CAROLYN RAMOS; AND PHILLIP RAMOS, APPELLANTS, *v.* ASHLEY DAWN FRANKLIN; AND JOHN BRYAN FRANKLIN, RESPONDENTS.

No. 84520

March 16, 2023 525 P.3d 1227

Appeal from a district court order denying a petition for grandparent visitation. Eighth Judicial District Court, Family Division, Clark County; Amy Mastin, Judge.

Affirmed.

Robert W. Lueck, Ltd., and *Robert W. Lueck*, Las Vegas, for Appellants.

McFarling Law Group and *Emily M. McFarling* and *Ashlee N. Vazquez*, Las Vegas, for Respondent Ashley Dawn Franklin.

Before the Supreme Court, STIGLICH, C.J., HERNDON, J., and SILVER, Sr. J.[1]

OPINION

By the Court, STIGLICH, C.J.:

NRS 125C.050 permits grandparents and others to petition for visitation with a minor child when "a parent of the child has denied or unreasonably restricted visits with the child." Here, the district court denied a petition for grandparent visitation after concluding that one of the parents provided the grandparents with reasonable visitation. The grandparents now challenge that conclusion, asserting that the requirement was met because the other parent denied them visitation entirely and the district court incorrectly found that the visitation they received was reasonable.

We conclude that the relevant inquiry, in the context of a petition for visitation in joint custody situations, is whether the petitioners' visits with the children overall have been denied or unreasonably restricted. Because the district court in this case did not abuse its discretion in concluding that visits with the children were not denied or unreasonably restricted, we conclude that the district court properly denied the grandparents' petition for visitation. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Respondents Ashley Franklin and John Franklin divorced in 2022. While the divorce proceedings were ongoing, Ashley and

[1]The Honorable Abbi Silver, Senior Justice, participated in this decision under a general order of assignment.

John voluntarily signed a six-month guardianship agreement providing appellant Carolyn Ramos, Ashley's mother, with temporary legal and physical custody of their two minor children, A.F. and K.F. Although Carolyn's husband, Phillip Ramos, was not named in the agreement, the parties understood that he was also responsible for the children.[2]

The children returned to their parents' care in August 2020, while the divorce proceedings were still pending.[3] Ashley and John agreed to a partial parenting agreement, which the district court adopted. In the agreement, Ashley and John "agree[d] that no other person, including maternal grandparents, shall have court-ordered permanent custody of or visitation with their children."

The grandparents moved to intervene in the divorce case and petitioned for visitation under NRS 125C.050 in September 2020, arguing that the parents had "unreasonably restricted their ability to visit with the minor children" and citing the partial parenting agreement as evidence. In November 2020, they petitioned for immediate visitation and for an evidentiary hearing, seeking one weekend with their grandchildren each month, two weeks with their grandchildren every summer, and potentially overnight visitation on Christmas Eve. The district court granted the motion to intervene but deferred ruling on the grandparents' visitation petition until after the divorce was settled.

Ultimately, the divorce decree awarded Ashley and John joint legal and physical custody of the children. Thereafter, in February 2022, the district court held an evidentiary hearing on the grandparents' petition for visitation. Ashley, John, and the grandparents testified. The district court found that Ashley was not a credible witness and relied instead on John's and the grandparents' testimony.

John testified that he did not allow the grandparents contact with the children when they initially returned to his and Ashley's care. John said that he did not permit contact because he believed that Phillip was responsible for his fiancé's arrest. When he learned that was not true, he allowed the grandparents to visit the children.

---

[2]We refer to Carolyn and Phillip collectively as "the grandparents."

[3]On appeal, the grandparents argue that the order terminating their temporary custody of the children, which led to the children returning to their parents' care, was made in error. The six-month guardianship agreement was entered on December 26, 2019, and thus expired on June 26, 2020. *See* NRS 159A.205(6) ("The short-term guardian appointed pursuant to this section serves as a guardian of the minor for 6 months . . . ."). Accordingly, the grandparents' arguments regarding the order terminating their temporary custody are moot because they admit that at the time they were not seeking permanent physical custody, and, regardless of any alleged error in how the district court terminated their temporary custody, the temporary guardianship had already expired. *See NCAA v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) (describing mootness). Thus, we decline to reach these arguments.

According to John, the grandparents (1) visited the children during his weekends for "an afternoon, maybe"; (2) picked up the children from school occasionally; (3) hosted the children overnight on Christmas Eve 2021; (4) arranged a spring-break trip involving the grandparents, John, his fiancé, and the children; and (5) had three overnight stays with the children while he was working.

John also expressed that he was willing to agree to the grandparents visiting with the children during his weekends. When asked about the partial parenting agreement, he testified that he understood the difference between court-ordered contact and contact that he decides to allow. However, John also said, "I can't guarantee time with the [grandparents]. I work a lot."

Phillip testified that there was a period of about "five months, maybe—maybe a little bit less" when John denied the grandparents contact with the children. After John apologized to Phillip for his mistaken belief that Phillip was responsible for his fiancé's arrest, Phillip said, they "got to see them for—occasionally. Not very often." Phillip provided a list of the dates, times, and duration of his visits with the children since August 2020, reporting 196 hours spent with the children in 2021.

Carolyn testified that, since August 2020, she had no contact with the children via Ashley. She said that when she reached out to Ashley, Ashley responded with "I'll let you know" but did not follow up. Carolyn recognized that there could be additional days when she had contact with the children that are not on Phillip's list. For example, she helped the children with virtual schooling for a few days at her home in 2021. Carolyn said, "If the Court doesn't grant us any time with these kids, there—there isn't any guarantee these children will ever see us again, from either parent." She continued, "We can't—we can't count on either one."

The district court denied the grandparents' petition, concluding that "although the grandparents' contact is limited to the alternating weeks that John has custody of the children, the amount of time spent with the girls is sufficient to defeat a finding that the [grandparents'] contact is being denied or unreasonably restricted." Although the court acknowledged the partial parenting agreement and the fact that the grandparents were "denied nearly all contact for a five month period," by time of the February 2022 hearing, circumstances had changed—the grandparents had ongoing contact with A.F. and K.F. The grandparents appealed.[4]

---

[4]John consents to the idea of court-ordered visitation insofar as it forces Ashley to give up some of her custodial time to the grandparents. Accordingly, he did not respond to the grandparents' fast track statement or otherwise communicate with this court about the response. As a result, we resolve this appeal without his response. *Ramos v. Franklin*, Docket No. 84520 (Order, August 24, 2022).

DISCUSSION

Petitioners' visits with the children must have been denied or unreasonably restricted to warrant relief in a petition for visitation

The grandparents argue that their visits with the children were "denied or unreasonably restricted."[5] They contend that the district court's finding that they were not denied or unreasonably restricted visits "rubber stamped" Ashley's decision to deny them contact with the children during her time. We disagree and take this opportunity to clarify NRS 125C.050(3).

We have not addressed whether NRS 125C.050(3) requires each parent, rather than just one, to have denied or unreasonably restricted contact. Here, the district court focused on the contact that the grandparents had with the children, not which parent provided it. Because the grandparents had regular access to the children, it was irrelevant to the district court that Ashley allegedly denied visits. We agree and clarify that in a petition for visitation, where the parents have joint custody and participate in resolving the petition, the focus is on petitioners' access to the children. As a result, if one parent has not denied or unreasonably restricted visits, then the petition fails, and the district court does not need to address the actions of the other parent.

Although we generally review decisions regarding visitation rights for an abuse of discretion, *Rennels v. Rennels*, 127 Nev. 564, 568-69, 257 P.3d. 396, 399 (2011), we review a district court's interpretation of a statute de novo, *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005); *see Rennels*, 127 Nev. at 568-69, 257 P.3d at 399 (providing that even in the context of a child visitation case, we review questions of law de novo). "When the language of a statute is clear and unambiguous, its apparent intent must be given effect." *Potter*, 121 Nev. at 616, 119 P.3d at 1248. But if a statute is ambiguous, "we then look beyond the statute to the legislative history and interpret the statute in a reasonable manner in light of policy and the spirit of the law." *Pawlik v. Shyang-Fenn Deng*, 134 Nev. 83, 85, 412 P.3d 68, 71 (2018) (internal quotations omitted). A statute is ambiguous if it "is subject to two or more reasonable interpretations." *Id.*

NRS 125C.050 provides that certain relatives or other persons may petition for visitation with minor children. If a parent of a

[5]We decline to consider the grandparents' arguments that Ashley is an unfit parent and that we should adopt the functional-parent theory because they are waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Although Carolyn argued in an earlier motion that Ashley was unfit, she abandoned that argument by failing to raise it in subsequent petitions for visitation, and the district court did not address it. Thus, this argument is waived. Likewise, the grandparents did not raise the functional-parent theory below, so it also is waived. *Id.*

minor child is deceased, divorced or separated from the parent who has custody of the child, no longer has parental rights, or was never married to the other parent but cohabitated with the other parent and is deceased or separated from the other parent, then the grandparents, great-grandparents, or other children of either parent may petition for a reasonable right to visit the child. NRS 125C.050(1). Alternatively, regardless of biological relation, a person who has lived with and established a meaningful relationship with the child may petition for visitation.[6] NRS 125C.050(2).

Visitation under these provisions may be ordered "only if a parent of the child has denied or unreasonably restricted visits with the child." NRS 125C.050(3). If visits have been denied or unreasonably restricted, "there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation . . . is not in the best interests of the child." NRS 125C.050(4). "To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation." *Id.* NRS 125C.050(6) provides factors that the district court must consider in determining whether the petitioners rebutted the presumption.

NRS 125C.050(3) is ambiguous

Here, there are two reasonable ways to interpret NRS 125C.050(3). On the one hand, NRS 125C.050(3) refers to "a parent," which is singular, so it can be read as allowing the court to consider ordering visitation when only one parent denies or unreasonably restricts visits. On the other hand, where two parents have joint custody, NRS 125C.050(3) can be read to apply to each parent, so that the inquiry is whether, overall, the petitioners' visits have been denied or unreasonably restricted. Thus, NRS 125C.050(3) is ambiguous, and we must "look beyond the statute." *Pawlik*, 134 Nev. at 85, 412 P.3d at 71.

Reason and policy suggest that NRS 125C.050(3), in a petition for visitation, refers to the actions of both parents collectively, not to those of just one parent

In 2001, the Nevada Legislature amended NRS 125C.050 in response to the United States Supreme Court case *Troxel v. Granville*, 530 U.S. 57 (2000). 2001 Nev. Stat., ch. 547, § 1, at 2712-14; Hearing on S.B. 25 Before the S. Comm. on Judiciary, 71st Leg. (Nev. Feb. 13, 2001) (noting that "language might need to be added

[6]Although the district court acknowledged NRS 125C.050(1) and (2), it did not address which category the grandparents fell into. The parties agree that the grandparents were eligible to petition for visitation. Regardless of whether the grandparents fell under NRS 125C.050(1) or (2), in order for a petition for visitation to proceed the district court must find that a parent denied or unreasonably restricted visits under NRS 125C.050(3). Accordingly, we only address NRS 125C.050(3).

to S.B. 25 to meet the constitutional challenge of *Troxel*" (statement of Senator Ann O'Connell)). In *Troxel*, a plurality of the Supreme Court held that a Washington State visitation statute was unconstitutional because it infringed on the parents' fundamental rights to make decisions on the care, custody, and control of their child. *Troxel*, 530 U.S. at 60, 75. NRS 125C.050(3), along with the presumption in NRS 125C.050(4), were added to strengthen the constitutionality of NRS 125C.050 by protecting the parents' fundamental interests. *See* Hearing on S.B. 25 Before the Assemb. Comm. on Judiciary, 71st Leg., Ex. D (Nev. May 7, 2001) (advising that "NRS 125C.050 would be less vulnerable to constitutional challenge if the statute were amended to require a threshold showing of harm or potential harm to the child before visitation may be sought" and listing denial of visits and the parental presumption as examples); *compare* NRS 125C.050 (1999) (containing no parental presumption or "denied or unreasonably restricted" language), *with* NRS 125C.050 (2001) (adding NRS 125C.050(3), (4)).

We are persuaded that interpreting "a parent" to refer to each parent rather than just one parent serves both the interests of the child and the parents' interests. NRS 125C.050 recognizes that the best interests of the child may be contact with grandparents in some circumstances. The proper focus then is whether the child has reasonable contact with the grandparents, not which parent provides that contact. The "each" parent interpretation properly focuses on what contact the child actually receives, and if one parent is providing reasonable contact, then the petition for visitation fails. This result serves the best interests of the child because the child is receiving contact with the grandparents while the parents' rights to determine those interests are also being recognized.

In contrast, interpreting "a parent" to refer to only one parent unreasonably burdens the parents' interests without furthering the child's interests. Under this interpretation, one parent may provide the grandparents with regular, reasonable contact with the child, which serves the child's best interest, but the petition may nonetheless proceed just because the other parent denies or unreasonably restricts additional contact. This interpretation does not further the child's best interests because the child's best interests are already met via the contact that one parent provides and thus undermines a parent's interest in the care, custody, and control of his or her child for no justifiable reason.

The district court did not abuse its discretion by finding that the parents did not unreasonably restrict visits with the children

The grandparents argue that the record does not support the district court's finding that their visits with the children have not been unreasonably restricted. However, the grandparents do not allege that the district court got the facts wrong by relying on visits that

did not actually happen. Instead, they disagree with how the district court determined that the visits did not amount to an unreasonable restriction.

A district court decision regarding visitation rights is reviewed for an abuse of discretion. *Rennels*, 127 Nev. at 568-69, 257 P.3d at 399. We uphold the district court's factual findings if they are supported by substantial evidence and not clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

Here, the grandparents do not dispute the facts, and the visits relied on by the district court in making its findings are supported by testimony at the evidentiary hearing. Although Ashley and John agreed to oppose court-ordered visitation, an agreement against court-ordered visitation is not the same thing as an agreement that the grandparents will not have any contact with the children. Instead, Ashley and John seek to retain their discretion as parents to decide who has contact with their children and the circumstances under which such contact occurs.

The grandparents appear to assert that the volatility of their relationships with both John and Ashley warrant court-ordered visitation. But this volatility, this uncertainty, is inherent in parent-child relationships. Without more, anxiety about what the future may hold, or uncertainty about how relationships will play out in the future, does not constitute an unreasonable restriction. Based on these facts, where the grandparents are receiving fairly regular visits with the children, we cannot say that the district court abused its discretion by finding that the parents did not unreasonably restrict the grandparents' visits with the children.[7]

CONCLUSION

In a petition for visitation under NRS 125C.050, where the parents of minor children have joint custody, the district court must determine whether the parents have denied or unreasonably restricted petitioners' visits with the children. If one parent provides the petitioners with sufficient contact with the children so that their visits are not denied or unreasonably restricted under NRS 125C.050(3), the petition fails, regardless of whether the other parent provides contact. Here, one parent permitted regular contact between the grandparents and the children and thus the grandparents were not denied or unreasonably restricted visitation. The grandparents' concern for the volatility of their relationships with either parent does not constitute an unreasonable restriction. Accordingly, we affirm.

Herndon, J., and Silver, Sr. J., concur.

---

[7]We decline Ashley's request for monetary sanctions on appeal.

BRETT GILMAN, Appellant, *v.* CLARK COUNTY SCHOOL DISTRICT; and SIERRA NEVADA ADMINISTRATORS, Respondents.

No. 84703-COA

March 16, 2023 527 P.3d 624

Appeal from a district court order denying a petition for judicial review of an appeals officer's decision in a workers' compensation matter. Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.

Reversed and remanded.

Bertoldo Baker Carter Smith & Cullen and *Javier A. Arguello*, Las Vegas, for Appellant.

Gilson Daub, LLP, and *Matthew W. Smith* and *Jennifer Santana*, Las Vegas, for Respondents.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Bulla, J.:

In this opinion, we consider the purpose and application of NRS 616C.065(7) in granting or denying the reopening of an industrial claim. That subsection places the onus on the workers' compensation insurer to expressly indicate acceptance or denial of coverage for a body part or condition, usually set forth in its notice of claim acceptance. In the absence of such indication, the statute provides that the insurer has neither accepted nor denied coverage for that body part or condition. The legislative purpose behind enacting this provision was to end the practice whereby an insurer would accept an industrial claim but restrict its acceptance to a certain body part or condition and then later use that restriction as a sword to deny coverage for other injuries arising out of the same industrial accident.

In this case, the insurer's acceptance of coverage was restricted to the claimant's cervical strain and thoracic sprain "only," but the insurer did not expressly deny coverage for treatment to the claimant's lumber spine. Therefore, the claimant was not required to appeal from either the determination of claim acceptance or claim closure to preserve his right to seek the reopening of his industrial claim under NRS 616C.390 for treatment to his lumbar spine.

FACTS AND PROCEDURAL HISTORY

In 2019, appellant Brett Gilman, an English teacher with respondent Clark County School District, sustained injuries while diverting a student altercation. According to the information Gilman provided in his Incident Report/Form C-1, "Student was fleeing Administration, [r]unning at breakneck speed. I stopped the student, by the straps of the backpack. They threw a trash can between us to avoid capture, causing me to slip [and] fall." Gilman reported his injuries as being "multiple" but "unknown" at the time he completed the incident report. Soon after, Gilman requested workers' compensation from the school district's industrial insurer, respondent Sierra Nevada Administrators (Sierra), for injuries related to his "neck" and "back." Several days later, Gilman was evaluated at Concentra Medical Center, which diagnosed cervical strain and thoracic sprain. Gilman's treatment records from Concentra did not mention any injury to his lumbar spine. Gilman was advised to return to full work and activity and referred for physical therapy. The physical therapy records support that Gilman complained of "low back pain," and his rehabilitation goals were to decrease neck and back pain.

Gilman's injuries reportedly continued to improve. Meanwhile, Sierra advised Gilman in a notice of claim acceptance that it would be accepting his industrial insurance claim for "Cervical Strain (Only) [and] Thoracic Sprain (Only)." Sierra did not mention the lumbar spine in its claim acceptance letter, and it did not issue either a written acceptance or a written denial for treatment to the lumbar spine. Gilman did not appeal this determination. A few months later, Sierra notified Gilman that all workers' compensation benefits had been paid and that his claim was being closed without an award of permanent partial disability (PPD). Gilman did not appeal this determination either, and his claim was closed.

Almost immediately after the closure of his claim, Gilman began experiencing significant low back or lumbar pain, for which he sought treatment. X-rays of Gilman's spine revealed degenerative disc disease. In early 2020, well within one year of the closure of his workers' compensation claim, Gilman requested that his claim be reopened for further evaluation and treatment of injuries to his lumbar spine.[1] Sierra denied Gilman's request because the lumbar

[1]Although Gilman had initially also requested reopening of the claim for treatment to his cervical, thoracic, *and* lumbar spine, he testified at the hearing before the appeals officer that he was only seeking to reopen his industrial claim to cover treatment to his lumbar spine and not for any further treatment related to the cervical and thoracic spine. However, on appeal, Gilman appears to assert that he is moving to reopen the entirety of his claim, contrary to both his testimony before the appeals officer and the record. For purposes of this appeal, we focus on Gilman's request to reopen his industrial claim as it relates to the lumbar spine. On remand, the appeals officer should confirm the scope of the claim Gilman is seeking to reopen.

spine was not a body part covered by the initial acceptance of his claim. Gilman timely appealed Sierra's decision to a hearing officer.

Before a decision was rendered, an MRI revealed that Gilman had advanced degenerative disease of the spine with lumbar disc herniations. Dr. Firooz Mashood opined that the disc herniations were not present prior to the industrial injury and recommended that, "given the worsening of patient's symptomatology, physical examination findings and MRI study findings[,] . . . his case be reopened for further diagnostic workup and treatment not limited to repeat MRI study of the lumbar spine and/or referral to a spine orthopedic surgeon." Dr. Daniel Lee, the orthopedic surgeon to whom Gilman was referred, noted disc herniations at L4-5 and L5-S1, which he classified as being slightly worse, presumedly in comparison to a prior study not clearly identified in the record.

The hearing officer issued two orders affirming Sierra's decision to deny Gilman's request to reopen his claim. The hearing officer's first decision and order identified the issue as an appeal from a "denial of treatment" and affirmed Sierra's denial of additional medical treatment based on the claim being closed. The hearing officer's second decision and order identified the issue as an appeal from a "de facto denial" and a request for claim reopening. In this second decision, the hearing officer denied reopening because "the [workers'] compensation claim was accepted for the cervical strain and thoracic sprain only." After reviewing Dr. Mashood's consultation report, the hearing officer concluded that, "[a]s Dr. Mashood is recommending reopening for lumbar spine treatment that is not included in the original claim, [Sierra's] de facto denial of the reopening request is proper and is hereby **AFFIRMED**." Gilman timely administratively appealed the hearing officer's decision.

While the matter was pending, Gilman continued to experience low back pain and underwent selective nerve root blocks, which provided some relief. Dr. Lee eventually diagnosed Gilman as having a lumbar disc herniation with radiculopathy, noting that Gilman had "worsening foot drop on the left [and] progressive weakness." Consequently, Dr. Lee performed a posterior lumbar decompression and fusion surgery at L4-S1. Subsequently, Dr. Mashood concluded that "Gilman's cervical, thoracic and lumbar have worsened and the need of additional medical treatment, to a reasonable degree of medical probability is primarily related to the April 25, 2019 Industrial Injury."

The appeals officer issued a decision and order affirming Sierra's denial of Gilman's request for additional medical treatment and his request to reopen his claim. After noting that Sierra had "accepted the claim for the following body parts: 'cervical strain only' and 'thoracic sprain only,'" the appeals officer found that Gilman's "lumbar spine was never accepted as part of his industrial claim" and that he failed to appeal Sierra's claim closure determination. In

addition, the appeals officer found that Gilman did not receive treatment to his lumbar spine until after his industrial claim was closed and, therefore, equitable estoppel did not apply.[2] In other words, because the insurer did not pay for treatment to the lumbar spine, it could not be equitably estopped from denying coverage under *Dickinson v. American Medical Response*, 124 Nev. 460, 186 P.3d 878 (2008). The appeals officer also found that Gilman failed to comply with the requirements of the reopening statute, NRS 616C.390, explaining, "[h]ere, Mr. Gilman does not satisfy the statute because the lumbar was never an accepted body part." The appeals officer ultimately concluded that "[Mr. Gilman] has not met his burden to justify reopening his claim." Subsequently, the district court denied Gilman's petition for judicial review. This appeal followed.[3]

ANALYSIS

On appeal, Gilman argues that the appeals officer erred in denying his motion to reopen his industrial claim. Primarily, Gilman contends that the appeals officer improperly considered Sierra's acceptance letter to be a "denial" of coverage for injuries to the lumbar spine that Gilman was obligated to appeal under NRS 616C.220.[4] Building on this assertion, he argues that his failure to appeal did not preclude the reopening of his industrial claim. Gilman further argues that overwhelming evidence supports reopening his industrial claim to include coverage for the low back surgery performed by Dr. Lee pursuant to NRS 616C.390. Sierra, in turn, argues that reopening the claim to include treatment to the lumbar spine would have been improper because Gilman failed to appeal the "acceptance" of his claim, which was limited to cervical strain and thoracic sprain only. Sierra also argues that substantial evidence supports the appeals officer's finding that Gilman failed to establish he was entitled to reopen his claim for medical treatment to his lumbar spine.

---

[2]Gilman does not raise equitable estoppel as an issue on appeal. Therefore, we need not address it further. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived). Although Gilman's physical therapy records are equivocal as to whether treatment was given for the lower back or lumbar region, he testified at the hearing before the appeals officer that he received treatment for low back pain before his claim was closed.

[3]We hereinafter refer to respondents collectively as Sierra.

[4]Under NRS 616C.220(10), "[a]ny party aggrieved by a determination to accept or to deny any claim" for industrial injury "may appeal that determination, within 70 days after the determination is rendered." The parties agree that Gilman did not appeal after receiving either Sierra's determination of claim acceptance or claim closure. The parties do, however, dispute whether Gilman's failure to administratively appeal either determination has any legal significance in resolving the issues before us.

Generally, on appeal, the "standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court." *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011) (internal citations omitted). This court reviews an administrative officer's construction of statutes de novo. *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 153, 274 P.3d 759, 761 (2012). Further, we decide "pure legal questions without deference to an agency determination." *City of Reno,* 127 Nev. at 119, 251 P.3d at 721 (quoting *Jones v. Rosner*, 102 Nev 215, 217, 719 P.2d 805, 806 (1986)); *see also Maxwell v. State Indus. Ins. Sys*., 109 Nev. 327, 329, 849 P.2d 267, 269 (1993) ("The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate.").

While we do not defer to administrative constructions of statutes, "[w]e review 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." *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (internal quotation marks omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). This court will not "reweigh the evidence or revisit an appeals officer's credibility determination." *Id.* at 362, 184 P.3d at 384. And we do not make factual determinations in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

The pivotal issue in this appeal is whether the appeals officer misapplied NRS 616C.065(7) to find that the lumbar spine was not within the scope of Gilman's accepted industrial claim and thus erred in denying Gilman's request to reopen his claim for treatment to his lumbar spine on that basis. The appeals officer reasoned that Gilman could not move to reopen his claim for a body part that was never accepted as part of the original claim, asking rhetorically, "How can one have a worsening body part that was never part of the claim?"

We review the construction of NRS 616C.065(7) de novo. *See Holiday Ret. Corp.*, 128 Nev. at 153, 274 P.3d at 761. When interpreting a statute, "the proper place to begin is with the plain text of the relevant statute[s], and if those words are unambiguous, that is where our analysis ends as well." *In re Execution of Search Warrants*, 134 Nev. 799, 801, 435 P.3d 672, 675 (Ct. App. 2018). However, "when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that

ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (internal quotations omitted).

Here, the language of NRS 616C.065(7) clearly states that "[t]he failure of the insurer to indicate the acceptance or denial of a claim for a part of the body or condition *does not constitute a denial or acceptance thereof.*" (Emphasis added.) And the acceptance or denial must be in writing. *See* NRS 616C.065(5) ("The insurer shall notify the claimant or the person acting on behalf of the claimant that a claim has been accepted or denied pursuant to subsection 1 or 2 [by mailing or sending] its written determination . . . ."). The plain language of these subsections of the statute unambiguously places the responsibility on Sierra to either accept or deny coverage of a specific body part or condition in writing when determining coverage for an industrial claim.

Further, this plain language interpretation is supported by the purpose of permitting claims to be reopened pursuant to NRS 616C.390. We have "a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." *Orion Portfolio Servs. 2, LLC v. County of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010). And we "will not render any part of [a] statute meaningless, and will not read [a] statute's language so as to produce absurd or unreasonable results." *Id.* Failure to give effect to the plain language of NRS 616C.065(7) would frustrate the purpose of NRS 616C.390, which permits the reopening of a claim and expanding the scope of coverage where, for example, an injury to a body part manifests after a claim has been closed but is medically related to the original industrial accident.

In this case, Sierra's acceptance letter did not address coverage for the low back or lumbar pain that Gilman reported experiencing. Instead, Sierra's letter simply identified the "Body Part(s)/ Injury Diagnosis" as "Cervical Strain (Only), Thoracic Sprain (Only)." Based on the statute's plain language, since Sierra neither accepted nor denied coverage for treatment to the lumbar spine, the letter cannot be interpreted to either accept or deny coverage for *future treatment* related to the lumbar spine. Thus, under NRS 616C.065(7), the appeals officer's determination that Sierra's failure to expressly accept coverage for treatment to the lumbar spine was an implicit denial of coverage for that body part is incorrect.[5] Spe-

[5]To the extent Sierra relies on NRS 616C.495 for the proposition that "disputes concerning the scope of the claim ***do not*** survive claim closure," that statute is inapposite. Gilman did not dispute that his claim could be closed without a PPD evaluation. And even if we looked to NRS 616C.495 for "guidance as to the issues of claim closure and the scope of the claim" as suggested by Sierra, there was no "dispute" related to coverage for Gilman's lumbar spine

cifically, the appeals officer, without considering the plain language of the statute, appears to have found an *implicit* denial of coverage for the lumbar spine based on the *explicit* acceptance of coverage for other body parts. But the denial of coverage for the body part at issue—the lumbar spine—must be explicitly indicated in writing in keeping with the plain meaning of NRS 616C.065(7) and the requirements of NRS 616C.065(5) addressed above. Thus, we are not persuaded that the qualifier of "only" as related to the acceptance of the injuries to the other two body parts, cervical strain and thoracic sprain, supports the denial of coverage for the lumbar injury. By way of example, an argument could be made that the qualifier of "only" listed after cervical strain modifies the term strain, thereby limiting coverage to a cervical strain and excluding other cervical conditions.

Further, without an explicit denial of coverage for treatment to the lumbar spine, Gilman was not required to appeal within 70 days after either receiving Sierra's determination of claim acceptance or claim closure. *See* NRS 616C.220(10) (providing a right of appeal for "[a]ny party aggrieved by a determination to accept or to deny any claim") and NRS 616C.315(3) (providing a right of appeal from a determination). In other words, since Sierra had not yet denied coverage for treatment to Gilman's lumbar spine, it would be illogical to require Gilman to appeal the lack of coverage for his lumbar spine injury. Accordingly, the appeals officer's decision to deny the reopening of Gilman's claim for failure to appeal Sierra's determination of coverage disregarded the plain language of NRS 616C.065(7) and was in error.

Even though it is unnecessary to consider the legislative history because of the plain language of the statute, we note that the history clearly supports that NRS 616C.065(7) was intended to permit the reopening of a claim to obtain treatment of a body part or condition which was not specifically denied by the insurer.[6] During a subcommittee meeting of the Assembly Committee on Commerce and Labor, Robert Ostrovsky, representing Employers Insurance Group, explained the key legislative history:

> [the proposed amendment to S.B. 195(R1) adopting provisions of A.B. 178] includes nine major areas of consensus. The first area is the acceptance of a claim. There was a dispute that the letters sent to claimants, accepting a claim on a body part for

---

that existed prior to claim closure because Sierra never expressly denied coverage for that claim in its claim acceptance letter. *Cf.* NRS 616C.065(7).

[6]We note that Gilman and Sierra dispute the timely disclosure of the legislative history to the appeals officer. As we review the interpretation of a statute de novo, we may consider the legislative history. *See Zohar*, 130 Nev. at 737, 334 P.3d at 405. We also note that Gilman brought the legislative history to the attention of the appeals officer on reconsideration and provided that same authority to the district court as well.

> example, were then used as a method for denying claims in the future—if the claimant had an arm injury and had to add a hip injury if both body parts were injured during the same incident. There were issues that the acceptance letter was being used as a weapon to deny those claimants the right to expand their claim. To solve that problem, we added language that would clearly indicate that the letter of acceptance is not an exclusion, and not an automatic denial for other body parts. It does not mean that they will automatically be accepted, but it does mean you will get the opportunity to litigate those matters before an appropriate appeals or hearing officer, and/or discuss them with the parties.

Hearing on S.B. 195, Before the Assemb. Comm. on Commerce and Labor, 75th Leg., at 3 (Nev., May 13, 2009). Both the plain language of NRS 616C.065(7) and the statute's legislative history support our conclusion that Sierra's failure to expressly accept coverage for treatment to the lumbar spine cannot be interpreted as a denial of coverage. Therefore, Gilman's failure to appeal after receiving either Sierra's determination of claim acceptance or claim closure did not preclude him from subsequently seeking to reopen his claim under NRS 616C.390.

While the parties also dispute whether substantial evidence supported the appeals officer's decision that Gilman failed to establish that he was entitled to reopen his claim under NRS 616C.390 to seek medical treatment for his lumbar spine, this issue does not provide a basis to affirm the challenged decision. The appeals officer concluded that Gilman did not satisfy the reopening statute, NRS 616C.390, for a single reason: "because the lumbar was never an accepted body part." But as set forth above, the appeals officer erred in reaching this decision because Sierra did not explicitly deny coverage for injuries to the lumbar spine and, in any event, the appeals officer's one-line conclusionary statement cannot be considered substantial evidence supporting the denial of Gilman's request to reopen his industrial claim.

CONCLUSION

Because the appeals officer erred in denying Gilman's request to reopen his industrial claim by misapplying NRS 616C.065(7) and without properly considering whether he satisfied the requirements of NRS 616C.390, we reverse and remand the matter to the district court with instructions to remand the matter to the appeals officer for further proceedings consistent with this opinion.

Gibbons, C.J., and Westbrook, J., concur.

LAS VEGAS REVIEW-JOURNAL, INC., Appellant, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.

No. 82460

March 30, 2023 526 P.3d 724

Appeal from a district court order denying a petition for a writ of mandamus seeking to compel production of public records under the NPRA. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Reversed and remanded with instructions.

[Rehearing denied June 8, 2023]

McLetchie Law and *Margaret A. McLetchie*, Las Vegas, for Appellant.

Marquis Aurbach Chtd. and *Craig R. Anderson* and *Jacqueline V. Nichols*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Cadish, J.:

This appeal involves the denial of a records request made pursuant to the Nevada Public Records Act (NPRA). The request, made by a reporter, concerns an investigation into potential criminal activity by a law-enforcement officer. The police department conducting the investigation denied the reporter's request several times, first claiming that the investigation was ongoing, then denying that any public records were available, and finally releasing heavily redacted portions of the investigative files. The reporter's news agency sought relief in the district court, but the district court ultimately denied the petition, concluding that the files contained confidential and private information not subject to public release.

The news agency now raises several arguments in challenging the district court's decision. Addressing these arguments, we first reject the argument that a governmental entity waives its claims of confidentiality by failing to timely respond to a public-records request because waiver risks harm to third-party interests and thus does not constitute an appropriate remedy for noncompliance with the NPRA's timeliness requirement.

[1]The Honorable Justices Patricia Lee and Linda Marie Bell did not participate in the decision of this matter.

We consider second whether records related to a police investigation into a law-enforcement officer are confidential under NRS 49.335 based on the assertion that the information therein, when provided by a confidential informant, may reveal the informant's identity. We conclude that while the informant privilege in NRS 49.335 provides a basis to deem governmental records confidential, it does not permit the governmental entity to refuse to disclose records where it failed to prove that the withheld information exposes the informant's identity and, more importantly, where selective and narrow redactions of the records would adequately protect the informant's identity.

Also related to confidentiality, we consider third whether, under our balancing tests, the police department met its burden to establish the records as confidential based on assertions that they contain potentially harmful and private information, when weighed against the significant public interests in access to those records. We conclude that, no, the unsubstantiated assertions of harm, stigmatization, and privacy do not justify withholding the investigative records here, particularly when weighed against the significant public interests that access to these records advance. However, to the extent the record supports these concerns, redactions adequately protect against them in this case.

As the district court abused its discretion in denying the NPRA petition, we reverse and remand with instructions to the district court to issue a writ of mandamus compelling production of the investigative files.

FACTS AND PROCEDURAL HISTORY

A reporter for appellant Las Vegas Review-Journal, Inc. (LVRJ) learned of a 2018 investigation by respondent Las Vegas Metropolitan Police Department (Metro) into a Nevada Highway Patrol (NHP) trooper concerning allegations that the trooper had solicited a confidential informant (CI) to murder or harm his wife. The reporter made a public-records request under the NPRA in December 2019 for the entire case file, including all video and audio recordings, associated with Metro's investigation of the matter. Responding five business days later, Metro withheld the records on the basis that they "pertain[ed] to an open criminal investigation." Unbeknownst to Metro, the reporter had obtained from an undisclosed source an Officer's Report summarizing Metro's investigation, which noted that Metro had closed the investigation over a year earlier in November 2018 after a decision was made not to file criminal charges against the trooper.[2]

[2]The report has been made public, as it has been filed with the district court below; it was also included in the record before this court.

According to that report, Metro officers met with and recorded an interview of the CI, whom the trooper had contacted to "take[ ] care of" his wife. Metro officers surveilled a subsequent meeting between the trooper and the CI from nearby. The trooper, who arrived at the meeting in his NHP vehicle and uniform, again asked the CI to take care of his wife. The CI, who had been outfitted with a covert audio-recording device, gave "numerous" scenarios on how to harm her, and at one point, the trooper asked how much these scenarios cost.

The report also details that Metro officers briefed a lieutenant with NHP and a sergeant with the Office of Professional Responsibility (OPR) immediately after the arranged meeting. NHP permanently relieved the trooper of duty and committed him to a medical evaluation, holding him in the hospital for 72 hours. Officers also notified the trooper's wife of the incident and seized the trooper's firearms from their residence. A detective found a GPS tracking device in the trunk of the vehicle of the trooper's wife. Soon after, the trooper's wife filed a petition for divorce and obtained a temporary protection order, both of which recounted some details of Metro's investigation and the trooper's actions. When Metro officers attempted to serve the trooper with the temporary protection order at his residence, he fled the scene.

The report continues that Metro officers, after a discussion, concluded the elements of solicitation for murder were not met. They also met with prosecutors at the Clark County District Attorney's Office (CCDA), including Chief Deputy Christopher Lalli. After reviewing the evidence collected by Metro, Lalli and his colleagues agreed that the elements for "any criminal charges" against the trooper were not met. They also concluded that waiting to obtain evidence to support criminal charges presented "too big of a risk to the safety of the family." NHP and OPR continued a separate investigation concerning violations by the trooper of their respective internal policies, the outcome of which is not included within the report. OPR sought to conduct a follow-up interview with the CI; however, the CI refused out of fear of retaliation from NHP. The lead detective and a sergeant involved in the investigation gave recorded interviews to OPR detailing their "opinions of" the trooper, including "how his conduct reflects that of [a] sworn police officer," before ultimately closing the Metro investigation in November 2018.

Relying in part on information obtained from this report, the LVRJ reporter renewed his request for the case file, informing Metro that his probe of the incident found that Metro had, in fact, closed its investigation into the trooper a year earlier. Another four business days later, Metro responded that it had "researched [the] request and determined [that] there [were] no public records available."

The reporter replied to clarify whether Metro meant that "no such records exist" or that the existing records qualified as "confidential."

Eight business days later, Metro produced three Property Reports. Within these documents, almost all information had been redacted. Each redaction was accompanied by standardized abbreviations in the redacted space, followed by standard documents purporting to provide (verbatim) rationales for the redactions of each separate document. In this disclosure, Metro neither provided the Officer's Report nor acknowledged its existence. Shortly thereafter, LVRJ through counsel emailed Metro regarding perceived deficiencies in its compliance with the NPRA, including Metro's use of standard explanations to withhold the redacted information, and renewed LVRJ's request for the records.

After Metro did not respond, LVRJ petitioned the district court for a writ of mandamus to access the requested public records and to impose penalties on Metro. LVRJ filed an opening brief in support of the petition, attaching an unredacted copy of the Officer's Report of the investigation.[3] LVRJ argued that Metro had failed to meet its burden to establish the confidentiality of the records; it therefore requested that the district court order disclosure of the records. It also asserted that Metro, by its failure to timely respond to the requests, had waived any assertions of confidentiality that did not implicate third-party interests. It alternatively requested that the district court compel Metro to produce a privilege log identifying the withheld documents and setting forth the specific bases to continue to withhold those documents. Finally, LVRJ requested the court impose penalties on Metro based on several alleged willful failures to comply with the NPRA.

Responding to the opening brief, Metro lambasted LVRJ's petition as an "abusive" request for public records. It attached declarations from two officers, both of whom expressed concern that disclosure of the case file would expose investigative tactics, reveal the identities of individuals involved, such as undercover officers, the suspect, the CI, and the victim, thwart future investigations, and subject the suspect to "stigmatization" and "harassment." Citing to Nevada caselaw and the federal Freedom of Information Act (FOIA), Metro argued that it timely responded to the requests, appropriately withheld records, and gave "extensive citations" to withhold the records. It also contended that it had not willfully violated the NPRA based on its proper reliance on several exemptions to disclosure.

Over Metro's objections, the district court ordered Metro to produce a privilege log. The privilege log identified the case file as comprised of the following documents: (1) an Officer's Report (allegedly the same report filed in the lawsuit); (2) three Property

[3]Over Metro's objections, the district court declined to seal the report.

Reports; and (3) three recordings of the CI. Metro further maintained that the Officer's Report and Property Reports contained "identifying" and "personal" information regarding the CI, suspect, and undercover officers. For each log entry, Metro provided identical privilege claims and explanations to support withholding the documents, relying on two separate balancing tests and asserting, for the first time, two statutory exemptions.

Following production of the privilege log, LVRJ questioned its completeness and challenged the generalized, identical string citation provided for each log entry as insufficient under the NPRA. It again argued that Metro's confidentiality claims lacked support, also pointing out Metro had raised some of its confidentiality claims for the first time. Further, it renewed its request to impose penalties on Metro, relying on Metro's conduct in this and other NPRA litigation to show a pattern of willful failures to comply with the NPRA.

The district court denied LVRJ's petition. First, the district court concluded that NRS 49.335 justified withholding the entire case file, as the Officer's Report, Property Reports, and recordings revealed the identity of the CI who had participated in the investigation. Second, the district court concluded that two separate balancing tests also supported withholding the entire investigative file. In applying those tests, it reasoned that disclosure jeopardized the privacy interests of and "needlessly" endangered the lives of those involved in the investigation, including the CI, victim, and officers, and that these considerations "substantially outweigh[ed] the public's interest in access." It similarly determined that the requests implicated nontrivial privacy interests of third parties, such as "the name of each victim," an "officer's home address," "a private citizen's alleged infidelity and sexual proclivity," "highly personal medical history," and "personal identifying information of a [CI]." Moreover, the court concluded that the public's interest in access did not outweigh the privacy interests implicated by disclosure because the records did not implicate any "accountability of elected officials," "any arrest or criminal prosecution," or "any legitimate type of public inquiry." Third, the district court found that redactions of the case file "would constitute a pointless exercise," as almost all of the information contained in the case file would require redaction. In denying the petition, the district court did not address LVRJ's request to apply waiver or penalties. This appeal followed.

DISCUSSION

Standard of review under and overview of the NPRA

We review a district court's denial of a petition for a writ of mandamus seeking access to public records for an abuse of discretion, except where, as here, the petition implicates questions of law, which we review de novo. *Clark Cty. Sch. Dist. v. Las Vegas Review-*

Journal (*CCSD*), 134 Nev. 700, 703-04, 429 P.3d 313, 317 (2018). The NPRA requires governmental entities to make available to the public upon request any public records within their legal custody or control so as to "foster democratic principles." NRS 239.001(1); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878, 266 P.3d 623, 626 (2011) ("[T]he provisions of the NPRA . . . promote government transparency and accountability."). Public records include any book or record of a governmental entity unless declared confidential by law. NRS 239.010(1). Records thus qualify as confidential and exempt from disclosure only to the extent that a specific statutory or caselaw exemption applies. *See Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (explaining that limitations on disclosure may be based on "a statutory provision" or "a broad balancing of the interests involved"). The NPRA further imposes several obligations on governmental entities in responding to, and even in denying, requests for public records. *See, e.g.*, NRS 239.0107(1)(d)(1)-(2) (requiring entities to provide the requester with a written denial that includes "citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential"). When only portions of a record qualify as confidential, a "governmental entity . . . shall not deny a request . . . on the basis" of confidentiality "if the governmental entity can redact, delete, conceal or separate, including, without limitation, electronically, the confidential information from the [nonconfidential] information." NRS 239.010(3).

In reviewing a public-records request, we follow a framework by which to test an entity's "claims of confidentiality under the backdrop of the NPRA's" important principles. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. We start our "analysis of claims of confidentiality under the [NPRA] with a presumption in favor of disclosure." *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc.* (*PERS*), 129 Nev. 833, 837, 313 P.3d 221, 223-24 (2013). Absent a statutory exemption, we apply a balancing-of-the-interests test initially derived from our caselaw that is broadly applicable to any claims of confidentiality. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also* NRS 239.001(3) (directing courts and government agencies to apply the "balancing of interests" narrowly). Consistent with our starting presumption, the governmental entity bears the burden to prove, under a preponderance standard, that the requested records qualify as confidential by showing either that the records remain protected by a statutory exemption or that the entity's "interest in nondisclosure clearly outweighs the public's interest in access." *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also* NRS 239.0113. In neither case does the entity satisfy its burden by making "a non-particularized showing, or by expressing hypothetical concerns." *Gibbons*, 127

Nev. at 880, 266 P.3d at 628 (citation omitted). Finally, we adhere to the NPRA's mandate to liberally construe any provisions that facilitate access to public records; conversely, we narrowly construe any exemptions or balancing tests that limit access to public records. NRS 239.001(2)-(3); *see also Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal* (*Coroner's Office*), 136 Nev. 44, 45, 458 P.3d 1048, 1050-51 (2020) (interpreting a limitation on access to public records "narrowly" and concluding such limitation "applies strictly").

Waiver is not available to remedy noncompliance with the NPRA's requirement for a governmental entity to respond to a records request within five business days

Acknowledging that we have previously rejected waiver as a remedy for the failure to timely respond to NPRA requests, LVRJ nevertheless asks this court to apply waiver to several of Metro's claims of confidentiality for its failure to timely respond to LVRJ's requests, based on a 2019 amendment that expanded remedies under the NPRA and emphasized prompt access to records.

Although a governmental entity must respond to a records request and include citations to any relevant authority making the requested records confidential within five business days of the request, *see* NRS 239.0107(1)(d), to do so, it must sift through "more than 400 explicitly named statutes, many of which prohibit the disclosure of public records that contain confidential information" to determine whether a specific exemption applies, *Republican Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't* (*RAGA*), 136 Nev. 28, 31, 458 P.3d 328, 331 (2020). Thus, just as we have recognized that "the provisions of the NPRA place an unmistakable emphasis on" prompt disclosure, *see Gibbons*, 127 Nev. at 882, 266 P.3d at 629; NRS 239.001(1) (providing that the NPRA achieves its purpose "to foster democratic principles by providing members of the public with prompt access" to public records), we have also cautioned that the obligation to disclose does not come "without limits," *RAGA*, 136 Nev. at 31, 458 P.3d at 331.

Prior to 2019, the NPRA provided only court-ordered disclosure or inspection of the records to correct a governmental entity's noncompliance with its requirements and to compel production of public records. 2019 Nev. Stat., ch. 612, § 7, at 4007-08. Starting in 2019, those statutory remedies were legislatively supplemented by "any other rights or remedies that may exist in law or in equity." *See id.*; NRS 239.011(4). Waiver constitutes an equitable remedy, but we have "adamantly disagree[d]" with the suggestion that waiver, by virtue of the fact that it "exist[s] in equity," applies to claims of confidentiality as a result of noncompliance with the timeliness

requirement.[4] *RAGA*, 136 Nev. at 32, 458 P.3d at 332. We find no cause to depart from our reasoning in *RAGA* that applying waiver to a governmental entity's "assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadans' private information solely because of [the entity's] failure to timely respond." *Id.* While we sympathize with LVRJ's frustration at Metro's delays in responding to records requests, waiver of "an assertion of confidentiality due to Metro's noncompliance with the response requirement goes far beyond the NPRA's emphasis on [prompt] disclosure. It undermines the NPRA's expressly listed exceptions for confidential information." *Id.*; *see also* NRS 239.340(1) (mandating the district court impose a civil penalty for a governmental entity's willful failure to comply with the provisions of the NPRA). Therefore, although the district court did not address LVRJ's waiver request, we perceive no basis for reversal under these circumstances where waiver should not apply to bar Metro's claims of confidentiality.

Metro failed to meet its burden to show that the records should be withheld as confidential under NRS 49.335 because the small portions of identifying information may be redacted without compromising such information

LVRJ argues that, contrary to the district court's conclusion, NRS 49.335 does not justify withholding the records in their entirety simply because some portions of the record identify the CI.

We review statutory interpretation issues de novo and interpret a statute by its plain meaning unless the statute is ambiguous, or the resulting interpretation would lead to an absurd or unintended result. *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020). "However, when the statute is ambiguous and subject to more than one interpretation," we construe it "in a manner that conforms to reason and public policy." *Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010). "[W]henever possible, [the] court . . . interpret[s] a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

The informant privilege permits a governmental entity "to refuse to disclose the identity of a person who has furnished to a law-enforcement officer information purporting to reveal the commission of a crime." NRS 49.335. It extends to any person, including a CI. *See, e.g.*, *Sheriff of Washoe Cty. v. Vasile*, 96 Nev. 5, 7, 604 P.2d 809, 810 (1980). While the statutory scheme leaves "identity" unde-

[4]Although we did not apply the 2019 amendment at issue here to the facts in *RAGA*, our discussion of the amendment, in which we acknowledged the newly added language at issue here, nevertheless remains persuasive under the facts before us. *See RAGA*, 136 Nev. at 29 n.1, 32, 458 P.3d at 330 n.1, 332.

fined, it distinguishes between the "identity of the informer" and the "informer's interest in the subject matter of his or her communication." *See* NRS 49.355 ("No privilege exists under NRS 49.335 . . . if the identity of the informer *or* the informer's interest in the subject matter of his or her communication has been disclosed by a holder of the privilege or by the informer's own action, or if the informer appears as a witness." (emphasis added)).

As commonly and ordinarily understood, *see Young*, 136 Nev. at 587, 473 P.3d at 1036-37 (enforcing the "commonly understood meaning" of "patron"), identity means "the qualities and attitudes that a person or group of people have, differentiating them from others," or "[t]he distinguishing personality or attributes of an individual," *Identity*, *Black's Law Dictionary* (11th ed. 2019); *see also State v. Euler*, 499 P.3d 448, 454 (Kan. 2021) ("In addition, the word 'identity' has a plain and clear meaning today that connotes something that is personally possessed by an individual human being. Merriam-Webster defines identity as 'the distinguishing character or personality of an individual.'" (quoting *Merriam-Webster Collegiate Dictionary* 616 (11th ed. 2003))). Identity includes "any attribute of an individual that *serves to identify* that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice." *Nationstar Mortg. LLC v. Benavides*, 171 N.E.3d 514, 520 (Ill. Ct. App. 2020) (emphasis added) (quoting Illinois's Right to Publicity Act, 765 Ill. Comp. Stat. Ann. 1075/5 (West 2018)).

Based on this understanding of identity, some circumstances may exist in which the informant privilege extends to "the content of an informant's statements" because the statements, by virtue of their subject matter, "disclose the identity of the informer." *E.g.*, *People v. Martinez*, 33 Cal. Rptr. 3d 328, 333-34 (Ct. App. 2005) (quoting in the second quotation *People v. Hobbs*, 873 P.2d 1246, 1252 (Cal. 1994)) (conducting an "independent review of the record and sealed materials" to conclude that the information, "if disclosed, would tend to reveal the identity of the [CI]"). But where the information and the identity remain distinct, no confidentiality violations arise with the disclosure of the underlying information provided by the informant. *See, e.g.*, *Mitrovich v. United States*, 15 F.2d 163, 163 (9th Cir. 1926) (finding no error in the trial court's refusal to allow the defendant to "ask[ ] the name of the informer," but noting that the informer testified about the events at issue without disclosing the informer's identity). Combining these authorities, the plain meaning of identity under NRS 49.335 includes any attribute, quality, personality, or character that distinguishes or indicates an individual and encompasses the content of the informant's statements to law enforcement only to the extent such content reveals the identity of the informant.

Applying this definition, as we must, in light of the NPRA's mandate to "narrowly" construe a public-records exemption, *see* NRS 239.001(3), we conclude that the district court abused its discretion in permitting Metro to withhold all records under this statutory exemption. Turning first to the Officer's Report, we recognize that the report contains attributes and qualities of the CI that make it possible to identify him or her.[5] While the report does not include the CI's name, instead referring to him or her as "CI" throughout, it includes details about the CI's employment, the CI's familiarity with the NHP trooper through his or her employment, the CI's affiliation with a specific group, and the CI's attorney. Nevertheless, these background details do not justify withholding the Officer's Report in its entirety, as they remain excisable from the remainder of the report, which redaction the NPRA allows for and indeed favors over wholesale withholding. *See* NRS 239.010(3) (prohibiting withholding of public records where redaction, deletion, concealment, or separation of any confidential information in the public records remains possible).

Moreover, the district court's conclusion that the report, in full, identified the CI was based on unsubstantiated claims that Metro solely relied on the CI to investigate the trooper and exaggerated assertions that the CI's assistance in the investigation by itself identified the CI. Even if the investigation included no other witnesses besides the CI, such fact does not identify the CI because, from the perspective of an ordinary and reasonable observer, nothing about the CI's involvement in the ensuing investigation includes personal attributes, characteristics, qualities, or personalities of the CI. Nor does the narrative, contained within the report, of how Metro conducted the undercover operation or of how the CI participated in the ensuing investigation attribute any differentiating detail to the CI. While the trooper already knew the identity of the CI and, presumably, reached out to the CI because of his or her affiliations and connections, we disagree that the trooper's solicitation of the CI and the CI's decision to advise law enforcement of the potential crime differentiates this CI from any other CI in any meaningful way.

Turning second to the Property Reports, we find no evidence in the record that the Property Reports reveal the identity of the CI. While Metro stated, in conclusory fashion, that the Property Reports contained the personal information of the CI, it never explained what personal information was implicated in the Prop-

[5]As noted, LVRJ obtained this report through an undisclosed source, attached the report to a public filing before the district court, and included it in the record on appeal. And the report has not been sealed. While LVRJ has access to the report, we still discuss whether Metro was obligated to produce it under the NPRA, as the act does not limit a governmental entity's obligation to produce public records simply because the requester may have obtained some or all of those records through another source.

erty Reports or even asserted that the personal information was inseparable from other information in the Property Reports, such as the collected evidence. Metro also never supported its assertion that a description of the evidence collected in the investigation would allow an outside observer to ascertain the CI's identity.

Finally, turning third to the recordings, we assume without deciding that the CI's voice constitutes a distinguishing attribute, as the district court concluded. However, Metro offered no explanation, let alone any evidence, for why modification of the CI's voice does not adequately protect the CI's identity. Instead, Metro now claims that modification requires the creation of a new record. While the NPRA does not require a governmental entity "to create new documents or customized reports" to comply with a records request, *PERS*, 129 Nev. at 840, 313 P.3d at 225, modification of a voice in an *existing* record does not amount to the creation of a new record, *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 170 N.E.3d 768, 786 (Ohio 2020). We agree with the Ohio Supreme Court's reasoning, in addressing a provision similar to NRS 239.010(3) under its public-records act, that a record "already exist[s]" if "reasonable computer programming" permits the governmental entity to "produce the requested output." *See id.* Here, Metro provided no support that it lacks the ability to modify the CI's voice or redact the portions of the recordings that distinguished the CI from others.

In sum, we conclude that the district court abused its discretion in denying LVRJ's petition to access the Officer's Report, Property Reports, and recordings. Even though the district court purported to apply the same plain-meaning definition of identity discussed herein, it abused its discretion in permitting Metro to withhold the case file under NRS 49.335's informant privilege by relying on Metro's unsubstantiated assertions that broad swaths, if not all, of the public records requested by LVRJ revealed the identity of the CI. Having the benefit of the Officer's Report in the record, such assertions ring hollow. Metro provided no evidence that NRS 49.335 supports withholding those documents and recordings in their entirety or that selective redactions or modifications fail to satisfy any legitimate concerns about compromising the CI's identity. The district court further abused its discretion in declining to order redaction, in contravention of the NPRA's preference, of the small, identifying portions of the Officer's Report.[6]

[6]We decline to address Metro's argument that NRS 289.025, which deems confidential "the home address and any photograph of a peace officer," supports withholding, as Metro cites no authority that NRS 289.025 survives the trooper's termination from NHP or supports wholesale nondisclosure over redaction. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider an issue where the party failed to "present relevant authority" or cogent argument).

Metro failed to meet its burden to show that the records are confidential under our court's balancing tests because, when compared to the public's significant interests in the records, Metro's unsubstantiated allegations of potential harm to individuals or privacy from disclosure fail to overcome the NPRA's presumption of disclosure

LVRJ argues that, in applying our balancing tests, the district court improperly deferred to Metro's unsupported claims that law enforcement would face harm and third parties would see their nontrivial privacy interests violated if the records were disclosed. It also contends that the district court failed to give appropriate weight and deference to the public's numerous interests in access to the public records.

As noted, we apply a balancing test in the absence of a statutory exemption rendering records confidential, which may allow the governmental entity to withhold the records as confidential. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 217-18, 234 P.3d 922, 926 (2010); NRS 239.001(3). However, we have distinguished between a general balancing test applicable to any records, as embodied in our decisions in *Gibbons* and *Haley*, and a balancing test applicable to records that implicate nontrivial privacy interests, as embodied in our decisions in *CCSD* and *LVMPD*. *See Las Vegas Metro. Police Dep't v. Las Vegas Review-Journal* (*LVMPD*), 136 Nev. 733, 738 & n.8, 478 P.3d 383, 388 & n.8 (2020) (emphasizing "that the *CCSD* test is distinct from the inquiry under *Gibbons*" and clarifying that "*CCSD* supplies a refined framework to analyze privacy claims," while "*Gibbons* applies to claims against disclosure that are unrelated to personal privacy"). As Metro claims that the records were properly withheld because they were confidential based on potential harm to officers and private based on the nontrivial privacy interests of those named therein, both balancing tests apply here, and we address each in turn below.

Our generalized balancing test favors disclosure of the investigative records

In *Haley*, we clarified that we employ the general balancing test, first introduced in *Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), "in accordance with the underlying policies and rules of construction required by the" NPRA, meaning that we narrowly construe exemptions and liberally apply the "policy for an open and accessible government." *Haley*, 126 Nev. at 218, 234 P.3d at 926; *see also* NRS 239.001(1)-(3). And similarly, we recognized that the NPRA, as early as 2007, has required us, in contrast to our application of the balancing test in *Bradshaw*, to favor the public's interest in access over the governmental entity's interest in nondisclosure when weighing the respective interests. *See Haley*,

126 Nev. at 217-18, 234 P.3d at 926. What is more, we explained that the NPRA "requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure." *Id.* Consistent with the Legislature's mandate, it is the governmental entity's burden to show that its interests in confidentiality or nondisclosure "*clearly* outweigh[ ]" the public's interests in access to the records, as this balancing promotes the important purposes of the NPRA in ensuring government accountability and transparency. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628 (emphasis added); *see Haley*, 126 Nev. at 217-18, 234 P.3d at 926-27.

To the extent the district court's order may be construed as equally weighing the public's interest in access against Metro's interest in nondisclosure, it abused its discretion.[7] More fundamentally, however, the district court abused its discretion in permitting Metro to support withholding the records in their entirety based on unsubstantiated claims that the release of the investigative records would endanger the lives of those involved in the investigation. For example, Metro did not explain or support its claim that descriptions of evidence contained in the Property Reports would endanger officers, reveal investigative techniques, identify the CI, or implicate the privacy interests of anyone involved. Similarly, contrary to Metro's assertions, the Officer's Report contained generalized descriptions of commonly known police tactics regarding the investigation. Even if the Officer's Report contained confidential techniques and sensitive information, Metro failed to support with evidence its contention that disclosure of such information would jeopardize the health and safety of law enforcement.[8] As we concluded in *Haley*, a governmental entity's supposition does not overcome "the public's right to access." *Haley*, 126 Nev. at 218-19, 234 P.3d at 927 (agreeing that "[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records" (quoting *CBS, Inc. v. Block*, 725 P.2d 470, 474 (Cal. 1986))).

---

[7]While we discussed in *Bradshaw* some of the interests in nondisclosure that may apply, *see* 106 Nev. at 636, 798 P.2d at 148, we never intimated that the failure on the part of the requester to prove that these interests were not implicated automatically supports the governmental entity's decisions to withhold the records, as the district court suggested in its order and Metro argues on appeal.

We also reject any suggestion in *Bradshaw* that the balancing test is "virtually identical" to FOIA's Exemption 7, *see id.* at 635 n.4, 798 P.2d at 147 n.4, because, as discussed already, the Legislature's subsequent amendments to the NPRA altered the balancing test as originally conceived in *Bradshaw*. *See* NRS 239.001(3).

[8]The declarations from two officers merely repeat the same vague conjectures about the potential harm to befall officers, the CI, and the NHP trooper. While the Officer's Report includes the names of certain officers, Metro overlooks that the NPRA prefers redaction over withholding in its entirety and that such redaction may be used to protect the identity of undercover officers, to the extent any such officers would otherwise be identified.

Putting aside the lack of evidence in the record to support Metro's arguments against disclosure, the district court also abused its discretion in engaging in only a perfunctory analysis of the public's interest in disclosure. LVRJ identified several compelling interests that the public possesses in these records, such as the oversight of law enforcement, the safety of the community, and the accountability of a law-enforcement officer who uses his position of authority to solicit the commission of a violent crime, yet all of these were summarily dismissed.

The district court instead repeated Metro's refrain that the public lacked any interest because neither was a crime committed nor was a public official accountable to voters involved. However, each of these assertions are belied by the record. The Officer's Report itself directly calls into question the claim that the suspect trooper did not commit a crime. Nevertheless, the assertion overlooks the public's interest in scrutinizing that conclusion. Moreover, the public has a significant interest in determining whether Metro's decision to close the investigation, and its participation, if any, in the fallout of the investigation, was informed and proper. Regarding the alleged lack of involvement of a public official, Metro remains under the supervision of an elected sheriff (who was, at the time of the request, a candidate for governor) and Metro collaborates with the District Attorney's Office, which remains under the supervision of the elected district attorney. And the suspect NHP trooper was a public employee, tasked with ensuring the safety of the community, who allegedly used his position of great authority to undermine safety by attempting to inflict harm on another. In our view, the district court failed to meaningfully examine and favor these interests in access to the case file, when compared to the weight the court gave to Metro's unsupported claims of harm, and in so doing, it exceeded its discretion. Accordingly, we conclude that the general balancing test does not support Metro's refusal to disclose the requested records.

Our burden-shifting balancing test under CCSD favors disclosure of the investigative records

As distinct from the balancing test discussed above, we have adopted a burden-shifting balancing test in cases where the governmental entity asserts nontrivial personal privacy interests in the content of the records. *LVMPD*, 136 Nev. at 733, 737, 478 P.3d at 385, 387. We outlined the test as follows:

> It first requires the government to establish a "personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester must show that the

> public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest."

CCSD, 134 Nev. at 707-08, 429 P.3d at 320 (citation and alterations omitted) (quoting *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 637 (9th Cir. 2017)). Nontrivial personal privacy interests arise "where disclosure poses a risk of harassment, endangerment, or similar harm." *LVMPD*, 136 Nev. at 739, 478 P.3d at 389; *Cameranesi*, 856 F.3d at 638 ("Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment constitute nontrivial intrusions into privacy.").

We have maintained that the governmental entity still bears the initial burden to prove by a preponderance of the evidence that the public records implicate "individual nontrivial privacy rights." *See CCSD*, 134 Nev. at 708-09, 429 P.3d at 321 (stating that the *CCSD* balancing test "coheres with both NRS 239.0113 and *Gibbons*"). However, in meeting that burden, the governmental entity does not need "to wait for a serious harm from an unwarranted intrusion of personal privacy to occur in order to justify nondisclosure." *See LVMPD*, 136 Nev. at 738, 478 P.3d at 388. While "real risks should not be discounted as 'hypothetical' merely because they have not crystallized into actual harm," the governmental entity "surely" does "not meet its burden, even under *CCSD*, by merely asserting a speculative or implausible harm." *Id.* at 738 n.8, 478 P.3d at 388 n.8.

Recently, in clarifying that the *CCSD* test applies "whenever the government asserts a nontrivial privacy interest," *id.* at 733, 478 P.3d at 385, we did not retreat from the Legislature's declaration that a significant interest exists in access to information held by governmental entities for its own sake because such access "foster[s] democratic principles," NRS 239.001(1); *see Gibbons*, 127 Nev. at 878, 266 P.3d at 626; *see also Coroner's Office*, 136 Nev. at 57-58, 458 P.3d at 1059 (concluding that "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant," but remanding to determine how such information "would advance the public's interest").

Moreover, *CCSD* and its progeny establish narrow circumstances in which the presumption in favor of disclosure is overcome. *See LVMPD*, 136 Nev. at 735, 478 P.3d at 386 (recognizing presumption that records are "open to public inspection"). It does not support nondisclosure because some information, in the abstract, is "personal" or "intimate" to an individual; rather, it protects information that, if disclosed, is harmful in some way because of its identifying features to third parties who lack the ability to control the dissemination of such information. *See, e.g.*, *id.* at 739, 478 P.3d at 389 (concluding that the unit assignments "reveal[ed] the locations of officers" and, thus, threatened to "subject officers to harassment and retaliation"); *Coroner's Office*, 136 Nev. at 56, 458 P.3d at 1058

(permitting the governmental entity to refuse to disclose "private information and personal characteristics" of "medical records and health history" in juvenile autopsy reports, where such information revealed "detailed, intimate information about the subject's body and medical condition" (quoting, in the second clause, *Globe Newspaper Co. v. Chief Med. Exam'r*, 533 N.E.2d 1356, 1357 (Mass. 1989))); *CCSD*, 134 Nev. at 709, 429 P.3d at 321 (concluding that disclosure of the "names or other information that would identify" witnesses or teachers posed a risk of "stigma or backlash" to those individuals because of their participation in an investigation). But because selective redaction of this private information eliminates its identifying features and concomitant harms, the *CCSD* balancing test does not provide a basis to withhold *all* information. *See Coroner's Office*, 136 Nev. at 55-56, 458 P.3d at 1057 (requiring redaction, not denial, of public records under the *CCSD* balancing test if those records implicate nontrivial privacy interests); *CCSD*, 134 Nev. at 707, 709, 429 P.3d at 319-20, 321 (specifically noting that the governmental entity requested to "redact . . . everything" but allowing, on remand, for the entity to redact names and other identifying information); NRS 239.010(3).

Applying the *CCSD* balancing test to the requested records here, the district court exceeded its discretion in permitting Metro to withhold all the records based on the conclusion that *portions* of those documents implicated nontrivial personal privacy interests. Addressing first the Property Reports, Metro identified only three discrete aspects (the names, birth dates, and addresses of the victim and suspect) of the documents that involved personal privacy concerns, which, if disclosed, would subject those individuals to harm. Even accepting the assertions of harm as true, redaction clearly remains available, particularly in light of Metro's failure to show why redaction would fall short of protecting the victim and suspect from such harm.

Addressing second the Officer's Report, the district court disregarded that the victim herself disclosed many of the details of the investigation that in its view warranted nondisclosure. While we do not believe the victim's disclosure of such information negates that the records implicated her nontrivial personal privacy interests, we note only that the disclosure here undermines Metro's claims that the information, if disclosed, poses a danger to her or subjects her and the suspect to shame, ridicule, or stigmatization. Even so, a review of the Officer's Report makes clear that redactions of the victim's and suspect's name and address eliminate any identifying aspect without resort to withholding the entirety of the report and, thereby, disassociate the individuals involved from any personal details about them.

Moreover, while the governmental entity's burden under the *CCSD* balancing test does not require proof of actual harm, Metro in

this matter speculated as to the harm, stigmatization, and harassment that would befall the victim, the suspect, the CI, and the officers. The privilege log Metro produced, as opaque as it was, did not even mention concerns about the personal privacy interests of the victim. It primarily focused on the CI, the identity of whom may be adequately protected from association with or participation in the investigation by redaction. And, importantly, we have never permitted a governmental entity to use individual personal privacy interests as a shield against accountability. Metro's argument here, if adopted, would seem to justify withholding all police reports, as they will almost always involve some embarrassing or identifying information about individuals, including victims, suspects, and witnesses. Accordingly, we conclude that the district court abused its discretion in shifting the burden to LVRJ to prove a significant public interest in the public records where Metro failed to make a plausible showing that disclosure implicated harm to nontrivial, identifying privacy interests that redaction could not otherwise have avoided.

Finally, even if the burden properly shifted to LVRJ, the district court also failed to meaningfully consider the public's significant interests in access and how access to the documents facilitates those interests. The district court's conclusion that the absence of a crime supported Metro's nondisclosure ignores that support for this conclusion remains largely unverifiable because it appears in the very records that Metro refuses to disclose in their entirety. Moreover, the public has a significant interest in determining whether Metro handled the investigation appropriately or whether it treated a fellow law-enforcement officer with more sympathy or leniency than any other offender. To say the least, the incident raises questions about the safety of the public and the accountability of officers. But the public should not and, according to the NPRA does not, have to accept at face value Metro's claims that its actions were lawful and legitimate. And it may only begin to broach these concerns with access to the investigative records. Contrary to legislative directives and the corresponding balancing test, the district court gave little, if any, weight to the public's interest in these records. Thus, the district court abused its discretion in concluding that LVRJ failed to meet its burden to show that access to the information advances significant public interests.[9]

[9]LVRJ argues that the district court abused its discretion by failing to impose civil penalties on Metro under NRS 239.340(1) ("In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity willfully failed to comply with the provisions of this chapter concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty . . . ."). As our decision today concludes that Metro has failed to comply with the NPRA's requirements, on remand, the district court must evaluate LVRJ's request for penalties under NRS 239.340(1), including determining whether Metro acted willfully in failing to comply with the NPRA's requirements as discussed in this opinion.

CONCLUSION

While we conclude that waiver does not apply to any of Metro's claims of confidentiality, based on concerns for third parties, we conclude that the district court abused its discretion in denying disclosure, as none of the three bases offered by Metro support wholesale withholding. First, the informant privilege in NRS 49.335 supports only narrow redaction of details regarding an informant's identity, such as attributes, qualities, personalities, or characteristics that distinguish the CI from others. As Metro never proved that the information given by the informant meaningfully distinguishes him or her from others, NRS 49.335 does not permit Metro to withhold all the requested records.

Second, under the general balancing test, a governmental entity does not overcome the presumption in favor of public access to public records, where, as here, the entity speculates and overstates the sensitivity of the information or the danger of disclosure. And even if Metro had provided evidence of its claims, those risks of disclosure did not overcome the significant public interests in understanding why Metro determined no crime had been committed, what role supervisory elected officials played in that determination, and whether the officer involved faced appropriate accountability, if any.

Third, we emphasize that the *CCSD* balancing test protects nontrivial personal privacy interests that, if disclosed, would subject those third-party individuals to harm. But because so little of the requested records contain this personal information and the alleged harm remains unsupported in the appellate record, narrowly tailored redaction adequately protects third parties from any harm that would result from dissemination of this information. Particularly in light of a preference for redaction, we conclude that the public's significant interests in these records overcomes Metro's interests in withholding the records in their entirety.

Concluding, as we do, that Metro failed to meet its burden under the NPRA to establish the requested records as confidential in their entirety under either a statutory or caselaw exemption, we reverse the district court's order denying the petition for writ of mandamus. Because we also conclude that small portions of the documents contain identifying information regarding the CI and implicate nontrivial personal privacy interests of the victim and, potentially, the suspect and officers involved, we remand with instructions to the district court to evaluate the documents for their confidential portions consistent with this opinion, permit narrowly tailored redaction of such aspects, and compel production of the remainder of those documents. Additionally, we remand to the district court to assess the merits of LVRJ's request for penalties under NRS 239.340(1) and, if warranted by the statute, to impose an appropriate penalty on Metro.

The Legislature has, in enacting the NPRA, determined that the public's access to governmental records promotes government transparency and accountability and fosters democratic principles and participation. While the NPRA nevertheless recognizes the importance of safeguarding confidential and sensitive information, it does not permit courts to accept at face value assertions that disclosure of governmental records jeopardizes the safety or eviscerates the personal privacy interests of others. Today, in compelling disclosure, we simply adhere to these important principles.

Stiglich, C.J., and Pickering, Herndon, and Parraguirre, JJ., concur.

VERNON NEWSON, JR., Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 83335

March 30, 2023 526 P.3d 717

Appeal from an amended judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Affirmed.

Darin F. Imlay, Public Defender, *William M. Waters*, Chief Deputy Public Defender, and *Ryan J. Bashor*, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen* and *Taleen Pandukht*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, C.J.:

In this opinion, we examine whether a district court's invocation of general, as opposed to case-specific, concerns related to the COVID-19 pandemic justifies dispensing with a defendant's right to in-person confrontation. We conclude it does not. The right to confront one's accuser in person at trial is sacrosanct. As both this court and the United States Supreme Court have explained, remote testimony by way of video-conferencing satisfies the right to confrontation only if (1) the district court finds that permitting a witness to testify remotely is necessary to further a compelling public policy interest, and (2) the testimony is otherwise reliable. *Maryland v. Craig*, 497 U.S. 836, 850 (1990); *Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019).

While we acknowledge that efforts to curtail the spread of the COVID-19 virus and protect the public health constitute compelling public policy interests, to satisfy procedural safeguards a district court must make specific findings as to why permitting a witness to testify remotely is necessary to further this interest. Concerns of convenience, cost-savings, or efficiency generally do not justify per-

[1]The Honorable Douglas W. Herndon, Justice, is disqualified from participation in this matter. Although not present at oral argument, the Honorable Patricia Lee, Justice, and the Honorable Linda Marie Bell, Justice, reviewed the oral argument in their consideration of this matter.

mitting remote testimony. Because the district court did not make the required findings of necessity before allowing two witnesses to testify remotely at appellant's murder trial, we conclude that appellant's right to confrontation was violated. Nevertheless, because this constitutional error was harmless beyond a reasonable doubt, we affirm the judgment of conviction.

BACKGROUND

Appellant Vernon Newson, Jr., fatally shot his girlfriend Anshanette McNeil in a car in which two children were present. The State charged Newson with murder with the use of a deadly weapon; two counts of child abuse, neglect, or endangerment; and ownership or possession of a firearm by a prohibited person. At his first trial, the district court declined to give Newson's proffered voluntary manslaughter instruction, and Newson was convicted on all counts. On appeal, this court reversed Newson's first-degree murder conviction, concluding that the district court abused its discretion by failing to give the voluntary manslaughter instruction, affirmed the remaining convictions, and remanded the matter for a new trial. *Newson v. State*, 136 Nev. 181, 462 P.3d 246 (2020).

Before the second trial, the State moved to have two of its witnesses, Zaharia Marshall and Officer Boris Santana, testify via an in-court, live video-conference call. Regarding Marshall, the State explained that she worked almost every day, could not afford to appear for trial other than by video, and lived in Phoenix, Arizona. As to Officer Santana, the State explained that he had commenced a new job, had mandatory training during the pendency of the trial, and now lived in Pasadena, California. The State did not point to any COVID-19-related concerns for either witness. Regardless, the State justified its motion by referencing an administrative order of the Eighth Judicial District Court, *In the Administrative Matter Regarding All Court Operations in Response to Covid-19*, Administrative Order (AO) 21-04, to support the remote appearances. The order, which was entered in June 2021 to update court procedures during the pandemic, states, in relevant part, "For trials, District Court Judges should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person [as to COVID-19] under current CDC guidelines." AO 21-04 at 4.

Newson argued that the State failed to explain why either Marshall or Officer Santana was considered a vulnerable person under CDC guidelines. Rather, Newson pointed out that the State merely offered reasons why Marshall and Officer Santana would find it inconvenient to testify at trial, like cost and vocational concerns, which did not fit within AO 21-04's parameters. He also argued that AO 21-04 is unconstitutional.

The district court granted the State's motion, stating that it would ask the remote witnesses under oath to confirm that they were alone in the room from which they would be testifying. The district court did not make any findings as to why it was necessary for the witnesses to testify remotely. Indeed, the court did not hear at any point from either Marshall or Officer Santana as to why it was necessary for them to testify remotely.

Both witnesses testified at trial via a video-conferencing platform. Marshall testified that McNeil was her godsister and that she babysat McNeil's two youngest children every day. She testified that on the night of the shooting, McNeil called her. On the phone call, McNeil told Marshall that she and Newson had engaged in an argument and that she would drop off her children at Marshall's house, but McNeil never arrived. Rather, Marshall testified that a frantic Newson arrived and pulled into her driveway with McNeil's children. In the vehicle, she saw that one of the children's pants and the car seat were stained with blood. Newson gave the children to Marshall, along with McNeil's purse. After Newson left her house in the vehicle, Marshall found bullets in her driveway. Marshall called McNeil, but she did not answer. On cross-examination, Marshall testified that Newson and McNeil often argued in the car and fought almost every day.

Officer Santana recounted that he was called to an on-ramp to Interstate 15 responding to a report that someone had been shot. By the time he arrived at the scene, McNeil had already been transported to the hospital. He testified that he helped other officers secure the location and preserve evidence. At the scene, he saw bullet shell casings, a cellphone, and a pool of blood. Newson did not cross-examine Santana.

Newson moved for a mistrial, taking issue with certain technical difficulties that occurred during Marshall's video-conference testimony. He argued that Marshall's audio kept cutting in and out, which "really affected this jury's ability to assess her demeanor and credibility." Newson also pointed out that a smoke alarm chirped throughout the testimony, Marshall moved around her house while testifying, and she retrieved her baby, who made noises in the background. In moving for a mistrial, Newson also renewed his argument that the State's reasons for justifying the witnesses testifying remotely were due to convenience and did not arise out of concerns related to COVID-19.

The district court denied Newson's motion for a mistrial. In so doing, it invoked the COVID-19 pandemic generally, observing,

> Well, I mean this is the situation we're in. While it's not ideal to have any witnesses testifying via audio/visual technology, it's a different time that we're living in, and we have people under different circumstances. And in light of everything that has

> happened in the last year, the Court has specific orders that are in place by our chief judge that allows for this type of audio/visual testimony as well as there are statutes that allow for this. This issue has been brought before the legislature, and that is absolutely allowed.

Thereafter, Newson testified to the following facts: while he was driving and McNeil was riding in the seat behind him, McNeil started a confrontation with him. In the ensuing moments, McNeil reached forward from the backseat and started choking Newson. He slowed the car to a stop, at which point McNeil stated that Newson was "dead" and began rummaging in her purse, in which Newson knew she had a gun. Newson retrieved his gun from the vehicle's center console and pointed it behind him at McNeil. When she pulled her hand from her purse, Newson closed his eyes and fired his gun until it ran out of bullets.

The jury convicted Newson of first-degree murder with the use of a deadly weapon. This appeal followed.

DISCUSSION

The district court violated Newson's right to confrontation by permitting Marshall and Officer Santana to testify remotely

Newson argues that the district court violated his constitutional right to confrontation by permitting Marshall and Officer Santana to testify via video. Newson maintains that the witnesses' convenience does not justify permitting remote testimony. Newson further argues that the district court should not have summarily ordered that the witnesses may appear remotely without making any case-specific findings. We agree.

"[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that [we] review[ ] de novo." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal quotation marks omitted). "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI; Nev. Const. art. 1, § 8(1). We have observed that "[f]ace-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved." *Chavez*, 125 Nev. at 337, 213 P.3d at 483. The right to confrontation is satisfied by remote testimony if (1) having a witness testify remotely "is necessary to further an important public policy," and (2) "the reliability of the [witness's] testimony is otherwise assured." *Lipsitz*, 135 Nev. at 136, 442 P.3d at 143 (applying the standard set forth in *Craig* to two-way audiovisual communication); *see* SCR Part IX-A(B) Rule 2. Remote testimony may only be used after the trial court hears evidence and makes a case-specific finding that remote testimony is necessary. *Lipsitz*, 135 Nev. at 136-37, 442

P.3d at 143. Remote testimony, as set forth in Nevada Supreme Court Rules Part IX-A(B), is generally reliable—it allows the witness to swear under oath, the defendant to cross-examine the witness, and the court and jury to observe the witness's demeanor and judge her credibility. *Id.* at 138, 442 P.3d at 144.

Case-specific findings, as opposed to general concerns related to the COVID-19 pandemic, are required before permitting witnesses to testify remotely

The district court failed to make the requisite finding under *Lipsitz* that remote testimony was necessary to further a compelling public policy interest. *See id.* at 136-37, 442 P.3d at 143. The State nevertheless argues that preventing the spread of COVID-19 is a compelling public policy interest supporting the remote testimony in this case. We disagree.

We are not the first court to consider a defendant's confrontation right in light of the COVID-19 pandemic. Other courts that have considered this issue agree that a trial court must make a case-specific finding of necessity prior to invoking the pandemic to justify a witness testifying remotely. This case-specific finding could be witness-specific; for example, that a witness has a particular susceptibility to the COVID-19 virus. *See, e.g.*, *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50, 65-66 (Mo. 2022) (reversing the adjudication of a juvenile as delinquent because the trial court failed to make specific findings as to why an enhanced risk to COVID-19 necessitated remote witness testimony). Or the case-specific finding could relate to the state of the pandemic in the trial court's locality at the time of the defendant's trial. *See, e.g.*, *People v. Hernandez*, 488 P.3d 1055, 1058 (Colo. 2021) (upholding trial court order allowing remote testimony where order contained detailed findings regarding the county's high COVID-19 incident rate, lack of hospital beds, and a statewide mask mandate).

C.A.R.A. and *Hernandez* reflect the conclusion that courts around the country have reached in considering a defendant's confrontation rights in light of the pandemic—that a trial court must make case-specific findings related to COVID-19 before citing that pandemic as a justification for permitting a witness to testify remotely. *See also, e.g.*, *State v. Comacho*, 960 N.W.2d 739, 754-56 (Neb.), *cert. denied*, ___ U.S. ___, 142 S. Ct. 501 (2021); *State v. Stefanko*, 193 N.E.3d 632, 639 (Ohio Ct. App. 2022); *State v. Milko*, 505 P.3d 1251, 1256 (Wash. Ct. App. 2022). Abstract concerns related to the pandemic generally are not an adequate justification for dispensing with a defendant's right to in-person confrontation. Although preventing the spread of COVID-19 constitutes a compelling public policy interest, we find these cases persuasive. Accordingly, we hold that a district court must make case-specific findings as to why remote testimony is necessary in light of the pandemic.

Here, to the extent that the district court relied on the pandemic to justify permitting remote testimony, such reliance was impermissibly based on general concerns related to the virus. The court did not make specific findings as to why the pandemic necessitated remote testimony in this case. While we acknowledge that COVID-19 may have justified taking remote testimony from certain witnesses under specific circumstances, the district court did not identify any such circumstances in this case.

Convenience, efficiency, and cost-savings generally do not justify permitting witnesses to testify remotely

We turn then to the reasons the State proffered below to justify Marshall's and Officer Santana's remote appearances. Despite invoking AO 21-04 in its motion, the State listed reasons related to the witnesses' ability to travel and other personal or job-related concerns. These reasons sound primarily in witness convenience. Indeed, at oral argument before this court, the State admitted that convenience was the proffered justification for the remote testimony. The State conceded that its request for remote testimony was inadequate and that it failed to include pandemic-related justifications—for example, that travel could subject Marshall's newborn child to the virus—in its request. To that end, we find nothing in the record to indicate that the State ever discussed any pandemic-related concerns with either witness.

"There is . . . a general consensus among courts that mere convenience, efficiency, and cost-saving are not sufficiently important public necessities to justify depriving a defendant of face-to-face confrontation." *State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014); *see also* Ayyan Zubair, Note, *Confrontation After Covid*, 110 Calif. L. Rev. 1689, 1699, 1714-15 (2022) (collecting cases that hold that mere efficiency or cost-saving concerns are insufficient for a finding of necessity under *Craig*). Here, the district court did not make a finding of necessity related to any of the concerns the State raised in its motion as to why its witnesses needed to testify remotely. Neither witness testified as to why any of those concerns necessitated remote appearances. And neither general concerns related to the COVID-19 pandemic nor concerns of convenience, efficiency, or cost-savings justify permitting the remote testimony. Accordingly, to the extent that the district court relied upon these factors in permitting the witnesses' remote testimony, such was a violation of Newson's right to in-person confrontation.

Although the district court erred in permitting the witnesses' remote appearances, we note that the witnesses' testimony was reliable: the witnesses were sworn under oath, Newson had the opportunity to cross-examine each, and the court and jury were able to observe the witnesses' demeanor and judge their credibility. *See Lipsitz*, 135 Nev. at 138, 442 P.3d at 144; *see also Craig*, 497

U.S. at 851 ("Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.").

Reversal is not warranted because the district court's error was harmless beyond a reasonable doubt

The State argues that even if the district court erred by allowing the witnesses to testify via video, we should nevertheless affirm Newson's conviction. The State argues that Marshall's testimony supported Newson's theory of the case and disallowing it would have been detrimental to him. Newson counters that permitting Marshall to testify via video was not harmless because her testimony was critical to his defense. He argues the effectiveness of that testimony was impaired because the jury's ability to assess Marshall's credibility was compromised due to technical issues during her testimony.

Where a Confrontation Clause error has occurred, "reversal is not required 'if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (internal quotation marks omitted)); *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967) (creating this standard). To determine whether an error contributed to the verdict obtained, we consider the following factors: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case." *Medina*, 122 Nev. at 355, 143 P.3d at 477 (omission in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). The State bears the burden of demonstrating that a constitutional error was harmless beyond a reasonable doubt. *See Polk v. State*, 126 Nev. 180, 183 n.2, 233 P.3d 357, 359 n.2 (2010).

We conclude that permitting Marshall and Officer Santana to testify remotely was harmless beyond a reasonable doubt because the jury's verdict was unattributable to the error. The defense conceded that Newson shot McNeil, and thus the issue at trial was whether Newson was guilty of murder or voluntary manslaughter. *Compare* NRS 200.010(1) (defining "murder"), *with* NRS 200.050(1) (defining "voluntary manslaughter"). The record demonstrates that Newson wanted Marshall to testify and viewed her testimony as being critical to his defense. Newson cross-examined Marshall and elicited

from her the same testimony she provided in his first trial—specifically the testimony that could have implicated a verdict of voluntary manslaughter. Importantly, Newson testified at trial. The jury therefore had the opportunity to assess his demeanor and credibility, in addition to Marshall's testimony.

As noted above, we conclude that Marshall's testimony was reliable for the purposes of *Craig* and *Lipsitz*. Furthermore, we are not persuaded that any technical issues during Marshall's testimony downplayed the importance of her testimony. Newson complains that a fire alarm chirped periodically in Marshall's home, that Marshall moved throughout her home several times prior to being admonished by the district court to stay in one place, and that Marshall retrieved a baby from its nap during her testimony. Each of these minor issues were addressed to the extent needed by the district court to ensure that they had minimal impact on the delivery of Marshall's testimony. And the district court gave both the State and Newson the time needed to fully elicit Marshall's testimony. Accordingly, we conclude that the error of permitting Marshall to testify remotely did not contribute to the jury's verdict and was therefore harmless beyond a reasonable doubt.[2]

CONCLUSION

The COVID-19 pandemic impacted many aspects of our criminal justice system. We acknowledge that case-specific concerns related to the virus may constitute a public policy justification for dispensing with a criminal defendant's right to in-person confrontation. However, general concerns related to the spread of the virus are not sufficient to dispense with this vital constitutional protection. Nor were the State's concerns related to convenience, cost-savings, or efficiency sufficient to justify the witnesses' remote testimony in this case. Here, the district court erred in permitting two witnesses to testify remotely without making the requisite findings of necessity and, therefore, violated Newson's right to confrontation. Nevertheless, we conclude that the district court's error was harmless beyond a reasonable doubt in light of the testimony's nature, the fact that the jury was able to assess Newson's credibility in light of his own testimony, and because it did not contribute to the jury's verdict. Accordingly, we affirm Newson's judgment of conviction.

Cadish, Pickering, Lee, Parraguirre, and Bell, JJ., concur.

---

[2]We also conclude that the error of permitting Officer Santana to testify remotely was harmless beyond a reasonable doubt. Officer Santana's testimony regarding the state of the crime scene was largely duplicative of two other witnesses who testified in person at Newson's trial, and Newson concedes on appeal that Santana's testimony likely did not contribute to the jury's verdict.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND CANNON COCHRAN MANAGEMENT SERVICES, INC., APPELLANTS, *v.* ROBERT HOLLAND, RESPONDENT.

No. 82843

April 20, 2023 527 P.3d 958

Appeal from a district court order granting a petition for judicial review in an occupational disease case. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Affirmed.

Lewis Brisbois Bisgaard & Smith LLP and *Daniel L. Schwartz* and *L. Michael Friend*, Las Vegas, for Appellants.

GGRM Law Firm and *Lisa M. Anderson*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HERNDON, J.:

In this opinion, we address the burden of proof for an NRS 617.457 occupational heart disease claim, when an NRS 617.457(11) defense is raised alleging that the employee failed to correct predisposing conditions. Respondent was denied occupational heart disease benefits after suffering from two heart attacks. On a petition for judicial review, the district court reversed the claim denial. At issue in this appeal is (1) whether the district court erred by improperly reweighing the evidence and retrying the case, and (2) whether the district court improperly added new requirements to the exclusion set forth in NRS 617.457(11).

We clarify that the employee bears the initial burden to establish entitlement to the statutory presumption pursuant to NRS 617.457(1) that their heart disease arose out of and in the course of employment. Thereafter, if the employer asserts an NRS 617.457(11) defense, the employer bears the burden to demonstrate that the employee had predisposing conditions that lead to heart disease, had the ability to correct those conditions, and failed to do so when ordered in writing by an examining physician. Finally, the employee has an opportunity to rebut the employer's evidence to establish their entitlement to the presumption. Upon analyzing respondent's claim under this framework, we affirm the district court's order.

[1]The Honorable Linda Marie Bell, Justice, voluntarily recused herself from participation in the decision of this matter.

FACTS AND PROCEDURAL HISTORY

In December 2012, respondent Robert Holland retired after 25 years as a police officer with appellant Las Vegas Metropolitan Police Department (LVMPD). In May 2019, Holland was admitted to the hospital with complaints of chest pain. Holland denied any cardiac history aside from hypertension. While at the hospital, Holland received two procedures to improve blood flow to his heart. Holland was discharged six days later and advised to follow up with his primary care provider and cardiologist. Holland's cardiologist filled out a workers' compensation claim form to request occupational disease benefits pursuant to NRS 617.457. The form confirmed that Holland had experienced two heart attacks (a disabling heart disease) and was totally disabled from May 27, 2019, to June 17, 2019.

During annual physical exams throughout his years of employment, Holland was notified that he had predisposing conditions and informed about associated corrective actions to address those conditions. In 2008, the examining physician observed that Holland had a predisposing condition of elevated triglycerides and provided a written recommendation for corrective action of implementing a low-fat diet. In 2009, the examining physician again identified elevated triglycerides, as well as elevated cholesterol, a second predisposing condition.[2] In 2010, the examining physician identified additional abnormal lab results and noted that Holland had low HDL (high-density lipoprotein, or "good" cholesterol). In 2011, the examining physician identified elevated triglycerides, elevated cholesterol, and elevated LDL (low-density lipoprotein, or "bad" cholesterol), with a recommended corrective action plan consisting of a low-fat diet and taking 250 mg/day of slo-niacin. Finally, in 2012, the examining physician identified elevated triglycerides and low HDL and recommended a corrective action of a low-fat diet, increased cardiovascular exercise, and 4 gm/day of omega 3. In 2015, following his retirement, Holland was also diagnosed with high blood pressure and started taking medication for the condition.

After receiving Holland's workers' compensation request, appellant Cannon Cochran Management Services, Inc. (CCMSI), LVMPD's workers' compensation administrator, sent Holland a letter denying his claim for failure to meet the statutory requirements. Holland administratively appealed. The hearing officer affirmed CCMSI's decision, finding that there was "[a] preponderance of the evidence . . . reveal[ing] that [Holland] has failed to meet the requirements of NRS 617.457." Specifically, the hearing officer determined that Holland "has a history of being told of the need to deal with predisposing factors/conditions on a continuous basis."

[2]The elevated cholesterol condition is not at issue in this appeal.

Holland appealed again, and the appeals officer affirmed. Following the same reasoning as the hearing officer, the appeals officer found that Holland failed "to correct predisposing factors/conditions on a continuous basis" and noted that he had been "warned on multiple occasions that failure to do so could result in exclusion from the benefits." Further, the appeals officer cited to the warnings Holland received in 2011 and 2012 about his elevated triglyceride levels and the examining physician's order to correct them, pointing out that, at the time of Holland's hospital admission, his triglyceride levels were nearly double what they were in 2012. The appeals officer determined that Holland "offered no [contradictory] evidence" and that he "failed to correct his predisposing condition of high triglycerides."

Holland petitioned for judicial review. The district court reversed, finding that the appeals officer's decision was summary and not supported by substantial evidence for four specific reasons. First, the district court found that while, prior to Holland's retirement, there were written instructions by examining physicians to correct predisposing conditions, they "were much too general in nature to effect change." The district court noted that there should have been "specific and pointed advice [such as] a given regimented diet plan and/or given regimented exercise routine" and that these programs should have "laid out diet specific instructions as to what [Holland] could and could not eat, and specific exercise instructions as to what exercises [he] needed to complete, frequency, duration, etc." Second, the district court determined that the physical examination documentation in the record did not show that "correcting the predisposing conditions was within [Holland]'s ability." Third, the district court determined that the reviewing physicians all stated that Holland was in "good health and remain[ed] acceptable for employment." Finally, the district court found that Holland "exercised good faith in adhering to the physician's recommendations," given that he was told that he was in good health and the physicians only provided "minimal recommendations." And because the examining physicians did not prescribe any medications to help control Holland's cholesterol and triglyceride levels, the district court found Holland appeared to have complied with the directives of those physicians and his predisposing conditions apparently were not altered through diet and exercise alone. LVMPD and CCMSI appealed.

DISCUSSION

On appeal, this court's role is the same as the district court's: to review "an appeals officer's decision for clear error or arbitrary abuse of discretion." *Manwill v. Clark County*, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007). In so doing, this court gives deference to "[t]he appeals officer's fact-based conclusions of law" and will not disturb them "if supported by substantial evidence." *Id.* Addi-

tionally, this court will "not substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact." *Id.* However, "we independently review the appeals officer's purely legal determinations, including those of statutory construction." *Id.* at 242, 162 P.3d at 879.

"When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words," and "the primary consideration is the Legislature's intent." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010); *see also Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). In the context of Nevada workers' compensation laws, "[t]his court has consistently upheld the plain meaning of the statutory scheme." *State Indus. Ins. Sys. v. Prewitt*, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997).

In a claim pursuant to NRS 617.457, the employee bears the initial burden of proof that they are entitled to the conclusive presumption in NRS 617.457(1)

As this court has previously explained, employees typically "must establish, by a preponderance of evidence, that [an occupational] disease arose out of and in the course of employment" to receive workers' compensation benefits for that disease. NRS 617.358(1); *Manwill*, 123 Nev. at 242, 162 P.3d at 879; *see also Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1015, 145 P.3d 1024, 1028 (2006) (discussing the same). However, when a police officer who has served for two years or more contracts heart disease that renders them disabled, NRS 617.457(1) provides a conclusive presumption that the disease arose out of and in the course of the officer's employment, relieving the officer of that initial burden. *See also Manwill*, 123 Nev. at 242-44, 162 P.3d at 879-80. Once the officer shows that they are disabled as the result of heart disease and that the statutory requirements are met, the heart disease "is covered, despite any preexisting symptom or condition," unless an exclusion exists. *Id*. at 243 & n.12, 162 P.3d at 879 & n.12.

Holland sought workers' compensation benefits pursuant to NRS 617.457(1), and the parties do not dispute that he met the statutory requirements for the statute's conclusive presumption. Holland has heart disease and was disabled in 2019 after experiencing two heart attacks, and he was employed as a police officer with LVMPD for more than 25 years. Thus, the record supports the proposition that Holland made a preliminary showing that he was entitled to the conclusive presumption.

NRS 617.457(11) is an affirmative defense, and the employer bears the burden of proof by a preponderance of evidence

Both appellants and Holland do not dispute that the burden of proof lies with the employer in making the preliminary showing

under NRS 617.457(11). Even when an employee meets the subsection 1 requirements, however, an employer may demonstrate that the employee is excluded from use of the conclusive presumption pursuant to NRS 617.457(11). Under this exclusion, "[a]n employer can defend a claim by showing that the employee failed to correct a predisposing condition . . . after being warned to do so in writing." *Daniels*, 122 Nev. at 1016, 145 P.3d at 1029. Because the plain and unambiguous language in NRS 617.457(11) precludes an employee who fails to correct a predisposing condition from relying on the conclusive presumption in NRS 617.457(1), it may operate as an affirmative defense to such a claim. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557-58, 170 P.3d 508, 513 (2007) ("An affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true.").

NRS 617.457(11) states the following:

> Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to a physical examination required pursuant to subsection 4 or 5 excludes the employee from the benefits of this section if the correction is within the ability of the employee.

It is well-established that a party asserting an affirmative defense has the burden of proving each element of that defense. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158-59 (2019) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979)). Thus, because appellants relied on NRS 617.457(11) to defeat Holland's claim, they bore the burden to prove, by a preponderance of the evidence, that (1) Holland had a predisposing condition that leads to heart disease, (2) Holland was "ordered in writing by the examining physician" to correct the predisposing condition, (3) Holland failed to correct the predisposing condition, and (4) the correction was "within the ability of the employee." *See Gault v. Grose*, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916) ("To maintain an affirmative defense it must be established by a preponderance of the evidence.").

Appellants failed to show Holland had the ability to correct his predisposing condition

Appellants argue that the district court improperly reweighed the evidence from the appeals officer's decision and added new requirements to NRS 617.457(11). Appellants do not dispute that Holland meets the initial requirements to qualify for the conclusive presumption of a claim compensable under NRS 617.457. Appellants contend that Holland failed to provide any evidence to support that he did take steps to correct predisposing conditions or make a good faith effort.

Holland counters that the appeals officer's decision was not supported by the record. Holland argues that appellants did not present any evidence that he had the ability to correct the predisposing conditions. Holland contends he made a consistent effort, although unsuccessful, to control the predisposing conditions. Thus, despite his best efforts, he was not able to obtain normal levels.

The appeals officer determines what weight is given to each piece of evidence. *Manwill*, 123 Nev. at 241, 162 P.3d at 879. We must give deference to the "appeals officer's fact-based conclusions of law" and will not disturb them "if supported by substantial evidence." *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (quoting *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993)).

In raising NRS 617.457(11) as a defense to Holland's claim, appellants were required to show "that [he] failed to correct a predisposing condition" in his control "after being warned to do so in writing." *Daniels*, 122 Nev. at 1016, 145 P.3d at 1029. As to the first element, Holland's medical records from 2008 through 2012 show that he had elevated triglyceride levels, which the parties agree qualify as a predisposing condition that leads to heart disease.[3] As to the second element, the record also demonstrates that Holland was instructed in writing by his physicians to adopt a low-fat diet, increase cardiovascular exercise, and take certain supplements. Despite these directives, Holland's triglyceride levels continued to rise over time and ultimately, in 2019, they had nearly doubled from when he was last examined in 2012. This supports the proposition that, as to the third element, Holland failed to correct his predisposing condition. Therefore, we conclude that appellants met their burden to establish the first, second, and third elements necessary to maintain their defense under NRS 617.457(11).

However, it is not enough to show that Holland failed to correct the predisposing condition leading to heart disease; appellants also had the burden to show the fourth element, that Holland had the ability to correct the condition. This factor is largely tied to the physician's directives for correcting the condition and whether the corrective action itself is within the employee's ability. Importantly, failure to take the corrective actions ordered by the examining physician may indicate that the employee had the ability to correct the condition but did not do so and thereby preclude the employee from the benefits of NRS 617.457(1). However, failure to correct the predisposing condition, despite the employee's compliance with the

[3]While the parties agree that elevated triglycerides are a predisposing condition in this case, we reiterate that it is the employer's burden to show that such was a predisposing condition under the statute.

corrective action, may indicate instead that the employee did not have the ability to correct the condition.

The record below does not include any testimony about whether correcting the predisposing condition was within Holland's ability. Nor was there evidence to support the argument that Holland failed to take corrective action. Instead, appellants rely solely on the *lack* of evidence and Holland's lack of improvement to his triglyceride levels to show that he failed to take corrective action, but the burden was theirs, and the inference that he thus had the ability to correct the condition does not follow. In fact, the record demonstrates that Holland experienced one of his two heart attacks after visiting the gym, suggesting that he might have increased cardiovascular exercise as directed, and also establishes that he had been seeing a primary care physician concerning his high cholesterol. Although appellants point to evidence showing Holland's weight increase, rising triglyceride levels, and lack of health improvement over the years, this does not necessarily show that Holland did not follow the recommended corrective actions; rather, it could just as well mean that Holland's efforts simply failed to correct the precondition, suggesting that the predisposing condition was not actually within his ability to correct. Appellants bore the burden to show that Holland did not take or attempt to take the corrective actions to correct his predisposing conditions, and their failure to do so is critical. Because appellants failed to make the requisite showing for the fourth element, they are unable to use NRS 617.457(11) to exclude Holland from relying on the statutory presumption that his heart disease arose out of and in the course of his employment with LVMPD.

If the employer makes the necessary showing under NRS 617.457(11), the burden shifts back to the employee to rebut the application

When an employer meets its burden of demonstrating the elements of NRS 617.457(11), the employee then has the opportunity to rebut the employer's evidence. With respect to this last element, the employee could do so by demonstrating that they complied with the corrective directives but those actions did not correct the predisposing condition. The employee is still entitled to the presumption if they can demonstrate that the predisposing condition could not be corrected through the recommended corrective actions.[4] Here, because appellants failed to show that Holland did not take or

[4]Alternatively, an employee could instead make the necessary showing under NRS 617.358 to seek workers' compensation benefits for occupational disease without the presumption. *Cf. City of Las Vegas v. Evans*, 129 Nev. 291, 297, 301 P.3d 844, 847 (2013) (concluding that an employee who failed to qualify for NRS 617.453's presumption that a firefighter's cancer was a compensable occupational disease could still seek compensation "under NRS 617.440, in conjunction with NRS 617.358").

attempt to take corrective actions to address his predisposing conditions, and therefore failed to demonstrate their entitlement to the use of NRS 617.457(11) to exclude Holland from the presumption in NRS 617.457(1), we find that Holland had no need to offer any evidence in rebuttal.

CONCLUSION

NRS 617.457(11) is an affirmative defense, and the burden of proof necessarily rests with the employer raising the defense to prove it by a preponderance of the evidence. Because appellants failed to put forth sufficient evidence in the record below demonstrating that Holland had the ability to correct his predisposing condition and failed to do so, appellants failed to meet their burden to exclude Holland from NRS 617.457(1)'s presumption that his heart disease arose out of and in the course of his employment with LVMPD. Therefore, we conclude that the district court properly granted Holland's petition for judicial review, and we affirm.

Stiglich, C.J., and Cadish, Pickering, Lee, and Parraguirre, JJ., concur.