IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 84112

ARNOLD TRANSPORTATION, F/K/A
LINKAMERICA CORP, and AIG,
Appellants,

v.

TONY HARRIS,
Respondent.

Appeal from a District Court Order Granting Petition for Judicial Review
First Judicial Court of Nevada, Carson City
Department No. 1
Case No. 21 OC 00065 1B

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Respondent's parent corporations: Not Applicable.

Firms having appeared: Nevada Attorney for Injured Workers

Respondent's pseudonyms: None

Submitted this 23rd day of March, 2023.

NEVADA ATTORNEY FOR INJURED WORKERS

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II.

JURISDICTIONAL STATEMENT

The jurisdictional statement as set out in the Appellants' opening brief is accurate, and therefore, Respondent does not recite his own jurisdictional statement here.

III.

ROUTING STATEMENT

Under NRAP 17(b)(9), the issue of the appeals officer's credibility determination regarding Respondent's expert witness would be presumptively assigned to the Court of Appeals as it concerns a petition for judicial review of an administrative agency's final decision.

However, under NRAP 17(a)(11), the issue of the appeals officer's decision that Appellant Insurer is not responsible for travel costs for a court ordered independent medical examination under NRS 616C.390(3)(a) is a question of first impression that the Supreme Court may hear and decide.

IV.

STATEMENT OF THE ISSUES

1. Whether the proper standard for review in this case is independent review for abuse of discretion and error of law?

2. Whether the appeals officer's finding in the final decision and order that dismissed the opinion of the Respondent's expert witness was an abuse of discretion prejudicing a substantial right of the Respondent?

2. Whether the denial of an independent medical examination, offered by the appeals officer after dismissing the opinion of the Respondent's expert, was an error of law and characterized by abuse of discretion?

4. Whether the district court erred as a matter of law when it granted Respondent's Petition for Judicial Review and reversed the appeals officer's Decision and Order which held that Respondent had not proven that his industrial claim should be reopened.

V.

STATEMENT OF THE CASE

The statement of the case as set out in the Appellants' opening brief is accurate except where restated or revised below in Respondent's argument, and therefore, Respondent does not recite his own statement of the case here.

VI.

STATEMENT OF FACTS

Respondent, Tony Harris, injured his lumbar spine at work on October 17, 2011, and his claim for benefits was accepted. Joint Appendix (hereinafter "JA") Volume I, p. 176 and 178. After undergoing a L3-4 and L4-5 decompressive

laminectomy and bilateral foraminotomies in April 2012, he was rated for the resulting permanent disability on September 20, 2013 that resulted in an award for eighteen percent (18%) whole person impairment for his lumbar spine. JA II, pp. 291-299 and 460-462. His claim was then closed for benefits in 2013. JA I, p. 190.

In November of 2015, Harris sought to reopen his claim under NRS 616C.390(1) believing that his lumbar spine condition had worsened since the claim closed. JA V, pp. 952-956. The Appellant Insurer, AIG, denied the request to reopen and litigation at the administrative hearing level resulted in an appeals officer's decision affirming the denial of reopening. JA V, pp. 957-958 and 963-967.

On January 7, 2019, Harris again sought to reopen his claim believing that his condition had worsened since his claim closed in 2013 and supported his request with reporting from Sierra Neurosurgery Group and an updated 2018 MRI of the lumbar spine. JA V, pp. 968-974. Harris' October 2012 MRI of the lumbar spine only showed disc bulges without significant spinal canal stenosis and mild neural foraminal narrowing at the L3-S1 levels. JA II, pp. 258-259. By comparison, Harris' November 2015 MRI of the lumbar spine demonstrated new moderate central canal stenosis and moderate to severe bilateral neural foramen stenosis along with facet degenerative changes at the L2-S1 levels. JA II, pp. 300-301. Lastly, an MRI of the lumbar spine in July 2018 demonstrated multilevel moderate to severe diffuse annular bulges, mild to moderate facet hypertrophy, moderate to severe spinal

stenosis, severe foraminal stenosis worse on the right, and severe degenerative changes of the disc and vertebral body endplate at the L5-S1 level. JA V, pp. 973-974. The new MRIs of the lumbar spine demonstrate advanced post-surgical degenerative changes that was either not present or minimal back in October 2012. JA II, pp. 258-259 and 300-301, and JA V., pp. 973-974.

Additionally, Harris was evaluated by Christopher P. Demers, M.D. of the Sierra Neurosurgery Group on January 7, 2019, where he complained of pain across his entire lumbar spine radiating to his posterior lateral legs down to the feet, right greater than left, with worsening neuropathy. JA V, pp. 970-972. Dr. Demers noted that Harris had not received any benefit from multiple epidural steroid injections, nerve ablation therapy, or chronic opiates utilized in the past year. *Id.* Dr. Demers opined that based upon Harris' subjective and objective worsening of condition, he should be referred for a neurosurgical consultation. *Id.*

On February 5, 2019, the AIG again denied Harris' request to reopen. JA V, pp. 975-976. Harris timely appealed the determination to a hearings officer. JA V, p. 977. Harris' appeal came for hearing before Hearings Officer Sondra L. Amodei on March 21, 2019. JA V, pp. 978-980. The hearings officer reversed the denial to reopen Harris' claim. *Id.* The Appellants then appealed the hearings officer's decision to the appeals office and filed a motion for stay, which was granted for all

but conservative and palliative care. JA IV, pp. 869-870 and 919-927, and JA V, p. 981.

While the matter was stayed on appeal, Harris obtained an updated MRI of the lumbar spine and sought treatment with James J. Lynch, M.D. on December 27, 2019. JA III, pp. 519-523. The July 22, 2019 MRI of the lumbar spine showed changes consistent with the July 2018 MRI. JA III, pp. 518. Based upon his examination of Harris and review of the July 2019 MRI, Dr. Lynch opined that Harris had degenerative changes with stenosis from the L1-L4 levels and collapse at the L4-5 and L5-S1 levels. *Id.* There was also evidence of recurrent stenosis at the L3-4 level. *Id.*

Harris returned to Dr. Lynch on January 20, 2020 for further evaluation. JA III, pp. 524-528. In the interim time between his appointments, he obtained a CT scan of the lumbar spine, which Dr. Lynch reviewed. *Id.* The CT scan showed post-surgical changes with laminectomy defects at L4-5, disc space collapse throughout the lumbar spine with vacuum disc phenomenon noted at the L1-2 and L3-4 levels with significant sclerosis of the endplates at L3-4 as well as slight retrolistheses at the L3-4 level, and recurrent bone spurring at the L4-5 level with resulting foraminal narrowing. *Id.* Dr. Lynch recommended Harris redo open L1-5 laminectomies without fusion. *Id.*

On April 27, 2020, Dr. Lynch responded to a letter from Harris' counsel asking for further opinions to support the reopening request. JA III, pp. 530-537. Counsel provided Dr. Lynch with 75 pages of medical records to review, which included: all MRIs of the lumbar spine from 2011 through 2019; Dr. Sekhon's 2012 surgical report; the functional capacity evaluation ("FCE") and disability rating evaluation from 2013; nerve conduction studies; 2018 motor vehicle accident treatment records; 2018 to 2019 medial branch block and radiofrequency ablation records from Jeffrey Muir, M.D.; 2018 to 2019 medical records from Dr. Demers; and Dr. Lynch's medical records.[1] JA II, pp. 445-468, and JA III pp. 469-528. Dr. Lynch was provided every relevant medical record, diagnostic report, and procedure report from the time of Harris' PPD evaluation in September 2013 through January 2020. *Id.*

In response to counsel's letter, Dr. Lynch diagnosed Harris with right L4-5 radiculopathies and L1-5 lumbar stenosis recurrent from L3-5 decompression in 2012. JA III, p. 535. He related each diagnosis to the original industrial injury on October 17, 2011. *Id.* Dr. Lynch opined that the medical evidence showed a worsening of condition between the date of Harris' PPD evaluation in September

[1] The 75-page production to Dr. Lynch did not include the September 2019 EMG of the bilateral lower extremities performed by Andrea Tatro, M.D. However, Dr. Lynch's January 20, 2020 medical record indicates that he had already reviewed Dr. Tatro's 2019 EMG study. Moreover, the 75-page production did not include medical records from Edward C. Perry, M.D. and James Murphy, M.D. because both treating providers were members of the Spine Nevada practice group along with Dr. Lynch, who had access to their records already.

2013 and his request for reopening in January 2019, including new symptoms of radiculopathy with pain and weakness in the lower extremities and recurrent stenosis at the L3-5 levels. JA III, p. 536. He directly related Harris' recurrent condition to the lumbar surgery he obtained in 2012. *Id.* Dr. Lynch also reviewed medical records from Harris' May 2018 motor vehicle accident and found the accident to be non-contributory given that he did not have any worsening low back complaints. JA III, p. 537.

On March 6, 2020, Harris submitted "Claimant's First Exhibit" to the appeals officer, including approximately 247 pages of medical records. JA I, pp. 163-168. This production included the 75 pages provided to Dr. Lynch by Harris' counsel, the Spine Nevada medical records authored by Dr. Murphy and Dr. Perry to which Dr. Lynch already had access, and approximately 109 pages of records from the date of loss until the time of the PPD evaluation in September 2013. *Id.*, see also RAB, n.1. These documents were submitted to Appellants in advance of the evidentiary hearing in this matter and admitted without objection. JA I, pp. 130-162.

On July 30, 2020, the case came on for hearing before Appeals Officer Sheila Y. Moore, Esq. *Id.* All evidence was admitted by both parties without objection, including Dr. Lynch's expert opinion. *Id.* Harris also provided testimony. *Id.* The appeals officer then took the matter under submission. *Id.* On August 14, 2020, the appeals officer issued an interim order ("IO") finding a medical question existed

pursuant to NRS 616C.390. JA IV, 819-821. The appeals officer noted in the IO that "Dr. Lynch was not provided all of [Harris'] medical records" and found that an independent medical examination ("IME") was "necessary to determine whether the primary cause of the need for surgery recommended by Dr. Lynch was the industrial injury." *Id.*

Following an unrecorded telephone conference on October 14, 2020 between the appeals officer and counsel for the parties, the appeals officer issued a new order dated October 15, 2020 finding that "[Harris] subsequently relocated to Hawaii," and that pursuant to NAC 616C.156(2), AIG was not responsible for payment of travel costs beyond 40 miles to attend an IME in Nevada. JA IV, pp. 814-816. When the parties did not reach an agreement as to who should pay for the travel, the appeals officer treated the matter as submitted. JA IV, pp. 812-813.

By Decision and Order dated March 26, 2021, the appeals officer reversed the hearings officer and affirmed AIG's determination to deny Harris more treatment under his claim. JA I, pp. 115-122. Regarding Dr. Lynch's medical opinion, the appeals officer found that the "Court does not find Dr. Lynch's opinion to be credible as he was not provided with all of the [Respondent's] medical records." *Id.* The appeals officer also found that the "only medical reporting that supports reopening of the claim was that of Dr. Lynch, however the appeals officer previously concluded in an interim order that Dr. Lynch's medical opinion was not sufficient to meet

[Harris'] burden of proof . . . due to the fact that Dr. Lynch was not provided all of [Harris'] medical reporting pertaining to his industrial injury." *Id.* Having failed to meet his burden under NRS 616C.390(1), the appeals officer affirmed AIG's February 5, 2019 determination denying Harris' request for reopening. *Id.*

Harris timely filed his Petition for Judicial Review to the district court on April 21, 2021. JA I, pp. 112-122. On December 20, 2021, the district court issued its Order Granting Petition for Judicial Review. JA I, pp. 27-35. The decision of the appeals officer was reversed as to the weight (or lack thereof) that she afforded Dr. Lynch's opinion and the application of NAC 616C.156(2) to the payment of travel expenses for the IME ordered under NRS 616C.390(3)(a), and the hearings officer's decision reversing AIG's denial of reopening was affirmed. *Id.* A Notice of Entry of Order Granting Respondent's Petition for Judicial Review was issued on December 28, 2021. JA I, pp. 16-26. Harris now files his answering brief in response to Appellants' opening brief filed before this Court on February 21, 2023.

VII.

SUMMARY OF THE ARGUMENT

Appellants seek to overturn the reversal of the appeals officer's final Decision and Order, which held that Harris had not proven that his industrial insurance claim should be reopened, arguing that the district court committed an error of law. This appeal revolves around two decisions made by the appeals officer that Harris argues

prejudiced a substantial right justifying reversal under NRS 233B.135(3)(a), (d), (e), and (f).

The first issue is the appeals officer's determination that Dr. Lynch's expert medical opinion is not credible. The appeals officer gave no weight to Dr. Lynch's opinion supporting Harris' request to reopen under NRS 616C.390(1) because Dr. Lynch did not review every medical record submitted into evidence. However, the appeals officer did not indicate in any of her orders what particular records Dr. Lynch failed to review that would have impacted his opinions. The appeals officer made an arbitrary decision to discount Dr. Lynch without even engaging with whether the unreviewed records had any relevance to this litigation or Harris' work-related injuries. Thus, without particular factual findings about what specific records could have impacted Dr. Lynch's opinion, the appeals officer's decision to discount his testimony, which she recognized was the only expert testimony clearly supporting reopening, should be presumed unreasonable and an abuse of discretion affecting a substantial right of Harris. *See Public Serv. Comm'n v. Continental Tel. Co.*, 94 Nev. 345, 350, 580 P.2d 467, 470 (1978). Ultimately, Dr. Lynch's opinion was improperly excluded substantial evidence as defined by NRS 233B.135(4) that supported all the elements for claim reopening under NRS 616C.390(1).

The second issue is both an abuse of discretion and error of law committed by the appeals officer when she ordered Harris to undergo an IME but then forced him

to pay for his own travel costs from Hawaii to Las Vegas or forgo the aid of an IME as substantial evidence. This decision by the appeals officer involves two reversible errors. As a matter of law, the appeals officer erred by using inapplicable regulations in Chapter 616C of the Nevada Administrative Code to limit AIG's obligation to reimburse travel expenses to only 40 miles each way.

Additionally, the appeals officer's factual and legal findings in her October 15, 2020 order giving Harris the ultimatum to pay for his own travel or forgo the IME was unsupported by any evidence in the record. At no point did the appeals officer make any findings based upon any portion of the record to determine whether scheduling the IME in Las Vegas was "convenient" for Harris as required under NRS 616C.140(1) and (3). Further, NRS 616C.390(3) requires that AIG pay for all the "costs" of the IME. "Costs" are not clearly defined in the statute, and the payment of travel expenses as a "cost" is a matter of first impression for this Court. Harris argues that travel costs are a necessary element of "costs" under NRS 616C.390(3) because to force Harris to pay for his own travel costs would create an absurd result when measured against the legislature's mandate that the appeals officer schedule the IME at a place "convenient" for the injured employee. See NRS 616C.140(1) and (3).

Ultimately, the district court agreed that the appeals officer had committed reversible error by discounting Dr. Lynch's opinion and found that the opinion

supported the elements of reopening, affirming the hearings officer's original decision in this matter. The district court did not, as Appellants' argue, commit an error of law that would require this Court to reverse the prior decision.

VIII.

ARGUMENT

A. Standard of Review

Pursuant to NRS 233B.135(2), the burden of proof is on the party attacking or resisting an agency's final decision to show that it is invalid pursuant to subsection (3) of the statute. Subsection (3) states:

> "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion."

Id. Subsection (4) of the statute defines "substantial evidence" as that "which a reasonable mind might accept as adequate to support a conclusion." *Id.* When reviewing an agency's final decision, the Supreme Court's review, like that of the district court, is limited to the record below and to whether the agency acted

arbitrarily or capriciously. *Bivins Constr. v. State Contractors' Bd.*, 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991).

Moreover, the Supreme Court may undertake independent review of the administrative construction of a statute. *State Indus. Ins. Sys. v. Campbell*, 109 Nev. 997, 999, 862 P.2d 1184, 1185 (1993) (Supreme Court reviewed as a matter of first impression suspension of disability benefits when a claimant was incarcerated, an issue not explicitly addressed by Chapter 616 of the Nevada Revised Statutes). The construction of a statute is a question of law and should be construed to avoid absurd results. *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995). Further, the effect of one statute upon another statutory process is also a pure question of law, which allows the Supreme Court to undertake an analysis of the effect, if any, the statutes have upon one another. *Department of Motor Vehicles v. Frangul*, 110 Nev. 46, 49, 867 P.2d 397, 398 (1994). The Supreme Court reviews the construction of a statute de novo. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). This Court may also remand a matter back to an agency for further fact finding when there is no evidence on the record to decide an issue. *General Motors*, 111 Nev. at 1029, 900 P.2d at 345. Lastly, the application of a regulation by an agency is a mixed question of law and fact that is subject to Supreme Court review on grounds that it was arbitrary and capricious and therefore an abuse

of discretion. *State Envtl. Comm'n v. John Lawrence Nev.*, 108 Nev. 431, 433-434, 834 P.2d 408, 410 (1992).

Harris requests that the Supreme Court affirm the district court's December 20, 2021 decision reversing the appeals officer as to the weight that she afforded Dr. Lynch's opinion and the appeals officer's application of NAC 616C.156(2) to the payment of travel expenses for the IME ordered under NRS 616C.390(3)(a). Ultimately, Harris asks this Court to affirm the original hearings officer's decision reversing AIG's denial of claim reopening. Deference is due the appeals officer's fact-based conclusions only if those findings are supported by substantial evidence. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

Here, the appeals officer's orders lacked substantial evidence in the record, were arbitrary and capricious, clearly erroneous against the whole record, and were an error of law and violation of statutory provisions. See NRS 233B.135(3)(a), (d), (e), and (f). The appeals officer's decision to discount the opinion of Dr. Lynch and order an IME only to later reverse herself, and then force the Claimant to pay for travel to the IME or have the matter submitted, prejudiced a substantial right of Harris that warranted reversal. *See Tighe v. Las Vegas Metro. Police Dep't.*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994) (a decision that lacks support in the form of substantial evidence is arbitrary and capricious, and thus an abuse of discretion that warrants reversal).

B. Dr. Lynch's expert opinion was substantial evidence, and the summary dismissal of that evidence was an abuse of discretion resulting in prejudice of a substantial right.

NRS 616C.390(1) states that if an application for reopening a claim for additional treatment is made in writing more than one year after the date of claim closure, the insurer shall reopen the claim if a physician or chiropractor certifies a change in circumstances warrants the treatment and the primary cause of the change in circumstances is the injury for which the claim was originally made.

In the appeals officer's March 26, 2021 Decision and Order, she made the critical finding that Dr. Lynch's opinion was to be given no credibility because he did not have all the records when he formed his opinion that Harris' low back condition had worsened and that the primary cause of the worsening was the original 2011 industrial injury. JA I, pp. 115-122. However, the appeals officer did not indicate in either the March 26th Decision and Order or her prior August 14, 2020 interim order what records in particular Dr. Lynch failed to review that would have impacted the credibility of his conclusions. JA IV, 819-821. The appeals officer's determination that Dr. Lynch was not credible, without reference to what evidence nullified the weight to be given the opinion, was arbitrary and an abuse of discretion. The Supreme Court has held that when an administrative agency makes no written findings of fact and conclusions of law to support particular findings, the agency's order should be presumed unreasonable. *Public Serv. Comm'n.*, 94 Nev. at 350.

Dr. Lynch's opinion, taken in consideration of the records he was provided for review and the information provided regarding Harris' history, constitutes "substantial evidence" as defined by NRS 233B.135(4). It was evidence that a "reasonable mind might accept as adequate to support a conclusion." *Id.* In fact, the appeals officer noted in paragraph 30 of the March 26th Decision and Order that Dr. Lynch's opinion was the only evidence in the record that supported reopening, and its exclusion left Harris without a medical opinion sufficient to reopen his claim. JA I, pp. 115-122.

A decision adverse to a party in a contested administrative proceeding is entitled to findings of fact and conclusions of law separately stated. NRS 233B.125. The decision must be made upon a preponderance of evidence. *Id.* Findings must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. *Id.* Specific factual findings aid the reviewing court to determine if the agency was engaging in reasoned decision making without intruding on the agency's fact-finding function. *Elizondo*, 129 Nev. at 785 (citing *Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008)). Protection of the substantial rights referenced in NRS 233B.135(3) cannot be effectively reviewed if the requirements of NRS 233B.125 are ignored. *Id.*

Here, the appeals officer summarily concluded that Dr. Lynch's opinion lacked credibility because he did not review all medical records in evidence. JA I,

pp. 115-122, and JA IV, 819-821. However, the appeals officer made no specific findings of what Dr. Lynch failed to review or how those records would have affected his opinions regarding Harris' worsening condition or its causal connection to the original industrial injury. *Id.*

Under *Hallmark v. Eldridge*, the admission of an expert opinion must be qualified and provide assistance to the court. 124 Nev. 492, 499, 189 P.3d 646, 650 (2008); *see also* NRS 50.275. No argument was presented on the record that Dr. Lynch was unqualified. The relevant inquiry here under *Hallmark* is whether Dr. Lynch's opinion assists "the trier of fact in understanding the evidence or determining a fact in issue." *Id.* The factors the court is to consider under the assistance requirement of NRS 50.275 are whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community; and (5) based more on particularized facts rather than assumption, conjecture, or generalization. *Id.* at 500-502.

Along with Harris' medical file already compiled by Spine Nevada[2], Dr. Lynch reviewed 75 pages of medical records provided by counsel, which included all MRIs and CT scans of the lumbar spine from October 2011 through reopening in 2019, the 2012 lumbar surgery records, the FCE and PPD evaluations from 2013,

[2] See RAB, n. 1.

two EMG/NCS reports, intervening motor vehicle accident records from 2018, pain management records from Dr. Muir in 2018 and 2019, and Dr. Demers' records. JA II, pp. 445-468, and JA III pp. 469-528. Dr. Lynch was supplied and reviewed every relevant medical record, diagnostic report, and procedure report from the time of Respondent's PPD evaluation in September 2013 through January 2020. *Id.* Dr. Lynch is a neurosurgeon who relied upon particularized facts, records, and diagnostic testing data. His opinion as set out in Claimant's Second Exhibit admitted into evidence by the appeals officer, without objection, meets the assistance requirement of NRS 50.275.

Dr. Lynch also authored an opinion letter in which he diagnosed Harris with right L4-5 radiculopathies and L1-5 lumbar stenosis recurrent from L3-5 decompression in 2012. JA III, p. 535. He related each diagnosis to the original industrial injury on October 17, 2011. *Id.* Dr. Lynch opined that the medical evidence showed a worsening of condition between the date of Harris' PPD evaluation in September 2013 and his request for reopening in January 2019, including new symptoms of radiculopathy with pain and weakness in the lower extremities and recurrent stenosis at the L3-5 levels. JA III, p. 536. He directly related Harris' recurrent condition to the lumbar surgery he obtained in 2012 and found that the 2018 motor vehicle accident had no effect on his current low back condition. JA III, p. 536-537.

What exactly did Dr. Lynch not review that would have affected his opinions here? The record and the appeals officer's orders are devoid of any answer that would allow this Court to interpret whether the decision to discount Dr. Lynch's opinion was fact-based and supported by substantial evidence. Thus, the appeals officer's credibility determination about Dr. Lynch was arbitrary, capricious or characterized by an abuse of discretion. As such, this Court should find that without written findings of fact to support the credibility determination of the appeals officer, the decision to discount Dr. Lynch's opinion should be presumed unreasonable. *Public Serv. Comm'n.*, 94 Nev. at 350.

Appellants argue in their opening brief that Harris submitted over 200 pages of medical evidence into the record, begging the question "of how the 100+ medical records that were not provided to Dr. Lynch may have affected his opinion." AOB, p. 16. How these records "may have affected" Dr. Lynch's opinion is the critical inquiry. This statement is a concession that neither the appeals officer nor the Appellants know whether these "unreviewed" records would have affected anything, and because the appeals officer made no specific findings of fact about the records Dr. Lynch failed to review, there is no explanation for why Dr. Lynch's opinion should have been excluded. For instance, was it necessary for Dr. Lynch to have reviewed every consultation record from prior to Harris' PPD evaluation in 2013 to opine about a change in circumstances between 2013 and 2019? The answer is no,

and the records bear no relevance to Harris' changing condition between 2013 and 2019.

Are the Sweetwater Pain and Spine records from December 2016 through 2019 identified by Appellants relevant? AOB, p. 16. First, Dr. Lynch did review all the pain management records from Dr. Muir at Sweetwater Pain and Spine, including the medial branch block and radiofrequency ablation procedure records. JA II, pp. 445-468, and JA III pp. 469-528. So, it is inaccurate for Appellants to state that Dr. Lynch did not review the Sweetwater records. AOB, p. 16. Second, while there were some records from Sweetwater authored by Daniel Brady, PA-C, that Dr. Lynch did not review, those records are irrelevant. As Appellants conceded, those records included non-industrial treatment focused on cervical and shoulder complaints following Harris' 2018 motor vehicle accident. AOB, p. 16, and JA II, 335-339, 347-351, 371-375, 381-385, and 399-426. While there are mentions of ongoing care with Drs. Muir, Demers, and Lynch in the records authored by Brady with respect to the low back, the records simply deal with prescription re-fills. *Id.* The relevant diagnostic and pain management treatment records from Sweetwater were those authored by Dr. Muir, which Dr. Lynch reviewed. How prescription refill records authored by a PA-C would have affected Dr. Lynch's analysis is unexplained. That is why Appellants refuse to engage with the content of the "unreviewed" medical

records in their argument. Such a review would not have altered Dr. Lynch's medical analysis.

Another problem with Appellants' argument is that because the appeals officer made no reference to any specific medical records that Dr. Lynch failed to review that would have impacted his opinion, this Court cannot determine the factual basis for the decision to exclude Dr. Lynch's opinion. There are no findings in the orders regarding specific, probative records that would raise a legitimate issue impacting Dr. Lynch's credibility. Because the Appeals Officer did not make specific factual findings to support the exclusion of Respondent's expert opinion, this Court cannot conclude that she engaged in reasoned decision making nor review whether Harris' substantial rights referenced in NRS 233B.135(3) were adversely affected. In such a situation, this Court is to presume that the appeals officer's decision to exclude Dr. Lynch's opinion was unreasonable, arbitrary, and an abuse of discretion. *Public Serv. Comm'n*, 94 Nev. at 350.

What is compelling, and what the Appellants fail to even address, is that no evidence was even offered in the administrative proceedings intended to impeach Dr. Lynch's opinion. The Appellant's opening brief does not cite to any place in the administrative record showing Dr. Lynch's conclusions were challenged by argument, much less evidence. Appellants cite to the "Sweetwater Pain and Spine" records that were authored by Daniel Brady as an example of something Dr. Lynch

failed to review, but they do not explain what was contained in those records that would have impacted Dr. Lynch's opinion. AOB, p. 16. Dr. Lynch did review the Sweetwater Pain records authored by Dr. Muir, which were the relevant diagnostic records. JA II, pp. 445-468, and JA III pp. 469-528.

Dr. Lynch provided a clear understanding of Harris' condition and opined affirmatively on each of the elements of NRS 616C.390(1) necessary to reopen the claim, and he confirmed his express opinions were stated to a reasonable degree of medical probability. JA III, pp. 530-537. Neither the Appeals Officer nor the district court on review can imply findings of facts unsupported by the record. *State Indus. Ins. Sys. v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408, 409 (1990). To avoid a decision based upon speculation and conjecture, the facts upon which the administrative fact finder relies must be supported by sufficient, worthy evidence in the record. *Nassiri v. Chiropractic Physicians' Bd. of Nev.*, 130 Nev. 245, 250, 327 P.3d 487, 490 (2014) (citations omitted).

The appeals officer's conclusion to grant Dr. Lynch no credibility appears to be nothing more than conjecture. Dr. Lynch's opinion remains unimpeached and meets the standard for substantial evidence under NRS 233B.135(4) that justified reopening under NRS 616C.390(1). Harris presented his case by a preponderance of evidence. *See* NRS 233B.0375. The appeals officer's decision to dismiss the evidence that supported reopening was clearly erroneous in the view of reliable,

probative and substantial evidence on the record as a whole. *See* NRS 233B.135(3)(e). The decision was also arbitrary, capricious, and characterized by an abuse of discretion that affected a substantial right of Harris. *See* NRS 233B.135(3)(f).

C. The denial of an independent medical examination offered by the appeals officer after dismissing the respondent's expert for a lack of credibility was an error of law and abuse of discretion.

1. There is no record of the October 14, 2020 call between the appeals officer and the parties, and thus, no evidence in the record for this Court to review the factual foundation for the appeals officer's October 15, 2020 order.

After taking evidence and hearing the arguments of counsel on July 30, 2020, the appeals officer took the matter under submission. JA I, 130-162. On August 14, 2020, the appeals officer *sua sponte* issued an interim order. JA IV, 819-821. In the order, she compared Dr. Demers and Dr. Song's reports regarding the complexity of the medical issues. *Id.* She then noted that Dr. Lynch specifically recommended surgery but found "Dr. Lynch was not provided all of [Harris'] medical records." *Id.* Because she excluded Dr. Lynch's opinion and found that the other two doctors came to no particular conclusion, the appeals officer determined that she was faced with a medical question and ordered an IME under NRS 616C.360(1). *Id.*

On October 15, 2020, the appeals officer then issued another order. JA IV, pp. 814-816. Following an unrecorded phone call with the parties on October 14th, she found without any facts in the record that Harris relocated to Hawaii after the IME

was ordered and then undertook a legal analysis of whether she had the authority to make AIG pay the cost for Harris to travel to Nevada for his IME. *Id.* Relying upon NAC 616C.156(2), she concluded that because Harris moved to Hawaii for his convenience, AIG only had to pay for 40 miles of travel. *Id.* None of her findings were based upon evidence or argument on the record, so this Court has nothing to cite to in the record to support the factual and legal determinations the appeals officer made in the October 15th order. *See Elizondo*, 129 Nev. at 784 (the Court reviews an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence) (quoting *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 685, 262 P.3d 715, 718 (2011)). The order concluded with the ultimatum that Harris must pay for his travel from Hawaii to attend the IME or have the matter deemed submitted. JA IV, pp. 814-815.

Assuming *arguendo* that a medical question was presented in the absence of Dr. Lynch's opinion, the IME ordered by the appeals officer could have confirmed Dr. Lynch's findings. In that regard, Harris lost a significant opportunity to provide substantial evidence to support his request for reopening. This opportunity was lost due to the appeals officer's error in law.

NRS 616C.360(3) states that if "there is a medical question or dispute concerning an injured employee's condition or concerning the necessity of

treatment," the appeals officer may order an IME. The insurer must also pay the costs of any examination requested." *Id.* Further, NRS 616C.140(1) states that when an IME is ordered by an appeals officer, the IME must be scheduled in a time and "place reasonably convenient for the employee." Here, Harris moved to Hawaii sometime after the claim was originally filed in 2011, and the appeals officer essentially forced Harris to do the IME in Nevada and pay for his own travel costs or have the matter submitted without the aid of the IME findings.[3] JA IV, pp. 814-816.

NRS 233B.121(4) requires all parties be afforded the opportunity to present evidence and argument in an administrative proceeding. Given that the appeals officer had already dismissed Dr. Lynch's opinion, the IME proposed under NRS 616C.360(3) was of significant value to Harris' request for reopening. The phone call between the appeals officer and the parties on October 14, 2020 was not recorded, and there is nothing in the record to corroborate what testimony,

[3] In the appeals officer's October 15, 2020 order, she wrote that the "appeals officer found a medical question existed pursuant to NRS 616C.360 and ordered Claimant to undergo an independent medical examination (IME) on August 14, 2020. [Harris] subsequently relocated to Hawaii." There is no evidence in the record of when Harris moved to Hawaii, whether it was for convenience or some other reason, whether IME doctors were available in Hawaii, or any other fact which would have been relevant to the analysis of whether this IME was scheduled in a "place reasonably convenient for the employee" as required by NRS 616C.140(1).

documents, or other evidence the appeals officer relied upon to draw the conclusions she set out in the October 15th order. *See also* RAB, n. 3.

The means by which the appeals officer determined that Harris had moved after the ordering of the IME; whether IME doctors were available in Hawaii; whether Harris had the ability to pay for travel; Harris' physical capabilities to travel; whether it was appropriate to schedule an IME in Nevada during the summer of 2020 while COVID lockdown and quarantine orders (particularly in Hawaii) were in effect; whether Harris even moved for "convenience" versus some other reason; and whether the time and place setting of the IME was convenient for the employee as required by NRS 616C.140 are completely devoid in the record. Moreover, the appeals officer did not make any of these factual findings in the October 15th order, so this Court has nothing to cite to (in the record or the orders) supporting the appeals officer's conclusions.

Therefore, the proceedings between the evidentiary hearing and the appeals officer's final decision on the merits were arbitrary, capricious, and an abuse of discretion. NRS 233B.135(3)(f). The reviewing court cannot imply findings of fact unsupported by the record when reviewing this issue. *State Indus. Ins. Sys. v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408 (1990); *see also Cannon Cochran Mgmt. Servs. V. Figueroa*, 136 Nev. Adv. Rep. 51, 468 P.3d 827, 829 (2020) (a decision that

lacks support in the form of substantial evidence is arbitrary and capricious, and thus an abuse of discretion that warrants reversal) (quoting *Tighe*).

2. The appeals officer relied upon inapplicable regulations in NAC Chapter 616C to avoid responsibility for scheduling the subject IME at a time and place convenient for the Respondent as required by NRS 616C.390 and NRS 616C.140, constituting an error of law.

In the October 15th order, the appeals officer wrote that NAC 616C.150, which requires the insurer to pay for travel under certain circumstances, is inapplicable because it deals exclusively with "health care" and that an IME is not "health care." JA IV, pp. 814-816. The appeals officer recognized that NAC 616C.153 states that with the "prior approval of the insurer, an injured employee may be reimbursed for airfare where the time, distance, convenience, or cost justifies the travel by air." *Id.* However, the appeals officer set this regulation aside and relied upon NAC 616C.156(2) to state that if "an injured employee moves outside this State… for his or her own convenience after becoming an injured employee, the maximum mileage for one direction for which he or she may be reimbursed is" 40 miles. *Id.* The appeals officer scheduled the matter for a telephone conference on November 16, 2020 so that Harris could decide if he was going to pay for his own travel costs for the IME or have the matter submitted for decision. *Id.* Ultimately, the matter was submitted for decision without addressing any issues regarding travel for the IME. JA IV, pp. 812-813.

In Appellants' opening brief, they acknowledge the provisions of NRS 616C.390(3) and NRS 616C.140(1)(b) that require an IME ordered by an appeals officer to be scheduled at a time and place convenient for the injured employee and that the costs of such are to be paid by the insurer. AOB, pp. 18-19. Nonetheless, Appellants and the appeals officer relied upon NAC 616C.156(2) to limit the cost of reimbursement to an injured employee who moves out of state for their own "convenience." AOB, p. 19. The appeals officer's use of this regulation is problematic because it specifically applies to obtaining "health care." See NAC 616C.156(1)-(3). The appeals officer here rejected the use of NAC 616C.150 as a basis for travel reimbursement because it only applies to health care, and then used NAC 616C.156(2) to limit AIG's exposure to travel costs for this IME even though that regulation also only deals with "health care." JA IV, pp. 814-816. If all the parties and the appeals officer agreed that an IME is not "health care" then neither NAC 616C.150 nor NAC 616C.156 would apply. The appeals officer committed an error in law in using an inapplicable regulation to limit exposure to travel costs for AIG which justifies reversal. *See* NRS 233B.135(3)(b) and (d).

Neither the appeals officer nor Appellants in their opening brief address the actual travel reimbursement regulation NAC 616C.1168. This was likely not addressed because NAC 616C.1168 does not apply in this situation either, but Harris will address it with this Court for the sake of completeness. NAC 616C.1168(6)

includes identical language to NAC 616C.156 regarding the limitation of travel reimbursement to 40 miles when an injured worker moves out of the State for their "convenience." However, this regulation only applies when an "insurer or employer... requests that an injured employee submit" to an IME under NRS 616C.140. *Id.* The regulation makes no mention of travel compensation when an IME is ordered by an appeals officer under NRS 616C.390(3).

Despite the clear intent of the legislature in NRS 616C.360(3)(a), the Appellants take the position that the phrase "pay the costs of any examination requested by the appeals officer" does not include travel costs. Whether they seek shelter under NAC 616C.1168 or NAC 616C.156 to avoid travel costs for an out-of-state injured employee, the Appellants can point to no legislative history or intent to show that these regulations were meant to apply to an IME ordered under NRS 616C.360(3)(a). What is clear is that this Court has set a precedent that regulations cannot be used to contradict statutes. *See Nev. Atty. for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265 (2010) (quoting *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995)); *see also DeMaranville v. Emplrs Ins. Co. of Nev.*, 135 Nev. Adv. Rep. 35, 448 P.3d 526, 532 (2019) (refusing to construe a regulation promulgated under the Industrial Insurance Act in a manner inconsistent with a statute within the Act). Provisions within a statute and a

regulation must be construed in harmony to affect the controlling legal provisions. *Felton v. Douglas Cty.*, 134 Nev. 34, 38, 410 P.3d 991 (2018) (citations omitted).

The denial of the chance to obtain this IME, which was necessary evidence to support the claim for reopening, prejudiced Harris and was a substantial right justifying reversal. NRS 233B.135(3). As Appellants' concede, there is no specific regulation that deals with the payment of travel expenses for a court-ordered IME. AOB, pp. 18-19. Thus, the issue of whether "costs" under NRS 616C.360(3)(a) include travel expenses is one of first impression for this Court. Moreover, the Supreme Court may undertake independent review of the administrative construction of a statute. *See Campbell,* 109 Nev. at 999. Further, the construction of a statute is a question of law and should be construed to avoid absurd results. *See Jackson*, 111 Nev. at 1029.

NRS 616C.140(3) requires that an order by an appeals officer "for an examination must fix a time and place thereof, with due regard for the nature of the medical examination, the convenience of the employee, the employee's physical condition and the employee's ability to attend at the time and place fixed." Neither the August 14, 2020 order nor the October 15, 2020 order address any of the factors related to "convenience" laid out in NRS 616C.140(3). While the orders did address the nature and purpose of the IME, they fail to include any consideration for the convenience to Harris, his physical condition, or his ability to attend an IME – or

any factors of financial limitations or COVID quarantine requirements impacting travel.

Ultimately, NRS 616C.390 and NRS 616C.140 are controlling over the use of any regulation that seeks to contradict or make its requirements inapplicable. Moreover, holding that an injured employee must pay for their own out-of-state travel to attend a court-ordered IME that is supposed to be scheduled in a manner convenient to the injured employee results in the exact kind of "absurd" result that the Supreme Court has held improper. *See Jackson*, 111 Nev. at 1029.

Upon review, this Court must be provided with factual determinations reasonably supported by evidence of sufficient quality and quantity. *Nassiri*, 130 Nev. at 249. Decisions based upon speculation and conjecture cannot be supported. *Id.* at 250. Factual findings "not only help ensure that the administrative agency engages in reasoned decision making, but they also facilitate judicial review." *Elizondo*, 129 Nev. at 785 (quoting *Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008)).

With no record of the proceedings between the original evidentiary hearing and final decision and no specific factual findings in the orders addressing whether scheduling the IME in Nevada was "convenient" for Harris, the appeals officer's decision to reverse her order for an IME under NRS 616C.360 and to force Harris to submit the matter of his reopening request prejudiced a substantial right and

opportunity to provide evidence to support reopening. The decision was arbitrary, capricious, and an abuse of discretion as defined by NRS 233B.135(3)(f).

Moreover, by failing to ascertain a time and place "convenient" for Harris as required by NRS 616C.140 and using regulations that do not apply to court-ordered IMEs to avoid AIG's responsibility for travel costs, the appeals officer committed an error of law that justifies reversal under NRS 233B.135(3)(b) and (d). The appeals officer should have scheduled the IME in Hawaii as that would have been convenient for Harris, and if no qualified expert was available, then the appeals officer should have ordered AIG to pay for travel expenses as part of the "costs" defined under NRS 616C.360(3)(a). To conclude that an injured employee must pay for long range travel costs to attend a court ordered IME directly contradicts the tenants of NRS 616C.390 and NRS 616C.140 and results in the absurd kind of outcome the Supreme Court requires the lower courts to avoid.

IX.

CONCLUSION

Based upon the foregoing, Respondent contends that the district court did not commit an error of law in reversing the appeals officer's final Decision and Order. The appeals officer's decisions to exclude Dr. Lynch's expert medical opinion and to force Harris to pay for travel costs to his IME were abuses of discretion and errors of law. The substantial evidence in the record, when viewed as a whole, supported

Harris' request for claim reopening under NRS 616C.390(1), and it was arbitrary and capricious, and therefore, an abuse of discretion for the appeals officer to ignore the weight of Dr. Lynch's opinion supporting reopening. *See* NRS 233B.135(3)(a), (d), (e), and (f).

WHEREFORE, Harris respectfully asks this Court to affirm the district court's order granting the Petition for Review filed December 20, 2021.

DATED this 23rd day of March, 2023.

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CERTIFICATE OF COMPLIANCE
(NRAP 28.2)

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,890 words.

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

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

DATED this 23rd day of March, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of NEVADA ATTORNEY FOR INJURED WORKERS, and that on this 23rd day of March, 2023, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENT'S ANSWERING BRIEF** property addressed to the following:

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and on this date, I deposited for mailing at Las Vegas, Nevada, a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** addressed to:

LAUIRE A YOTT
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DATED: 3/23/23

SIGNED: _____