures Act (NAPA) provides for judicial reversal of agency decisions made upon unlawful procedure. *See*, NRS 233B.135(3).

In accordance with the foregoing, the Petition for Judicial Review is hereby granted, and the decision made by the Appeals Officer is hereby reversed, and this case is hereby remanded to the Appeals Officer. On remand, the Appeals Officer is hereby ordered to permit Boulder City and the PACT to take the deposition of Dr. Swanson. Thereafter, the Appeals Officer is hereby ordered to conduct further proceedings consistent with the law and the uncontested facts in the record on appeal herein previously cited, as well as the deposition testimony of Dr. Swanson.

DATED this 25 day of Jan, 2019.

JOANNA S. KISHNER

DISTRICT COURT JUDGE

JOANNA S. KISHNER

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DISTRICT COURT

CLARK COUNTY, NEVADA

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| BOULDER CITY, PUBLIC AGENCY COMPENSATION TRUST, ALTERNATIVE SERVICE CONCEPTS, LLC<br>Petitioners,<br><br>vs.<br><br>THOMAS ENGEL, and the NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER GREGORY A. KROHN,<br><br>Respondents. | CASE NO. A-16-730103-J<br><br>DEPT. NO. XXXI |

**NOTICE OF ENTRY OF ORDER**

TO: THOMAS ENGEL, and his attorney of record EVAN BEAVERS, ESQ., Nevada Attorney for Injured Workers:

NOTICE IS HEREBY GIVEN that on February 7, 2019, the Court entered an ORDER GRANTING PETITION FOR JUDICIAL REVIEW, AND REVERSING AND REMANDING CASE TO APPEALS OFFICER FOR FURTHER PROCEEDINGS, and that attached hereto is a

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true and correct copy of said Order.

DATED this 8th day of February, 2019.

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER

*/ Robert F. Balkenbush, Esq. /*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing NOTICE OF ENTRY OF ORDER to be served on all parties to this action by:

__xx__ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

__xx__ Eighth Judicial District Court Eflex ECF (Electronic Case Filing)

_____ personal delivery

_____ facsimile (fax)

_____ Federal Express/UPS or other overnight delivery

Fully addressed as follows:

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Senior Appeals Officer Michelle Morgando
Nevada Department of Administration, Hearings Division
2200 S. Rancho Drive, Suite 220
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DATED this 8th day of February, 2019.

/s/ Laura Bautista
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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**DISTRICT COURT**

**COUNTY OF CLARK, NEVADA**

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| BOULDER CITY, PUBLIC AGENCY COMPENSATION TRUST, ALTERNATIVE SERVICE CONCEPTS, LLC<br>Petitioners,<br>vs.<br>THOMAS ENGEL, and the NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER GREGORY A. KROHN,<br>Respondents.<br>_____/ | Case No. A-16-730103-J<br>Dept. No. XXXI |

**ORDER GRANTING PETITION FOR JUDICIAL REVIEW, REVERSING APPEALS OFFICER DECISION AND REMANDING FOR FURTHER PROCEEDINGS**

## I. INTRODUCTION

The instant matter comes before the Court pursuant to a January 12, 2016, Petition for Judicial Review, filed in respect of a December 10, 2015, Decision and Order issued by Appeals Officer Gregory Krohn in Appeal Nos. 1406317-GK and 1406547-GK. In brief, the underlying matter involves a contested workers' compensation claim. In the underlying contested workers' compensation claim, the claimant or injured employee is Respondent Thomas Engel (hereinafter "Engel"), the employer is Boulder City, and the insurer is the Public Agency Compensation Trust (hereinafter, "PACT"). The third party claim administrator of Engel's workers' compensation claim herein at issue is Alternative Service Concepts, LLC. (hereinafter, "ASC").

## II. PROCEDURAL HISTORY OF UNDERLYING CASE

On December 28, 2012, ASC issued a determination to Engel declining authorization of a total hip replacement surgery. *ROA 653-654.* Engel disagreed with that determination and requested a hearing on the determination before a Hearing Officer, and Hearing No. 1306875-MB was assigned to his appeal. *ROA 656.* By written order dated April 4, 2013, the Hearing Officer remanded ASC's determination for further medical investigation, namely to clarify the opinion of the physician recommending the surgery (Robert Tait, M.D.) on the matter whether the medical condition in Engel's left hip for which surgery was recommended was caused by the year 2010 work-related incident that serves as the basis of Engel's workers' compensation claim. *ROA 658-659.* Accordingly, Dr. Tait's deposition was subsequently taken. *ROA 661-677.* Following the deposition, and by written determination dated August 28, 2013, ASC again declined to authorize a total hip replacement surgery under the umbrella of Engel's workers' compensation claim. *ROA 679-680.* Engel disagreed with this determination and, therefore, he requested a hearing on this determination before a Hearing Officer, and Hearing No. 1404281-SE was assigned to his appeal.[1] *See*, ROA 682.

After stating that all of the medical opinions under the claim indicated that the total hip replacement surgery was due to the progression of Engel's pre-existing degenerative arthritis, nevertheless, and by written order dated December 5, 2013, Hearing Officer Steven Evans held the Employer (Boulder City) and Insurer (PACT) liable for the total hip replacement surgery.[2] *ROA 572-574.*

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[1] On September 6, 2013, ASC issued a determination letter also declining to authorize an additional hernia surgery under Engel's claim. *ROA 684.* Engel disagreed with this determination and, therefore, he also requested a hearing on this determination before a Hearing Officer, and Hearing No. 1404280-SE was assigned to his appeal. *ROA 686.* Though the appeals were separate, involving different determinations and different subjects, Hearing Nos. 1404281-SE and 1404280-SE were set to be heard together, and a hearing of both appeals was held on November 19, 2013. *ROA 572-574.*

[2] The order further noted that any additional hernia surgery should be postponed until after the total hip replacement surgery was performed or completed. *ROA 572-574.* The medical condition known as a hernia and surgery for the hernia are not relevant to the disposition of this petition, and will either be not further referenced or only minimally referenced in this order.

Boulder City and the PACT disagreed with the December 5, 2013, decision made by the Hearing Officer and, therefore, filed an appeal from the decision with an Appeals Officer, and Appeal Nos. 1406317-GK and 1406547-GK were assigned to the appeal. *ROA 642-643 and 912-913.* Boulder City and the PACT also obtained a pre-hearing order from the Appeals Officer that stayed enforcement of the Hearing Officer's decision. *ROA 610-611.*

A hearing on both appeals herein before referenced (Appeal Nos. 1406317-GK & 1406547-GK) was held before Appeals Officer Gregory Krohn. At the hearing, the parties presented documentary evidence and Engel testified. *ROA 237-240.* By interim order dated and served by mail on the parties on June 6, 2014, Appeals Officer Krohn stated that the medical causation opinions from both Engel's treating orthopedic surgeon (Dr. Tait) and another independent orthopedic surgeon (Dr. Rosen), "create a medical question and pursuant to NRS 616C.360(3), the Appeals Officer orders" various steps toward collecting further medical evidence.[3] *Id.* The Appeals Officer further ordered that the Insurer arrange and pay for a medical evaluation by yet a third orthopedic surgeon and, in his order, the Appeals Officer himself solicited "yes/no" type answers to questions which were phrased directly from the language appearing in statutes in Nevada's workers' compensation act.[4] *Id.*; *see also*, NRS 616C.175; NRS 617.366.

Boulder City and the PACT respectfully filed an appeal to this District Court from the Appeals Officer's interim Order (Clark County District Court Case No. A-14-703455-J) to

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[3] In this case Boulder City and the PACT argued persuasively based upon evidence in the record on appeal that the Appeals Officer abused his discretion in finding the existence of a medical question, because the medical causation opinions of Dr. Tait and Dr. Rosen were not contradictory, but legally sufficient and consistent, and established that the recommended total hip replacement surgery was to remedy Engel's pre-existing left hip osteoarthritis, a condition not caused nor materially changed by the August 11, 2010 work-related duties underlying Engel claim for workers' compensation. Notwithstanding, the Court is deciding this case on a different basis as later set forth in this order.

[4] In this case, Boulder City and the PACT also argued persuasively based upon evidence in the record on appeal that this aspect of the Appeals Officer decision demonstrated that the questions which the Appeals Officer had were legal, not medical, in nature, and that physicians are not competent to answer such questions which, in turn, creates the inference that Engel had not carried his burden of proof in the case. *See generally, Day v. Washoe County School District*, 121 Nev. 387, 390 & n. 7, 116 P.3d 68, 70 & n.7(2005)(where physician is in effect making legal conclusions, the Nevada Supreme Court has questioned whether such "medical-legal" opinions are even admissible under NRS 233B.123(1) and NRS 50.275. Nevertheless, as stated in the previous note, the Court is deciding this case on a different basis as later set forth in this order.

address these legal errors. *See, Notes 3 & 4 supra.* By order filed on November 19, 2014, however, this Court dismissed the appeal because the order appealed was an interim order, not a final decision by the Appeals Officer and, therefore, the Court concluded it did not have subject matter jurisdiction to hear and decide the appeal. *Id.*

Pursuant to the Appeals Officer's interim order, a third orthopedic surgeon evaluation was obtained at the expense of the insurer (PACT), and this physician (Dr. Todd Swanson) described the August 11, 2010 work-related incident as a relatively minor traumatic incident, and initially opined to a degree of reasonable medical probability that Engel did not need a left hip replacement and that Engel's symptoms were not related to anything within the left hip joint. *ROA 184-193 and 197-201.* Later, Dr. Swanson opined that Engel needed a total left hip replacement surgery and that his left hip symptoms were the result of the year 2010 work-related incident forming the basis of Engel's workers' compensation claim. *ROA 160-164, 167-168, and 176-179.* In this regard, Dr. Swanson "believed" Engel's left hip pain "may be" due in part to moderate arthritic changes in the left hip joint that pre-existed the occurrence of the year 2010 work-related incident, and in part due to a small labral tear, despite the fact that a left hip MRI obtained in December 2010 did not demonstrate a left hip labral tear and a left hip MRI obtained in December 2014 at Dr. Swanson's request noted labral degeneration but no discrete tear.[5] *ROA 162-164; ROA 176-179 and 725.* Thereafter, the Appeals Officer rejected the request of the PACT and Boulder City to take the deposition of Dr. Swanson. Indeed, and in turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of Dr. Swanson persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *ROA 3-12.*

Therefore, Boulder City and the PACT filed with this Court a petition for judicial review

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[5] Moreover, even if a labral tear existed in the left hip, the medical causation opinion of the third orthopedic physician (Dr. Swanson) utterly failed to take into consideration that such a tear was likely due to a native (congenital) slight loss of anteversion (forward tipping) of the acetabulum (hip socket) which predisposed Engel to such a labral tear; and that such a tear lead to Engel's left hip osteoarthritis. *ROA 162-164 and 825-828.* Unfortunately, the Appeals Officer denied the request of Boulder City and the PACT to depose Dr. Swanson on this point and many others relevant to the disposition of this case.

of the Appeals Officer's December 10, 2015 decision.

## III. FACTS RELEVANT TO THE DISPOSITION OF THIS PETITION[6]

Thomas Engel was a fifty-four (54) year old male working as a laborer with Boulder City at the time of the year 2010 incident forming the basis of his claim. *ROA 692-693*. A claim for workers' compensation (Form C-4) dated August 17, 2010, indicated Engel experienced a gradual onset of pain after working on August 11, 2010, and his work at that time involved picking up bags full of brush and rocks, and loading these bags into a trailer. *Id.* The diagnosis on the Form C-4 was left hip strain. *Id.*.

On September 1, 2010, an x-ray of Engel's pelvis, ordered by a Dr. Smith, was normal. *ROA 696*.

On September 8, 2010, ASC wrote a determination letter to Engel which granted insurance coverage of Engel's claim, but limited the scope of coverage under the claim to a left hip strain.

Dr. Curtis Poindexter completed his initial consultation of Engel on September 21, 2010. *ROA 704-706*. At that time, Dr. Poindexter's medical record noted that on August 11, 2010, Engel was stepping-in and stepping-out of a trailer and picking up trash bags all day. *Id.* There was no immediate pain, however, later in the day/evening Engel had increased pain. *Id.* By November 23, 2010, Dr. Poindexter's medical impression of Engel's condition included a history of left groin strain/iliopsoas tendon strain due to work on August 11, 2010; chronic left hip pain and left groin pain with obvious decreased mobility. *See*, ROA 719-721.

An MRI of Engel's left hip was completed on December 15, 2010. *ROA 725*. The medical impression from that MRI at that time was osteoarthritis of the hip joints bilaterally. *Id.* An x-ray of the left hip was also performed on this same date. *ROA 726*. The medical impression from that x-ray indicated no fracture or other acute pathology and bony hypertrophy at the junctions of the femoral heads and necks bilaterally. *Id.*

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[6] The only facts relevant to the disposition of this petition relate to Engel's left hip. Hence, though the record on appeal contains other facts, including facts related to Engel's inguinal hernia, these other facts will not be recited or referenced.

In a medical report dated December 21, 2010, Dr. Poindexter noted the herein previously referenced MRI and x-ray results and recommended cancellation of an orthopedic evaluation, but requested authorization for an intra-articular left hip injection. *ROA 727-729.* On January 14, 2011, a fluoroscopic-guided joint injection of the left hip was completed. *ROA 730.* A second injection was completed on March 18, 2011. *ROA 734.*

On June 16, 2011, Dr. Ronald Koe made an assessment of bursitis/tendonitis in Engel's left hip. *ROA 737-738.*

On November 17, 2011, Engel wrote a letter to ASC requesting to see a hip specialist. *ROA 765.* In his letter, Engel stated he was still having consistent pain in his left hip. *Id.*

On December 1, 2011, Engel was evaluated by orthopedic surgeon Mark Rosen, M.D., with a chief complaint of left groin pain. *ROA 766-768.* Dr. Rosen found pre-existing osteoarthritis in Engel's hips bilaterally. Dr. Rosen noted that Engel might be in need of a total left hip replacement if his symptoms worsened, but that the need for such a surgery would be related to the natural progression of the pre-existing osteoarthritis, as Engel did not suffer any type of traumatic injury to his left hip during the performance of his work duties on August 11, 2010, that would cause or require a total hip replacement. *Id.* Dr. Rosen further noted that with regards to any orthopedic injury to his left hip caused by the performance of his work duties on August 11, 2010, Engel was stable, and had not suffered any impairment. *Id.* Dr. Rosen also noted that Engel did not require any work restrictions with regard to any industrial injury (or work-related injury) to his left hip. *Id.*

Following the medical evaluation by Dr. Rosen, ASC filed a request with the Nevada Division of Industrial Relations (DIR) to assign a permanent impairment rating physician or chiropractor from its official rotating list, and DIR assigned Larry Tarno, D.O. On January 20, 2012, a permanent partial disability (PPD) evaluation was performed by Dr. Tarno. *ROA 773-775.* The result of the evaluation was a zero percent (0%) whole person impairment for work-related injuries arising from the performance of work activities on August 11, 2010. *Id.* On January 30, 2012, ASC wrote a determination letter to Engel advising him of claim closure with a 0% permanent partial disability (PPD). *ROA 776.*

Engel was again evaluated by Dr. Poindexter on March 1, 2012. *ROA 777-779.* Dr. Poindexter's medical impression at that time was hip joint degenerative joint disease and hip pain with a history of groin strain. Dr. Poindexter recommended reopening of Engel's workers' compensation claim. *Id.*

On April 1, 2012, Engel requested a hearing before a Hearing officer regarding the January 30, 2012, claim closure determination letter from ASC, and Hearing No. 96030-TH was assigned to his appeal. *ROA 782-783.* Following a hearing, and by written decision dated May 4, 2012, made under Hearing No. 96030-TH, a Hearing Officer directed ASC to set aside the issue of claim closure.[7] *ROA 784.*

On October 4, 2012, Engel's employer, Boulder City, wrote a letter to Engel, discontinuing his light duty work, and indicating that Boulder City felt he might be aggravating his work-related injury and elongating his recovery with the modified duty he had been performing. *ROA 824.*

Engel then went to an orthopedic surgeon of his own choice on October 31, 2012, for an assessment of his left hip. *ROA 825-828.* This referenced evaluation was performed by Dr. Robert Tait from the Orthopaedic Institute of Henderson, Nevada. *Id.* Dr. Tait found moderate joint space narrowing in Engel's left and right hips with circumferential osteophytes present, and concluded or diagnosed that Engel had moderate hip osteoarthritis bilaterally and to remedy the osteoarthritis in the left hip, he recommended a total left hip replacement surgery. *Id.*; *see also*, ROA 335 (depo. pp. 43-44); ROA 336 (depo. pp. 48-49); ROA 329 (depo. pp. 20-21); and ROA 339 (depo. p. 59). In this regard, Dr. Tait admitted in his deposition that he could not state that the work-activities in August 2010 caused Engel's left hip osteoarthritis and need for a total hip joint replacement surgery.[8] ROA 335 (depo. p. 44). Moreover, and as a general point of orthopedics, Dr. Tait opined that Engel's hip osteoarthritis likely developed initially from a torn

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[7] The Hearing Officer ordered that an evaluation be scheduled with the treating surgeon in order to assess Engel's hernia condition. Again, the hernia condition is not relevant to the disposition of this petition.

[8] In the History of Present Illness section of his October 31, 2012 initial medical consultation, Dr. Tait describes Engel's left hip injury as one of overuse or repetitive motion. ROA 825.

labrum that progressively worsened; and that Engel was predisposed to a labral tear as a result of native (congenital) slight loss of anteversion (forward tipping) of the acetabulum (hip socket).[9] *Id.* In discussing this latter statement in his subsequent deposition, however, Dr. Tait admitted that he actually could not state whether Engel had a torn labrum and, even if a tear did exist there was no way he could "backtrack" and identify that tear as traumatic versus degenerative in nature. *ROA 331-332 (depo. pp. 27-30); ROA 332-333 (depo. pp. 33-34); ROA 334 (depo. pp. 40-41).*

Pursuant to the Appeals Officer's June 6, 2014, interim order, orthopedic surgeon Dr. Todd Swanson initially evaluated Engel on September 24, 2014, at the expense of the insurer (PACT), and this physician described the August 2010 work-related activities forming the basis of Engel's claim[10] as a relatively minor traumatic incident, and initially opined to a degree of reasonable medical probability that Engel did not need a left hip replacement and that Engel's symptoms were not related to anything within the left hip joint. *See,* ROA 162-164, 180-181, 184-193, 197-201, and 241-259. This determination by Dr. Swanson was made following a records review, physical, examination, and intra-articular injection of an anesthetic agent into Engel's left hip joint that did not provide even short-term significant relief of his symptoms. Notwithstanding, Dr. Swanson then requested an updated MRI of Engel's left hip and pelvis to look for and rule soft tissue lesions or abnormalities which may be the cause of Engel's symptoms; and, therefore, in his second interim order dated December 9, 2014, entered after the trial of the contested cases, the Appeals Officer ordered the insurer to arrange and pay for an updated MRI of Engel's left hip and pelvis MRI. ROA 180-181; ROA 184-193. The Appeals Officer further ordered that Dr. Swanson be asked to review the results of the updated MRI of

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[9] Engel argued that Dr. Tait was stating by means of his report that work-related activities in August 2010 caused the torn labrum.

[10] During the medical evaluation, which occurred some four (4) years after the work-related incident forming the basis of the claim, Engel asserted that what injured him in August 2010 was a single instance of jumping out of a five foot (5') high trailer, whereas initially Engel asserted that what injured him was moving trash bags full of debris into a trailer. *See,* ROA 191, 197, 692-693, and 704. Notwithstanding, Dr. Swanson described the work activities as a relatively minor traumatic incident. *See,* ROA 191, 197.

Engel's left and pelvis and provide an addendum to his initial medical causation opinion, and in the addendum state whether information from the updated MRI changed his initial medical causation opinion or offered any new insight as to the cause of Engel's symptoms. ROA 180-181. The updated MRI of Engel's left hip and pelvis was obtained on December 22, 2014, and paid for by the PACT. ROA 177-179. According to radiologist Dr. Patrick Boland. M.D., the updated MRI showed three medical conditions in Engel's left hip: (1) Degenerative changes within the left hip; (2) Mild iliopsoas bursitis; and (3) Labral degeneration without discrete labral tear. *Id. at 178.* After the updated MRI was obtained, however, and by means of a clinical evaluation of Engel conducted on March 4, 2015, Dr. Swanson was able to rule out the existence of iliopsoas bursitis, meaning only the following medical conditions remained assessed by the updated MRI: (1) Degenerative changes within the left hip; and (2) Labral degeneration without discrete labral tear. ROA 167-168. Notwithstanding, Dr. Swanson requested yet one more diagnostic test be performed, namely another intra-articular injection of an anesthetic agent into Engel's left hip under fluoroscopic guidance to be certain the that the anesthetic agent entered the joint.[11] ROA 167-168. Hence, on May 15, 2015, on the heels of this request by Dr. Swanson, the Appeals Officer entered a third interim order after the trial of the contested cases, and ordered the PACT (insurer) to provide this additional intra-articular injection and Dr. Swanson to provide a final addendum medical causation report as to whether information discovered by this injection changed his previous medical causation opinions or offered any insight as to the cause of Engel's symptoms. ROA 169-172. Thereafter, Dr. Swanson performed the additional intra-articular injection of an anesthetic agent into Engel's left hip under fluoroscopic guidance, and then opined that Engel needed a left hip replacement, and that his symptoms were the result of the year 2010 work-related incident forming the basis of Engel's workers' compensation claim. *See,* ROA 160-164, 167-168, and 176-179. In this regard, this third orthopedic physician "believed"

[11] As herein previously related, on September 24, 2014, Dr. Swanson provided an intra-articular injection of an anesthetic agent into Engel's left hip joint (not under fluoroscopic guidance) but Engel related the anesthetic agent did not significantly relieve his symptoms. ROA 191-192.

Engel's left hip pain "may be" due in part to moderate arthritic changes in the left hip joint, and in part due to a small labral tear, despite the fact a left hip MRI obtained in December 2010 did not demonstrate a left hip labral tear and a left hip MRI obtained in December 2014 only noted labral degeneration but no discrete tear. *See,* ROA 160-164, 176-179, and 725.

The Appeals Officer rejected the request of the PACT and Boulder City to take the deposition of Dr. Swanson. *See,* Exhibit 2 to Opening Brief filed by Boulder city and PACT. In turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of this third orthopedic physician persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *See,* ROA 3-12.

## IV. LAW RELEVANT TO THE DISPOSITION OF THIS PETITION

### A. Standard of Review

The parameters of judicial review are established by statute. *See,* NRS 233B.135. Judicial review of a final decision of an agency must be conducted by the Court without a jury and confined to the record. *Id.*. The burden of proof is on the party attacking the decision to show that the final decision is invalid. *Id.* A reviewing Court may remand or affirm the final decision or set it aside in whole or in part only if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

> (a) In violation of constitutional or statutory provisions;
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> (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
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> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).[12]

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[12] To avoid arbitrary applications of the mere definition of "substantial evidence", there are two (2) steps in the long-established methodology for applying the substantial evidence standard set forth in the NRS 233B.135(3)(e)-(f). First, identify the law which governs the contested issue, as such law establishes what facts had to be proven, and how

As noted by the Nevada Supreme Court, due process guarantees of fundamental fairness still apply to administrative proceedings. *See generally, Dutchess Bus. Servs. v. Nev. State Bd. of Pharm.*, 124 Nev. 701, 714, 191 P.3d 1159, 1168 (2008). Our Nevada Supreme Court has held that due process in the administrative forum is supposed to be flexible and call for such procedural protections as the situation demands. *Minton v. Bd. of Medical Examrs.* 110 Nev. 1060, 1082-83, 881 P.2d 1329, 1354-55 (1994). In *Minton*, the Court cited with approval *Bivens Constr. v. State Contractors Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991) for the principle that cross-examination in administrative proceedings may not be curtailed. As hereafter discussed, cross-examination of Dr. Swanson was improperly curtailed in this case.

**B. Decision**

In this case, instead of serving as an impartial adjudicator, the Appeals Officer became a partial advocate and improperly shouldered the statutory burden of proof placed upon Engel as the claimant by NRS 616C.150 and NRS 616C.175(1). The three (3) sequential interim orders entered by the Appeals Officer in the underlying contested cases make it clear that the Appeals Officer effectively solicited his own expert causation opinion from Dr. Swanson[1] and foreclosed any challenge to the questions he posed, as well as the opinions or conclusions made by his

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such facts had to be proven. *United Exposition Service Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423 (1993); *Horne v. State Indus. Sys.*, 113 Nev. 532, 936 P.2d 839 (1997); *State Emp. Sec. Div. v. Reliable Health Care Servs.*, 115 Nev. 253, 983 P.2d 414 (1999); *Langman v. Nev. Admr's, Inc.*, 114 Nev. 203, 955 P.2d 188 (1998); *Gubber v. Independence Mining Co.*, 112 Nev. 190, 192, 911 P.2d 1191 (1996); *Installation & Dismantle v. State Indus. Ins. Sys.*, 110 Nev. 930, 879 P.2d 58 (1994); *Titanium Metals Corp. v. Clark County*, 99 Nev. 397, 399, 663 P.2d 355 (1983). Second, review the record on appeal and determine whether the record contains both that quantity and quality of factual evidence which a reasonable man could accept as adequate proof of what the governing law requires. *Id.* If the record on appeal does not contain both that quantity and quality of factual evidence which a reasonable man could accept as adequate proof of what the governing law requires, then the decision of the Appeals Officer in this case) may be deemed by the Court to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS 233B.135(3).

[1] The Appeals Officer ordered the parties to agree on a hip expert. ROA 237-40, 238 at lines 10-17. In other words, the IME conducted by Dr. Swanson was not voluntary. *Id.* Boulder City and the PACT disagreed with the Appeals Officer's use of medical question authority to obtain an independent medical evaluation (IME) by a hip expert that was designed to determine whether the compensability standard under NRS 616C.175(1) had been satisfied in this case. *See, Exhibit 1 to Opening Brief.* Indeed, Boulder City and the PACT filed a petition for judicial review with this Court to challenge the Appeals Officer's use of medical question authority to obtain this IME. *Id.* The petition was dismissed by this Court because the interim order was deemed not a final administrative decision. *Id.*

expert[14], and then found his expert's opinions persuasive and dispositive of the case, demonstrating not merely advocacy, instead of impartial adjudication, but unfair advocacy. As noted in Exhibit 2 to the Petitioner's Opening Brief, following entry of the Appeals Officer's third interim order post-trial of the contested cases, and the submission of the final supplemental IME report from Dr. Swanson dated June 24, 2015, Boulder City and the PACT asked permission from the Appeals Officer to depose Dr. Swanson. This request was denied. *Id.* In turn, by written decision filed on December 10, 2015, the Appeals Officer found the opinions of this third orthopedic physician persuasive, and held Boulder City and the PACT responsible for Engel's left hip replacement. *See,* ROA 3-12. As herein previously related, our Nevada Supreme Court has held that due process in the administrative forum is supposed to be flexible and call for such procedural protections as the situation demands. *Minton v. Bd. of Medical Examrs,* 110 Nev. 1060, 1082-83, 881 P.2d 1329, 1354-55 (1994). In *Minton,* the Court cited with approval *Bivens Constr. v. State Contractors Bd.,* 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991) for the principle that cross-examination in administrative proceedings may not be curtailed. Cross-examination of Dr. Swanson was improperly curtailed by the Appeals Officer in this case. The Nevada Administrative Procedures Act (NAPA) provides for judicial reversal of agency decisions made upon unlawful procedure. *See,* NRS 233B.135(3).

In accordance with the foregoing, the decision made by the Appeals Officer is hereby

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[14] Courts, not physicians, are charged with the responsibility of interpreting statutes, and for good reason. As the Court in *Menditto* noted, opining physicians are more concerned with symptomatology than causation and, hence, use the terms aggravation, exacerbation, etcetera, differently than courts when assessing legal causation. *Grover C. Dils Medical Center v. Menditto,* 121 Nev. 278, 287-88 & nn. 23-27 112 P.3d 1093, 1100 & nn. 23-27 (2005). Hence, in determining liability in industrial insurance cases, "aggravation" (as well as "precipitation" and "acceleration") must be distinguished in the legal sense, not just the medical sense. *Id.* In this case, the Appeals Officer impermissibly placed interpretation of the legal causation standard in NRS 616C.175(1) in the hands of Dr. Swanson by requesting that he answer the legal causation questions of NRS 616C.175(1); in turn, the Appeals Officer found Dr. Swanson's interpretation of that legal causation standard persuasive to the substantial prejudice of Boulder City and PACT. In this regard, and even assuming arguendo that the August 2010 work activities resulted in Engel suffering symptoms in his left hip from pre-existing osteoarthritis in that hip, Dr. Swanson's opinion to this effect relates only to the legal issue whether the symptoms arose in the course of employment, not whether the symptoms arose out of employment. Moreover, where a physician is in effect making legal conclusions, the Nevada Supreme Court has properly questioned whether such "medical-legal" opinions are admissible under NRS 233B.123(1) and NRS 50.275. *See generally, Day v. Washoe County School District,* 121 Nev. 387, 390 & n. 7, 116 P.3d 68, 70 & n. 7 (2005).

reversed, and this case is hereby remanded to the Appeals Officer; and the Appeals Officer is hereby ordered to permit Boulder City and the PACT to take the deposition of Dr. Swanson.

Moreover, after the deposition of Dr. Swanson is obtained, further proceedings before the Appeals Officer in this matter will be facilitated by the legal principles hereafter set forth in the context of the hereafter recited uncontested facts in the record.

An injury arises out of employment when there is a causal connection between the employee's work injury and the nature of the work or workplace. *See, Wood v. Safeway Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005); *Balguen v. Harrah's Las Vegas*, LLC, 2018 Nev. LEXIS 70, 134 Nev. Adv. Rep. 71 (Nev. Sup. Ct. September 13, 2018). Merely being at work and suffering an injury is insufficient to show that the injury arose out of employment.[15] *See, Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997). *Balguen v. Harrah's Las Vegas, supra*; Rather, the employee must show that the origin of the injury is related to some risk involved within the scope of employment. *Balguen v. Harrah's Las Vegas, supra.*; *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2005). If the injury is not fairly traceable to the nature of the employment or workplace environment, then the injury cannot be said to arise out of employment. *Id.* Concerning risks, our Nevada Supreme Court has previously held and recently reaffirmed the principle that personal risks do not arise out of employment. *See, Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 351, 240 P.3d 2, 6 (2005); *Balguen v. Harrah's Las Vegas*, LLC, 2018 Nev. LEXIS 70, 134 Nev. Adv. Rep. 71 (Nev. Sup. Ct. September 13, 2018). Personal risks include injuries caused by personal conditions and illnesses, and include the effects of a disease or internal weakness. *Balguen v. Harrah's Las Vegas, supra.* Employment risks arise out of employment and are solely related to the employment. *Id.* Classic employment risks include machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears, excavations caving in, and so on, as well as occupational diseases. *Id.* Under certain circumstances, the risk may be mixed. *Balguen v. Harrah's Las Vegas, supra.* A mixed risk is a personal cause and an employment

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[15] Merely being at work and suffering an injury might be sufficient to show that the injury arose in the course of employment.

cause combining to produce the harm. *Id.* A classic example of an injury from a mixed risk is a person with a weak heart who dies because of strain occasioned by the employment. *Id.* A mixed risk arises out of employment if the employment risk was a contributing factor in the injury. *Id.* Finally, under NRS 616C.175(1), which is referenced in the Nevada Industrial Insurance Act (NIIA) as addressing the subject of compensability of employment-related aggravations of pre-existing conditions which are not employment related, the legislature requires that an injury from a work-related accident be at a minimum identifiable, and a significant and measurable cause of the resulting medical condition that requires medical treatment, and which condition results in any disability.

As herein previously discussed, the record on appeal reveals that Dr. Swanson issued three (3) sequential reports, but not one of them contained medical proof that the August 2010 work activities caused Engel's left hip osteoarthritis which is the medical condition to be remedied by the total hip replacement surgery. Indeed, Engel had osteoarthritis in his left hip before the August 2010 work activities and after these work activities. Moreover, the very existence of left hip osteoarthritis presents the risk of symptoms from this condition. Further the record contains no evidence proving that the August 2010 work activities broke any bones, tore any ligaments, ruptured any tendons, or caused any vascular or nerve injury in Engel's left hip. Indeed, an MRI of the left hip obtained in December 2010 and a second MRI of the left hip obtained four (4) years later in December 2014 did not reveal even a torn labrum in the left hip. Further, while the medical evidence in the record on appeal supports the finding that the August 2010 work activities caused a left hip strain, no consulting or treating physician opined to a degree of reasonable medical probability that the remedial treatment for Engel's left hip strain was a total left hip joint replacement surgery, nor that this injury had any medical effect on the pre-existing arthritis. Finally, there is no medical evidence in the record on appeal that proves a total left hip replacement surgery would have been required absent the presence of osteoarthritis in Engel's left hip before he performed the August 2010 work activities.

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**C. Order**

Cross-examination of Dr. Swanson was improperly curtailed in this case. The Nevada Administrative Procedures Act (NAPA) provides for judicial reversal of agency decisions made upon unlawful procedure. *See*, NRS 233B.135(3).

In accordance with the foregoing, the Petition for Judicial Review is hereby granted, and the decision made by the Appeals Officer is hereby reversed, and this case is hereby remanded to the Appeals Officer. On remand, the Appeals Officer is hereby ordered to permit Boulder City and the PACT to take the deposition of Dr. Swanson. Thereafter, the Appeals Officer is hereby ordered to conduct further proceedings consistent with the law and the uncontested facts in the record on appeal herein previously cited, as well as the deposition testimony of Dr. Swanson.

DATED this 25 day of Jan, 2019.

JOANNA S. KISHNER

DISTRICT COURT JUDGE

JOANNA S. KISHNER

Submitted by:

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing ORDER GRANTING PETITION FOR JUDICIAL REVIEW, AND REVERSING AND REMANDING CASE TO APPEALS OFFICER FOR FURTHER PROCEEDINGS to be served on all parties to this action by:

__xx__ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

__xx__ Eighth Judicial District Court Eflex ECF (Electronic Case Filing)

Fully addressed as follows:

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DATED this 1 day of February 2019.

*/s/ Natalie Steinhardt*
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger