SUPREME COURT OF THE STATE OF NEVADA

FITZGERALDS CASINO/HOTEL; and CANNON COCHRAN MANAGEMENT SERVICES, INC. Appellants, vs. GARY MOGG, Respondent.	Case No.: 55818

OPENING BRIEF

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I.

STATEMENT OF THE CASE

This is the appeal by the Employer, FITZGERALDS CASINO/HOTEL (hereinafter referred to as "Appellant Employer"), and Third-Party Administrator, CANNON COCHRAN MANAGEMENT SERVICES, INC., (hereinafter referred to as "Appellant Administrator"), of the Eighth Judicial District Court's March 22, 2010 Order Denying Petition for Judicial Review. (Joint Appendix pp. 25-26; hereinafter referred to as "Appendix p. __.") Appellants appealed on the basis that substantial evidence did not support the underlying Appeals Officer's finding that this was a compensable industrial insurance claim. Respondent, Gary Mogg (hereinafter referred to as "Respondent"), did not carry his burden to demonstrate that his alleged spine injuries arose out of and in the course of his employment as a surveillance inspector.

In a written determination dated February 26, 2008, Appellant Administrator denied liability for Respondent's industrial insurance claim. (Appendix p. 239.) Respondent appealed that determination to a Hearing Officer. (Appendix p. 240.)

The Hearings Division scheduled a hearing on the issue of claim denial on June 4, 2008. In an Order of Dismissal dated June 12, 2008, the Hearing Officer mistakenly dismissed Respondent's appeal due to Respondent's failure to appear. An Order of Rescission was issued on June 24, 2008, as Respondent was present for the hearing. (Appendix pp. 241-244.)

The Hearing Officer issued a Decision and Order dated June 24, 2008, affirming the denial of the industrial insurance claim. (Appendix pp. 270-271.)

Respondent appealed that Decision and Order to an Appeals Officer. (Appendix p. 269.)

On June 15, 2009, the Appeals Officer's Decision and Order reversed claim denial and remanded for claim acceptance as well as all appropriate benefits. (Appendix pp. 42-48.)

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Appellants timely filed their Petition for Judicial Review in the Eighth Judicial District Court on July 1, 2009. (Appendix pp. 39-41.)

Appellants filed a Motion for Stay Pending Appeal on July 2, 2009.

Respondent filed his Notice of Intent to Participate In and Response to Petition for Judicial Review on July 9, 2009. (Appendix pp. 35-38.)

The Eight Judicial District Court issued an Order Granting Stay on July 30, 2009. (Appendix pp. 33-34.) The Notice of Entry of Order was filed on August 3, 2009. (Appendix pp. 27-32.)

The Record on Appeal was transmitted on August 5, 2009.

After the parties' briefs were filed, on March 22, 2010 the District Court denied Appellants' Petition for Judicial Review. (Appendix pp. 25-26.)

On March 23, 2010, the Notice of Entry of Order was filed. (Appendix pp. 20-24.)

On April 8, 2010, Appellants filed their Notice of Appeal and requested a Stay pending the hearing on the merits of this appeal. (Appendix pp. 12-19.)

On May 7, 2010, the Eighth Judicial District Court's Order Granting Stay Pending Appeal to Supreme Court was entered. (Appendix pp. 7-8.) The Notice of Entry of Order was entered on May 11, 2010. (Appendix pp. 1-6.)

Appellants now file their Opening Brief.

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II.

STATEMENT OF FACTS

On January 29, 2008, Respondent completed a Notice of Injury or Occupational Disease (hereinafter referred to as "Form C-1".) He alleged that, on January 27, 2008, while working within the course and scope of his employment for Appellant Employer, he injured his back, neck and left arm. He described the accident as occurring when he "was attempting to place his feet on counter and the chair flipped over." (Appendix p. 225.)

On January 28, 2008, an Incident Data report was completed by Security Officer Sylvia Sinclair. Security Officer Sinclair spoke with Respondent by telephone. Respondent was employed as a Surveillance Agent. Respondent stated that, on January 27, 2008, he was attempting to place his feet on the counter in the Surveillance Room when his chair flipped over. He further stated that he injured his neck, left arm, and lower back. Respondent said he had a pre-existing injury and the fall aggravated the injury. (Appendix pp. 226-228.)

On January, 29, 2008, a co-worker, Sheldon Kanner, provided a witness statement as follows:

> At 13:30 Jan 27, 2008 I was sitting at my work station. I noticed that [claimant] was starting to lean back and put his feet on the desk in front of him. At that time the chair started to lean to the left the chair & [claimant] fell over and [claimant] landed on his left side. At that time I ask him if he needed any assistance. He walk around awhile then went back to work. (Appendix p. 229.)

On January 29, 2008, Respondent completed an Employee's Claim for Compensation/Report of Initial Treatment (hereinafter referred to as "Form C-4"). Respondent stated that he injured his neck and lower back when he went to put his legs up on the corner of a desk causing the chair to flip backwards. (Appendix p. 230.)

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The physician's portion of the Form C-4 was completed at Concentra Medical Center (hereinafter referred to as "Concentra") by Dr. Adrian. Respondent was diagnosed with a strain of the cervical, lumbar and thoracic spine. Physical therapy was recommended. Respondent was placed on restricted duty. (Appendix pp. 230-234.)

Appellant Employer completed an Employer's Report of Industrial Injury or Occupational Disease (hereinafter referred to as "Form C-3") on January 29, 2008. (Appendix p. 235.)

Respondent had a follow up appointment with Concentra on February 6, 2008. It was noted that Respondent had a significant pre-existing history related to his spine. In 1972, Respondent was in a motorcycle accident. In 1977, he was in a motor vehicle accident. He had another motor vehicle accident in 1984. He also had a work related accident in 1982, and a left knee injury in 1987. He had a shoulder injury in 1992 and 1993. "He says in the year 2000 he had a lipoma that was removed at the base of his neck and has always had pain since then." He is treating with a spine surgeon, Dr. William Smith who took him off methadone in January of 2008 and switched him to eight (8) pills of Oxycodone per day. He was also on Lyrica for pain in his left hand. Dr. Parekh's assessment was as follows:

> "Back pain. Previous history of a lot of preexisting issues with possible preexisting disc disease. Patient's lumbar spine x-rays that have been done her indicated a narrowing of L1-L2 disc space with osteophyte formation anteriorly, grade 1 spondylolisthesis at L5 anteriorly on S1 with bilateral spondylolysis at this level. On the cervical spine, osteophyte formation present anterior and posterior C5-6, C6-C7. Spinous and transverse processes appear normal." (Appendix pp. 236-238.)

In a letter dated February 26, 2008, Appellant Administrator issued a written determination denying liability for Respondent's industrial insurance claim. (Appendix p. 239.)

Respondent appealed that determination to a Hearing Officer. (Appendix p. 240.)

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The Hearings Division scheduled a hearing on the issue of claim denial on June 4, 2008. In an Order of Dismissal dated June 12, 2008, the Hearing Officer mistakenly dismissed Respondent's appeal due to Respondent's failure to appear. An Order of Rescission was issued on June 24, 2008, as Respondent was present for the hearing. (Appendix pp. 241-244.)

The Hearing Officer then issued a Decision and Order dated June 24, 2008, affirming the denial of the industrial insurance claim. (Appendix pp. 270-271.)

Respondent appealed that Decision and Order to an Appeals Officer. (Appendix p. 269.)

Several of Respondent's co-workers were interviewed regarding the practices and procedures for a surveillance inspector. These individuals provided statements regarding Respondent's act of putting his feet up on the counter at his work station.

Becky Shope, Surveillance Inspector, provided a voluntary statement as follows:

> I Becky Shope have currently been working here at Fitzgeralds Casino and Hotel in the Surveillance Department. During my time here in Surveillance it has been the procedure of the room to be constantly on guard at all time to observe anything at any time. At no time has it been allowed to rest any of our body parts on the working station. The only time when we use the working station for our personal use is for when he [sic] have lunch. (Appendix p. 172.)

William Preston Friday, provided a voluntary statement as follows:

> It is my knowledge that any surveillance Inspector or agent is not aloud [sic] to have his or her feet on the desk while working. This may indicated someone sleeping, or not doing his or hers [sic] job. This is not a professional position while in any Surveillance room. (Appendix p. 174.)

Philip Gravier, provided a voluntary statement as follows:

> I Philip Gravier, have worked in surveillance room at the Fitzgerald's since May of 2008. In that time that I've been here I've never been authorized to put my feet on the desk. (Appendix p. 175.)

Vicky Harper, swing shift surveillance inspector, provided a voluntary statement as follows:

> I have been employed with the Fitzgerald surveillance room for just over a year now. To my knowledge placing your feet on the workstation desk has never been accepted. (Appendix p. 176.)

Sheldon Kanner, Surveillance Inspector, provided a voluntary statement as follows:

> I, Sheldon Kanner have been working for the Fitzgerald for over 2 years in the Surveillance department. I have been in the work field for 45 years and I never seen anybody put there [sic] feet upon there [sic] work station. It is unprofessional and you cannot effectively do there [sic] assigned work in that position. I was told when I accepted the position that I must be aware of what is going on at all times. (Appendix p. 177.)

Edward J. Cashmon, Surveillance Manager, provided a voluntary statement as follows:

> I, Edward Cashmon have been employed in the Surveillance Department of the Fitzgerald's since 1995 and to my knowledge it has never been policy, condoned, or authorized to place your feet on the Surveillance console/desk to stretch your legs. (Appendix p. 178.)

Bruce Carlley a Surveillance Inspector, provided a voluntary statement as follows:

> I have been working in the Surveillance Department since March 2007. It is the policy of the room to act in a professional manner at all times. Using the work station as a foot rest (For example, putting your feet on the desk) violates this policy. (Appendix p. 179.)

David Rusyn, a Surveillance Inspector, provided a voluntary statement as follows:

> In my entire career as a Surveillance Inspector I have never observed any inspector place his feet on his desk. I do not believe that this would be considered acceptable behavior by any Inspector I have ever worked with. Furthermore, to my knowledge no inspector has been authorized to place their feet on the desk. (Appendix p. 180.)

Brian Swartwood, Employees Relation Manager/Risk Management provided a memorandum dated January 27, 2009, explaining that he did not recall the date of purchase for the chair involved in the incident. After the incident, the chair was inspected and no defects were found. The chair has continued to be used in the Surveillance Room. To the best of his knowledge, it is not common practice for the Surveillance staff to put their feet on the desk while sitting at work. The chairs are wheeled on a hard surface, and to put your feet up would not be a safe work place activity. (Appendix p. 181.)

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On June 15, 2009, the Appeals Officer's Decision and Order reversed claim denial and remanded for claim acceptance as well as all appropriate benefits. (Appendix pp. 42-48.)

Appellants, through Counsel, filed a Petition for Judicial Review and a Motion for Stay Pending Appeal and a Request for Order Shortening Time. (Appendix pp. 39-41.)

On July 30, 2009, the Order Granting Motion for Stay was filed. (Appendix pp. 33-34.)

On August 3, 2009, the Notice of Entry of Order for the Order Granting Motion for Stay was filed. (Appendix pp. 27-32.)

On March 22, 2010, the District Court's Decision and Order Denying Petition for Judicial Review was entered. (Appendix pp. 25-26.)

On March 23, 2010, the Notice of Entry of Order was mailed to Appellants' Counsel. (Appendix pp. 20-24.)

Appellants appealed the denial of the Petition for Judicial Review and requested a Stay pending the hearing on the merits of this appeal. (Appendix pp. 12-19.)

On May 7, 2010, the Eighth Judicial District Court's Order Granting Stay Pending Appeal to Supreme Court was entered. (Appendix pp. 7-8.) The Notice of Entry of Order was entered on May 11, 2010. (Appendix pp. 1-6.)

Appellants now file their Opening Brief.

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III.

ARGUMENT

The Decision of the Appeals Officer To Reverse the Denial of This Industrial Insurance Claim Is Not Supported by Substantial Evidence

The decision of an Appeals Officer must be supported by substantial evidence. Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. State Indus. Ins. Sys., 113 Nev. 532, 537, 936 P.2d 839 (1997).

It is Respondent, not Appellants, who had the burden of proving his case by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his case, Respondent had the burden of going beyond speculation and conjecture. That means that Respondent had to establish the work connection of his injuries, the causal relationship between the work related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all the evidence. To prevail, Respondent had to present more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

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The issue before this Court arose from Appellants' appeal of the Appeals Officer's reversal of claim denial. In the present case, Respondent alleged that he injured his lower back, neck and left arm when he went to prop his legs up on a desk causing his chair to flip over. Respondent was employed as a surveillance agent by Appellant Employer. His job required him to monitor televisions with surveillance feeds from around the casino property. The description of the January 27, 2008 incident does not establish a causal connection between his alleged injury and his employment as required by NRS 616C.150. Respondent has not carried his NRS 616C.150 burden as there is no medical evidence that connects his injury to the duties arising from the course and scope of his employment. His treating physician, Dr. Parekh, detailed a very significant history of pre-existing injuries and the fact that Respondent was already treating with Dr. Smith for his spine before this incident at work.

NRS 616A.010(2) makes it clear that:

> A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.

NRS 616C.150(1), NRS 616A.030, and NRS 616A.265 mandate that:

> **NRS 616C.150 Compensation prohibited unless preponderance of evidence establishes that injury arose out of and in course of employment; rebuttable presumption if notice of injury is filed after termination of employment.**
>
> 1. An injured employee or his dependents are not entitled to receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS unless the employee or his dependents establish by a preponderance of the evidence that the employee's injury arose out of and in the course of his employment.

> **NRS 616A.030 "Accident" defined.** "Accident" means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

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NRS 616A.265 "Injury" and "personal injury" defined.

1. "Injury" or "personal injury" means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence, including injuries to prosthetic devices. Except as otherwise provided in subsection 3, any injury sustained by an employee while engaging in an athletic or social event sponsored by his employer shall be deemed not to have arisen out of or in the course of employment unless the employee received remuneration for participation in the event.

An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, Respondent must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. However, if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of a claimant's employment. Finally, resolving whether an injury arose out of employment is examined by a totality of the circumstances. See, also, Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005).

Furthermore, this Court, in Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 939 P.2d 1043 (1997), held that the "Nevada Industrial Insurance Act is not a mechanism which makes employers absolutely liable for injuries suffered by employees who are on the job." The Court concluded by stating, "The requirements of 'arising out of and in the course of employment' make it clear that a claimant must establish more than being at work and suffering an injury in order to recover." Id.

The statements from Respondent's coworkers confirm that propping one's feet upon the desk was not a common practice for a surveillance agent. Therefore, any injury stemming from that action should not be considered to arise out of and in the course of employment. Respondent argued that because there was no written rule prohibiting the placement of his feet on the work counter, that such an act did not deviate from the normal practices of a surveillance agent, and therefore, his accident did arise out of and in the course of his employment.

The phrase "arose out of and in the course of employment" has been examined quite closely in recent years by the Nevada Supreme Court. In Mitchell, the Court further explained its holding in Gorsky by stating that the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. The Appeals Officer in the present case held that because Respondent was required to sit at a counter watching monitors for the majority of an eight (8) hour shift, the act of placing his feet on the work counter was justified to make himself more comfortable, and therefore, his accident was caused by a justifiable act due to the workplace conditions. Furthermore, the Appeals Officer found that the chair that Respondent was sitting in collapsed, thereby constituting a risk of injury which was clearly attributable to the workplace environment. There was no evidence that the chair collapsed, in fact, the evidence demonstrated that the chair was not in any way defective, and was still in use by Appellant Employer one year after Respondent's accident. (Appendix p. 181.) The Appeals Officer's conclusion on this issue is not supported by any evidence in the record.

In September 2010, this Court further clarified its findings in Mitchell in Rio All Suite Hotel and Casino v. Phillips, 126 Nev. Ad. Op. 34 (2010). In that case, Phillips was descending a staircase at work and injured her ankle. The Court found that Phillips' injury was caused by a neutral risk, one that was not personal to her or solely employment related. Use of the positional risk test was explicitly rejected and the increased risk test was endorsed for analysis of whether an incident arises out of and in the course of employment.

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This Court held in Rio:

> **Injuries resulting from employment-related risks** are 'all the obvious kinds of injur[ies] that one thinks of at once as industrial injur[ies]' and are generally compensable . . . [such as] tripping on a defect at employer's premises'
>
> **Personal risks** are those that are 'so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment . . . For example, a fall caused by [a personal condition such as] a bad knee, epilepsy, or multiple sclerosis, is a personal risk.'
>
> **[Neutral] risks** are those that are 'of neither distinctly employment nor distinctly personal character'. . . ('an unexplained fall, originating neither from employment conditions nor from conditions personal to the [employee]'. [Phillips'] injury occurred while traversing a staircase that was free of defects, and there [was] no evidence that a risk personal to [her] caused her fall. ["Philips started walking down the stairs that led to the employees' break room . . . grabbed the handrail with her right hand, took a step down . . . and . . . according to Phillips, '[W]hen I stepped down on my left foot, it just twisted over . . . I never missed a step . . . I didn't lose my balance . . . [or] even slip at all. Just that foot twisted around.'" Thus, [this injury] falls within the neutral -risk category. . .
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> We take this opportunity to clarify that determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment. In particular, whether an employee has a personal affliction is relevant . . . **[a]n employee's injury resulting from a personal risk is not compensable . . .**
>
> **The key inquiry is whether the risk faced by the employee was greater than the risk faced by the general public . . .** (Emphasis added.)

Appellants argue that Respondent was not at an increased risk for injury due to his employment duties, but in fact caused his own injury by acting in a manner that was completely beyond the scope of his employment. The fact that Respondent's decision to put his feet up on the counter caused his chair to flip over is undisputed. If we follow this Court's risk analysis in Rio to its natural conclusion, any act unique to Respondent that increases the risk of injury constitutes an injury that did not arise out of and in the course of employment.

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The Appeals Officer did not examine Respondent's action in the context of Mitchell. The sole act that should have been examined is whether or not Respondent's placement of his feet on the work counter constituted a work duty or requirement. He did not **have** to raise his feet up in order to view the monitors that he was required to watch. His act did not improve his view of the monitors, nor was there anything obstructing his ability to keep his feet on the floor. His supervisor did not order him to put his feet on the counter. The only reason his chair tipped over was because he put his feet up on the counter. There was no testimony that the chair was defective and had ever tipped over before. There is nothing inherently dangerous about sitting in a chair and watching television monitors.

The Appeals Officer erroneously concluded that because Respondent was not barred from putting his feet up, that the act could be considered part of his work duties. It is a ludicrous interpretation of the case law: any act which is not explicitly forbidden constitutes an act that falls within the course of your employment. There is simply no evidence that the workplace conditions caused Respondent to fall. The cause of his fall was his decision to perform an act that was not required by his employer as part of his work duties, and not an inherent risk in his job or the workplace conditions.

The Appeals Officer's decision characterizes Respondent's action as a "momentary act of personal comfort." (Appendix p. 45.) Larson's Workers' Compensation Law, (2006 Ed.; Chapter 21.) discusses the "personal comfort doctrine":

> Some jurisdictions have held that seeking personal comfort is outside the course of employment if the method chosen is unusual or unreasonable . . . [M]any jurisdictions seem to divide employment-related activities into two groups: actual performance of the direct duties of the job, and incidental activities such as seeking personal comfort, going and coming . . . the former are always within the course of employment . . . even, in fact, if the method is a prohibited one. These acts . . . are the very essence of the work to be accomplished.

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On the other hand, the incidental acts have no such necessary status as a part of the employment. They have to fight for their position . . . to prove themselves incidents of the work. As a result, they can be removed from the protected orbit in ways which would not affect acts in direct performance of work duties at all . . . [F]or example, the use of a prohibited method of seeking personal comfort . . . is fatal to coverage of such acts.

Some courts, then, have refused to recognize as part of the employment not only personal comfort activities which are prohibited but also those which are so remote from customary or reasonable practice that they cannot be said to be incidents of the employment.

This rule is most likely to be followed when the abnormal means are chosen in spite of the fact that satisfactory normal facilities are available. . .In [Relay v. Continental Am. Life Ins. Co., 22 N. J. Misc. 347, 39 A.2d 84 (1944); affir'd, 133 N.J.L. 143, 43 A. 2d 266 (1945)] an employee who felt ill ran down a long hall and vomited out of a twentieth-story window, although there was a toilet much closer . . . His fall from the window was held noncompensable, since the window was an inappropriate, unusual and dangerous place for the particular purpose, while a suitable, usual and safe place had been made available.

[T]here is a difference between [an] unreasonable method of seeking comfort and negligence. Negligence is seldom a defense in itself, whether the activity is a primary work task or an incidental personal comfort activity . . . the purpose of the personal comfort doctrine is to allow employees to attend to their biological personal requirements. People need to take breaks, go the bathroom. . . . Allowing an employee . . . to walk outside to clear his. . . head, is good for the employer's business. Injuries sustained during those activities should be compensable.

[I]n many of the unsuccessful personal comfort cases, the courts have spoken of the dangerousness of the method chosen. However, the danger alone should not disqualify the activity, if it is usual, normal or reasonable in the circumstances. **But if the method chosen is both abnormal and dangerous, then it is possible for the court to say that the danger so encountered was not an incident of the employment simply because the activity itself was not.** [For example], in Widell Co. v. Industrial Comm'n, 180 Wis. 179, 192 N.W. 449 (1923), it was shown to be common for employees to jump on and off moving trucks while going to get a drink of water, [so] this admittedly dangerous method of satisfying thirst was held compensable.

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> [**Implied Prohibition Test**] Since the test of "reasonableness" is at best a rubbery yardstick, there may be practical advantages in the substitution of the . . . more manageable concept of **implied prohibition . . . the rule . . . would then be that a personal comfort activity, although normally covered, is outside the course of employment if the method is impliedly prohibited. . . The first question . . . would be whether the employer would have prohibited the method if he had addressed himself to the subject . . . the provision of normal facilities would support an implication . . . that use of other and dangerous expedients was prohibited.**
>
> **The second question would be whether the employee knew or should have know of the implied prohibition. This question brings clearly into focus the factors of custom and employer acquiescence.** . . [An employer certainly] would have forbidden all acts of carelessness if it could. (Emphasis added.)

Whether there was a written policy forbidding Respondent's putting his feet up on the counter should not be decisive. Respondent argued that because there was no written rule prohibiting the placement of his feet on the work counter, that such an act did not deviate from the normal practices of a surveillance agent, and therefore, his accident did arise out of and in the course of his employment. There is no workers' compensation statute or regulation which requires that the employer have written instructions that all possible dangerous acts are prohibited; this would be an impossible task. Therefore, the Appeals Officer's Decision's Finding of Fact No. 3 which found that Appellant Employer had nothing in writing prohibiting this should not have been considered a deciding factor.

In the instant matter, as supported by numerous witness statements, Respondent's action, of putting his feet up on the desk and leaning back in his chair, was impliedly prohibited by Appellant Employer. (Appendix pp. 172-180.) Appellants are able to satisfy the requirements of the implied prohibition test: (1) The Appellant Employer would have prohibited Respondent's action if it had been addressed. Surveillance personnel did not lean back in their chairs and put their feet up because they needed to be alert at all times, and this was a dangerous, unprofessional action. Because it was not done, Appellant Employer had no reason to address it earlier, so the second part of the test is satisfied.

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Gregg Brewer, Director or Surveillance's January 27, 2009 memorandum explained that it was **not common practice for the surveillance staff to put their feet on the desk while sitting at work**. (Appendix p. 181.) And surveillance inspector Sheldon Kanner testified that, **if one leaned back in a chair and put his feet up, the monitors could not be completely seen.** (Appendix p. 61, lines 8-13.) Respondent certainly should have known that others did not prop their feet up dangerously as he did because he observed other employees' actions each day he worked. And, as a surveillance agent, he should have been particularly alert to others' actions. Indeed, getting so comfortable could easily make a surveillance agent fall asleep, thereby not performing the critical essence of his duties–surveillance. Therefore, propping one's feet at a surveillance job would certainly be an abnormal and dangerous action, and the injury which occurred as a result of it would not have been within the course and scope of employment. Further, Appellant Employer had provided him a newer chair; allowed investigators two (2) ten-minute breaks, and one (1) thirty-minute break and he could have even just stood up and stretched at work. (Appendix p. 63, lines 15-22.)

Respondent, through Counsel, discussed numerous cases in his District Court brief to support the theory that Nevada law does not require that the industrial injury be caused by defects or hazards or other abnormalities at the job site. That is not a disputed issue. The cases he cited, however, all dealt with the injured worker performing work within the course and scope of employment (Imperial Palace v. Clements, 102 Nev. 15, 714 P. 2d 564 (1986) where a maid strained her back while cleaning a tub; Barrick Gold Strike Mine v. Peterson, 116 Nev. 541, 2 P. 3d 850 (2000) in which the injured worker hurt his back while lifting a ladder; etc.). These situations are very different from the instant matter, as Respondent in this appeal was acting outside the course and scope of his employment.

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Given the lack of sufficient, objective evidence to support the Appeals Officer's Decision and Order, the Appeals Officer's Decision reversing the denial of the industrial insurance claim is not supported by substantial evidence and must be reversed. North Las Vegas v. Public Service Comm'n., 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982).

IV.

CONCLUSION

Accordingly, Appellants respectfully request that this Court reverse the District Court's Order Denying Petition for Judicial Review and find that this is not a compensable industrial insurance claim.

Dated this 21 day of January, 2011.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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CERTIFICATE OF COMPLIANCE

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

Dated this 21 day of January, 2011.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

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CANNON COCHRAN MANAGEMENT
SERVICES, INC.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I deposited in the United States mail, with postage fully prepaid thereon, or had hand-delivered, copies of the **APPELLANTS' OPENING BRIEF** in the above-captioned matter, addressed as follows:

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Dated this 21st day of January, 2011.

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP