

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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9 FITZGERALDS CASINO/HOTEL AND)
10 CANNON COCHRAN MANAGEMENT)
11 SERVICES, INC.)

12 Appellants,)

S.C. Case No. 55818

13 vs.)

14 GARY MOGG,)

15 Respondent.)

16 APPEAL: FROM MARCH 22, 2010 DENIAL OF PETITION
17 FOR JUDICIAL REVIEW BY EIGHTH JUDICIAL DISTRICT COURT

18 RESPONDENT'S ANSWERING BRIEF

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Appellants,)
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I.

STATEMENT OF ISSUES

(1) IS THE APPEALS OFFICER'S JUNE 15, 2009 DECISION AND ORDER SUPPORTED BY SUBSTANTIAL EVIDENCE AND DEVOID OF LEGAL ERROR?

II.

STATEMENT OF CASE

This is Appellants' Self-Insured Fitzgerald Casino/Hotel and Third-Party Administrator Cannon Cochran Management Services, Inc. (hereinafter Employer) appeal of the March 22, 2010 Decision and Order Denying Petition for Judicial Review. Appen. pp. 025-026. The Respondent injured worker, Gary Mogg (hereinafter Claimant), timely appealed a February 26, 2008 notice of claim denial (Appen. p. 239) regarding his January 27, 2008 job accident claim.

After a hearing on April 17, 2008, Hearing Officer Garcia entered her June 24, 2008 Decision and Order affirming denial of benefits. App. pp. 270-271.

The Claimant timely appealed to the higher appeals office level and the Nevada Attorney for Injured Workers (NAIW) was appointed to represent him on July 21, 2008. Appen. p. 267. NAIW is a State agency, being in effect public defenders appointed to assist injured workers in hearings before the State Department of Administration, Hearings Division. NAIW receives no financial remuneration from the appointed Claimants or from their benefits.

The Hearings and Appeals Offices are part of the State of Nevada, Department of Administration, and comprise the two levels of administrative appeal that an injured worker may

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1 utilize when appealing from an adverse determination by an
2 industrial insurer. The evidentiary hearings held on May 5 and
3 May 14, 2009 were governed by NRS Chapters 616A-D and 233B
4 (Administrative Procedure Act). Contrary to the prior hearing
5 before the hearing officer, this is a formal proceeding, in which
6 witnesses are sworn and a written record is made of the
7 proceeding. It is a de novo proceeding. Liggett v. State Indus.
8 Ins. Sys., 99 Nev. 262, 661 P.2d 882 (1983). The decision of the
9 appeals officer is the final and binding administrative
10 determination of a claim for compensation under Chapter 616, and
11 the whole record consists of all evidence taken at the hearing
12 before the appeals officer and any findings of fact and
13 conclusions of law based thereon. NRS 616C.340(6).

14 After duly considering witness testimony, arguments of
15 counsel, and the documentary evidence, in her June 15, 2009
16 Decision and Order (Appen. pp. 042-048) Appeals Officer
17 Schwartzer reversed the Employer's denial of industrial insurance
18 benefits and remanded to the self-insured Employer for provision
19 of appropriate benefits under NRS Chapter 616 (Nevada Industrial
20 Insurance Act).

21 The Employer timely filed a Petition for Judicial
22 Review with the district court on July 1, 2009. Appen. pp. 039-
23 041. NAIW filed a timely Notice of Intent to Participate
24 pursuant to NRS 233B.133(3) on July 9, 2009. Appen. pp. 035-037.
25 After considering a Motion for a Stay of Benefits pending appeal,
26 Judge Adair entered an Order Granting Stay of Benefits on July
27 27, 2009 which was filed on July 30, 2009. Appen. pp. 033-034.
28 ///

1 Her March 22, 2010 Decision and Order was timely appealed to
2 this Court on April 8, 2010. Appen. pp. 012-015. Judge Adair
3 also entered a post Judicial Review Order Granting Stay on May 7,
4 2010. Appen. pp. 007-008. The Claimant has thus received no
5 benefits in his claim since his January 27, 2008 job accident.

6 III.

7 STATEMENT OF FACTS

8 At the time of his January 27, 2008 job accident, the
9 Claimant had been employed by the Employer in surveillance for
10 almost two years. Appen. p. 235. The Claimant testified at the
11 first hearing setting: May 5, 2009. Appen. pp. 101-103. The
12 Claimant described the basic duties of a surveillance inspector,
13 a.k.a. "eye in the sky". He described two station desks and
14 approximately 38 video monitors. On his accident date, co-worker
15 Sheldon Kanner was on Station 2 and he was at Station 1. Appen.
16 p. 111. He went to the cafeteria for takeout lunch and ate at
17 his desk. Appen. p. 112. He described his January 27, 2008 job
18 accident:

19 Q. Can you explain to us what happened?

20 A. It was about an hour and a half left in my shift,
21 and instead of taking a break, we had new chairs
22 that were just ordered by Greg Brewer, who was the
23 manager, and they were on casters. I went to
24 swivel and put my feet up to get something, and
25 the chair bucked and threw me down on the ground.
26 I tried to catch myself and couldn't.

27 Q. Which direction did you fall off the chair?

28 A. To the left.

Q. Okay. And what was the purpose of your putting
your feet up on the desk?

A. To get some circulation in my legs.

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Q. Okay. And this was how far into your shift already?

A. Six and a half hours.

Q. Okay. Now, if the chair hadn't of thrown you back, back and on the ground, if you had gotten to the point where you were able to rest your feet on - - first of all, what part of the desk were you going to rest your feet on?

A. The corner.

Appen. pp. 113-114.

* * *

Q. Had you done that before during your shift in terms of propping your feet up on the corner of your desk?

A. Yes, I had.

Q. Okay. On the prior occasions that you had done that did it obstruct your view of any of the monitors you were assigned to watch?

A. Absolutely not.

Q. Okay. So going back to the actual accident, describe physically what you were feeling and what was happening with your body.

A. After I hit the floor?

Q. Well, during and after.

A. Well, as I was raising my legs, left leg first, I went right leg and the chair seemed to buck. I fell to the left, landed on my left elbow and my left side.

Q. Okay.

A. I laid there for a couple minutes. Sheldon Canner said, "Are you okay?"

I said, "I don't know."

Q. So Sheldon - - okay. I'm sorry. I didn't mean to interrupt you. Okay.

///

1 A. And it took me a few minutes to get up holding my
2 side, my arm, because it landed on - - it's a tile
floor.

3 Q. Okay. And did you finish your shift?

4 A. Yes, I did.

5 Appen. pp. 114-115.

6 The Claimant testified that he was using a new type of
7 chair that day. The old chairs provided by the Employer were of
8 a "lounge-type" and the new one was an executive-type on casters.
9 Appen. p. 117. Two of the new chairs were provided. Appen. pp.
10 117-118. On cross-examination, the Claimant explained that the
11 surveillance team "is supposed to be secret" and that they
12 therefore were not to associate with co-workers in the EDR -
13 employee dining room. Appen. p. 124. He explained that at his
14 work station it was difficult to extend his legs to get more leg
15 circulation in a seated position.

16 Q. The chair you're sitting in, is it on wheels?

17 A. The one I'm sitting in now?

18 Q. No, the chair you were sitting in at the time.

19 A. Absolutely.

20 Q. Okay. So if I understand your testimony
21 correctly, you're sitting in a chair
22 looking at a bank of monitors; is that
23 correct?

24 A. Yes.

25 Q. Okay. Your intent was to stretch your
26 legs; correct?

27 A. Yes.

28 ///

1 Q. Okay. So you couldn't extend your legs
2 in front of you in this rolling chair?

3 A. Stretch my legs, get some blood
4 circulating in them, because when you're
5 in a seated position, the blood goes
6 down to your feet. They end up getting
7 numb. If you've ever worked in
8 surveillance you know what it's like;
9 dark, dirty, dingy.

10 Mr. Lavery: Okay. Your Honor, I'm going to
11 move to strike as
12 nonresponsive.

13 By Mr. Lavery:

14 Q. My question was, you couldn't extend
15 your legs in front of you to stretch
16 your legs, to extend you legs in front
17 of you?

18 A. Only a little bit because there was a
19 row of wooden tape holders behind there
20 and a case next to me that had the VCR
21 and the DVD player and all of this. So
22 you could only move so much.

23 Appen. pp. 125-126.

24 When the Claimant testified that he had seen the
25 surveillance tape of his job accident, the Employer's counsel was
26 asked to provide it to the appeals officer. Appen. p. 132.

27 The hearing reconvened on May 14, 2009. Appen. pp.
28 051-093. A DVD tape of the surveillance film was admitted as

1 Employer's "C". Appen. pp. 098-100. It is assumed that the
2 Employer has provided a copy to the Court. Appen. pp. 98-100.
3 If not, the Appendix should be supplemented with a copy.
4 Claimant's co-worker, Mr. Kanner, testified for the Employer.
5 The witness testified that the two security inspectors on shift
6 would be reviewing approximately 40 monitors. Appen. p. 60. He
7 witnessed Claimant's job accident.

8 Q. Did you actually see Mr. Mogg fall to
9 the floor?

10 A. Yes, I did.

11 Q. Okay. Can you briefly describe to the
12 Appeals Officer what you saw?

13 A. I saw Mr. Mogg starting to lean back on
14 his chair and just in a relaxing way.
15 He put up his one foot, and then when he
16 put up the second foot, I saw the chair
17 start to lean just to the left which was
18 towards me. But when he started like
19 this he went - it was like slow motion
20 going down, and he just tipped over onto
21 the floor.

22 Q. Okay. Did the chair break? Did it
23 collapse?

24 A. No.

25 Q. Did it fall apart?

26 A. No, sir.

27 Q. Okay. It was simply a matter of
28 somebody leaning back in a chair and

1 just like you did when you're in second
2 grade. You flip over backwards?

3 A. He went to the left.

4 Q. Okay.

5 A. He went to the left.

6 Q. Did the chair - is the chair similar to
7 the ones that we have in here that have
8 the wheels on it?

9 A. Yes.

10 Q. Okay. And this particular chair has a
11 star pattern on the bottom of it. It
12 looks like there's five wheels on it.

13 Is it set up essentially the same way?

14 A. No. It has four, four wheels.

15 Appen. pp. 061-062. Emphasis added.

16 Q. Okay. It was simply a matter of somebody leaning
17 back in a chair and just like you did when you're
in the second grade. You flip over backward?

18 A. He went to the left.

19 Q. Okay.

20 A. He went to the left.

21 Appen. pp. 061-062.

22 His co-worker corroborated Claimant's testimony that
23 the surveillance inspectors "cannot eat lunch with anybody."

24 Appen. p. 063. NAIW counsel noted that the tape showed Mr.

25 Kanner turning his chair and leaning back. Appen. p. 071.

26 During final argument, Employer's counsel stipulated that the
27 evidence did not show that the Claimant intended to "willfully"
28 injure himself. Appen. p. 079.

1 Prior to the evidentiary hearings, the Employer
2 responded to Claimant's Request for Admissions. Appen. pp. 94-
3 95. In response to the request to Admit or Deny:

4 That putting one's feet up on the desk while
5 seated in a desk chair during a shift was not
6 specifically disallowed in any employment
7 hand/rule book.

8 the Employer responded

9 The request calls for and [sic] admission
10 which would be irrelevant. Without waiving
11 said objection the request for admission is
12 admitted.

13 Appen. p. 45. Emphasis added.

14 In Claimant's C-1 Report Form (Appen. p. 225), in
15 response to the question "Did the accident happen in the normal
16 course of work?", the Employer checked "YES".

17 The Claimant was seen for his job injuries at the
18 Concentra Medical Center. An attending physician linked spinal
19 (neck, thoracic and lumbar) injuries to Claimant's job accident
20 in his C-4 Claim Form. Appen. p. 230. Nevada law requires that
21 the Employer's responding C-3 Form must be timely prepared and
22 submitted to the insurer. The Employer's C-3 (Appen. p. 235), in
23 response to the question "If validity of claim is doubted, state
24 reason", responded: "N/A".

25 IV.

26 ARGUMENT

27 1. The appeals officer's June 15, 2009 Decision and Order is
28 supported by substantial evidence and devoid of legal error.

The standard for reviewing administrative action is
abuse of discretion; thus review is limited to determining
whether there was substantial evidence in the record to support

1 the determination below. State Indus. Ins. Sys. v. Christensen,
2 106 Nev. 2, 787 P.2d 408 (1990). Pursuant to NRS 233B.135(3)
3 this Court shall not substitute its judgment for that of the
4 agency as to the weight of evidence on a question of fact. This
5 Court's role in reviewing an administrative decision is to
6 determine whether the agency's decision was arbitrary or
7 capricious and thus an abuse of discretion. Jourdan v. State
8 Indus. Ins. Sys., 109 Nev. 497, 853 P.2d 99 (1993).

9 Substantial evidence, in the context of administrative
10 findings and decisions is that quantity and quality of evidence
11 which a reasonable mind could accept as adequate to support a
12 conclusion. State, Employment Sec. Dep't v. Hilton Hotels, 102
13 Nev. 606, 729 P.2d 497 (1986). Determining substantial evidence
14 does not include weighing the evidence to determine if a burden
15 of proof was met, nor is the reviewing court permitted to pass on
16 credibility or to reverse an administrative decision because it
17 is against the great weight and clear preponderance of the
18 evidence, if there was any substantial evidence to sustain it.
19 (id. p. 608 Footnote No. 1)

20 An agency's conclusions of law which are closely
21 related to the agency's view of the facts are entitled to
22 deference and not to be disturbed if they are supported by
23 substantial evidence. State Indus. Ins. Sys. v. Khweiss, 108
24 Nev. 123, 825 P.2d 218 (1992). The appeals officer has full
25 power and authority to determine the facts presented at
26 administrative hearings and to construe and apply the applicable
27 laws. Nevada Indus. Comm'n. v. Reese, 93 Nev. 115, 120, 560 P.2d
28 1352 (1977). An agency charged with the duty of administering an

1 act is impliedly clothed with power to construe it. City of Reno
2 v. Reno Police Protective Ass'n, 98 Nev. 472, 653 P.2d 156
3 (1982). The appeals officer's findings of causation, extent of,
4 and permanency of work injuries are a question of fact, not to be
5 set aside unless against the manifest weight of evidence. State
6 Indus. Ins. Sys. v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987);
7 Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47, 675 P.2d 40
8 (1984). Questions of law are reviewed de novo. Bob Allyn
9 Masonry v. Murphy, 124 Nev. __, 183 P.3d 126 (2008).

10 **NRS 616C.150. Compensation prohibited unless**
11 **preponderance of evidence establishes that**
12 **injury arose out of and in course of**
13 **employment; rebuttable presumption if notice**
14 **of injury is filed after termination of**
15 **employment**

16 1. An injured employee or his dependents are
17 not entitled to receive compensation pursuant
18 to the provisions of chapters 616A to 616D,
19 inclusive, of NRS unless the employee or his
20 dependents establish by a preponderance of
21 the evidence that the employee's injury arose
22 out of and in the course of his employment.

23 2. For the purposes of chapters 616A to 616D,
24 inclusive, of NRS, if the employee files a
25 notice of an injury pursuant to NRS 616C.015
26 after his employment has been terminated for
27 any reason, there is a rebuttable presumption
28 that the injury did not arise out of and in
the course of his employment.

29 The Employer argues that: (1) "arising out of" is not
30 met under the increased risk test and (2) Claimant acted outside
31 scope of employment through his alleged reckless personal
32 actions.

33 **NRS 616A.030. "Accident" defined**

34 "Accident" means an unexpected or unforeseen
35 event happening suddenly and violently, with
36 or without human fault, and producing at the

1 time objective symptoms of an injury.

2 **NRS 616A.265. "Injury" and "personal injury"**
3 **defined**

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

17 The Employer contends that the "arising out of" element
18 of NRS 616C.150(1) cannot be met under the "increased-risk" test
19 described in this Court's recent Opinion in Rio All Suites Hotel
20 & Casino v. Phillips, 126 Nev. __, 240 P.3d 2 (2010). Claimant
21 submits that the facts in this accident claim do not constitute a
22 neutral risk situation and the test is therefore inapplicable.
23 Injuries resulting from employment-related risks are "all the
24 obvious kinds of injur[ies] that one thinks of at once as
25 industrial injur[ies]" and are generally compensable. 240 P.3d
26 at p. 5. Personal risks are those that are "so clearly personal
27 that, even if they take effect while the employee is on the job,
28 they could not possibly be attributed to the employment." Id.
Finally, neutral risks are those that are "of neither distinctly
employment nor distinctly personal character." 240 P.3d at p. 6.
In Phillips, there were no defects or hazards found on the
stairway that caused-contributed to her accidental fall. This
Court therefore stated that:

///

1 [h]ere, Phillips' injury occurred while
2 traversing a staircase that was free of
3 defects, and there is no evidence that a risk
4 personal to Phillips caused her fall. Thus,
5 we conclude that Phillips' risk of injury
6 falls within the neutral-risk category.

7 240 P.3d at p. 6.

8 This Court then described the increased-risk test and
9 found that its application to the injured worker in Phillips
10 supported provision of benefits. The "increased-risk" that is
11 greater to the employee than the general public may be
12 quantitative or qualitative. This Court found that:

13 [t]he act of descending a staircase at work,
14 in and of itself, does not present a greater
15 risk than that faced by the general public;
16 however, when an employee is required to use
17 those stairs more frequently than a member of
18 the general public, she faces an increased
19 risk of injury.

20 240 P.3d at p. 7.

21 Attached hereto in the Answering Brief Appendix is a
22 copy of an United States Department of Labor, Occupational Safety
23 and Health Administration publication entitled "Computer Work
24 Stations". The Court may take judicial notice pursuant to NRS
25 47.150 and NRS 52.135. Office chairs with four or fewer legs are
26 described as a "potential hazard" due to being prone to tipping.
27 The publication states a possible solution to said potential
28 hazard is that "chairs should have a strong, five-legged base."
29 Claimant was exposed to a potential work-place hazard by his
30 Employer when the new four-legged chairs were provided to the
31 surveillance two-man crews. Not only was the Claimant injured
32 due to use of a chair provided him by his Employer, the type of
33 chair provided was prone to tipping. On his accident date, as he

1 leaned to his left, this is exactly what occurred. This is not
2 an unexplained fall case as in Phillips nor was there a lack of a
3 known workplace hazard as in Phillips. The Claimant was
4 therefore injured due to an actual employment risk. Bob Allyn
5 Masonry v. Murphy, 124 Nev. ___, 183 P.3d 126 (2008).

6 Should the Court instead apply the increased risk rule,
7 Claimant submits that the accident facts also meet it. The
8 Claimant worked in a private, secured, work area. An area in the
9 Employer's premises from which the public was prohibited to
10 enter. His new chair was to be used only by him and his fellow
11 surveillance crew members, not by the general public. This
12 obviously constitutes "an increased risk" to him versus the
13 general public who would never be exposed to said risk, i.e. use
14 of the chair in the surveillance room. The claim accident facts
15 meet the "arose out of" rule of NRS 616C.150(1).

16 Analysis of the "course of employment" rule includes
17 review/application of the Personal Comfort Doctrine. This Rule
18 provides:

19 Employees who, within the time and space
20 limits of their employment, engage in acts
21 which minister to personal comfort do not
22 thereby leave the course of employment,
23 unless the extent of the departure is so
24 great that an intent to abandon the job
temporarily may be inferred, or unless, in
some jurisdictions, the method chosen is so
unusual and unreasonable that the conduct
cannot be considered an incident of the
employment.

25 Larson's Workers' Compensation Law, (2006 ed.) at Chapter 21.

26 Nevada has in fact applied this common law principle.
27 In Costly v. NIC, 53 Nev. 219, 296 Pac. 1011 (1931), the Claimant
28 was a miner who suffered accidental injury while erecting his

1 tent on the Employer's premises a day before his start of work.
2 Our Court held that his injuries were sustained while arising out
3 of and in the course of his employment. In Dixon v. SIIS, 111
4 Nev. 994, 899 P.2d 571 (1995), workers' compensation benefits for
5 a worker accidentally injured while exercising on a bicycle
6 provided by her Employer were affirmed by our Court. This Court
7 reversed a district court judge that had reversed the award of
8 benefits. The Claimant was an employee of EG&G, assigned to a
9 remote work site in New Mexico. During her lunch breaks, she
10 would ride a bicycle, provided by the Employer, for exercise.
11 See 111 Nev. at p. 997. Thus, we have authority in Nevada
12 showing two instances of workers attending to their personal
13 comfort (erecting a tent for shelter and getting physical
14 exercise during breaks) that were not deemed to be such
15 substantial deviations from work to be deemed to have temporarily
16 abandoned their jobs and therefore outside course and scope.

17 The workplace risk Claimant was exposed to was use of
18 the Employer's chair at his work station. He was not used to it
19 yet as it had just been provided to him. Now he had a work chair
20 on wheels. He worked a job that required him to be in his "eye-
21 in-the-sky" office for the vast majority of his eight-hour shift.
22 On his accident date, he had already been working for six and a
23 half hours. Under such work conditions, it was not unreasonable
24 or unusual for him to need to briefly elevate his legs to
25 increase his circulation. He had done so before. He did so at
26 his work station. A rested, alert employee is a benefit to the
27 Employer, especially given his specific work duties wherein he is
28 required to have maximum attention and observation abilities.

1 Injuries sustained while performing acts of
2 comfort and convenience are compensable under
3 the Personal Comfort Doctrine which
4 recognizes the human need for periodic rest
5 and refreshment. Compensation for such
6 injuries is justified on the rationale that
7 the employer does receive indirect benefits
8 in the form of better work from a happy and
9 rested worker, and that such a minor
10 deviation does not take the employee out of
11 his or her employment. Under this Doctrine,
12 to the extent that such actions are not in
13 conflict with specific instructions, and are
14 acts that may normally be expected under the
15 conditions of the employee's work, and if
16 they occur within reasonable limits of time,
17 that is during the hours of employment, and
18 place, on or about the employer's premises,
19 acts of personal convenience and comfort are
20 incidental to employment duties and in the
21 course of employment (citations omitted).

22 2 Modern Workers Compensation, §112:5.

23 The Employer cites the Court to §21.08(4)(d) of
24 Larson's which discusses the concept of implied prohibition as a
25 potential alternate test to the "reasonableness" test applied by
26 the majority of jurisdictions. The primary opinion referenced by
27 the Employer as an example of an "unreasonable" or abnormal
28 behavior situation is a 1944 Illinois opinion wherein an ill
employee ran down a long hall and vomited out of a 20th story
window, suffering injuries, rather than using a closer toilet.
The Claimant submits that his accident facts are light years
different, and entirely reasonable given his specific job
condition circumstances. At the administrative hearing the
Employer submitted various self-serving unsworn statements of co-
workers stating that they were never "authorized" to rest their
feet on the surveillance console/desk. They state that this
would be considered "unprofessional". The appeals officer,
within her lawful authority and discretion, reviewed this

1 information and compared it to the claim/accident facts presented
2 by Claimant. His evidence included the Employer's admission that
3 there was no written policy on this issue. Appen. p. 45. Also
4 in evidence was a Memorandum from Mr. Swartwood, Employer
5 Relations Manager/Risk Management, which states that "putting
6 one's feet up on the desk was not specifically disallowed in the
7 employee handbook/rulebook." Appen. p. 181. Compared to the
8 information provided by co-workers with a vested interest in
9 their continued employment was the videotape showing Claimant's
10 co-worker also leaning back in his chair, and Claimant's
11 testimony that he had rested his feet on the desk before. There
12 was no rebuttal evidence from the Employer indicating that his
13 alleged "reckless" behavior had been reported to management
14 previously as some rule violation. The surveillance employee
15 sitting to his left or right at the two-man surveillance station
16 would obviously have observed him. The facts of this claim show
17 that the Claimant's act of briefly resting his leg(s) in the
18 fashion that he did, did not cause any break in his surveillance
19 duties and that it did not block his view of the monitors. The
20 appeals officer weighed all of this evidence in determining that
21 the written statements were not persuasive (Appen. p. 45) and
22 that there was no "substantial" deviation from his employment
23 duties. id. The Claimant was specifically found to be a credible
24 and persuasive witness. Appen. p. 45; p. 44. The Employer's
25 after-the-fact generated statements present a weak case, at best,
26 for establishing an alleged "implied prohibition" that the
27 Claimant would know about, or should have known about. Professor
28 Larson's ruminations about a possible alternative test to the

1 "reasonableness" test may have some credibility in an accident
2 claim involving much more compelling facts than here. Basically
3 the Employer's unsworn statements simply state that to be a
4 "professional" surveillance employee you should know that you
5 can't briefly elevate your feel in order to get blood back into
6 your legs and feet. These accident facts do not establish an
7 alleged implied "clear policy" that the Claimant would have any
8 idea might exist. The evidence before the appeals officer met
9 the "course of" rule of NRS 616C.150(1).

10 The Employer also mentions that the medical reporting
11 from the industrial clinic references previous spinal treatment.
12 The attending physician linked injury diagnoses of cervical,
13 thoracic and lumbar strains to the job accident. Appen. p. 230.
14 There were no rebutting medical opinions. It did not meet its
15 statutory burden to dispute these injury diagnoses. If the
16 Employer is truly contending now that this is a separate ground
17 besides their NRS 616C.150 arguments to avoid paying benefits,
18 their claim denial letter failed to set out alleged pre-existing
19 spinal conditions as a specific claim denial ground. Appen. p.
20 239.

21 **NRS 616C.175 Employment-related aggravation**
22 **of preexisting condition which is not**
23 **employment related; aggravation of**
24 **employment-related injury by incident which**
25 **is not employment related**

26 1. The resulting condition of an employee
27 who:

28 (a) Has a preexisting condition from a
cause or origin that did not arise out of or
in the course of his current or past
employment; and

(b) Subsequently sustains an injury by
accident arising out of and in the course of
his employment which aggravates, precipitates

1 or accelerates his preexisting condition,
2 shall be deemed to be an injury by accident
3 that is compensable pursuant to the
4 provisions of chapters 616A to 616D,
5 inclusive, of NRS, unless the insurer can
6 prove by a preponderance of the evidence that
7 the subsequent injury is not a substantial
8 contributing cause of the resulting
9 condition.

10 2. The resulting condition of an employee
11 who:
12 (a) Sustains an injury by accident arising
13 out of and in the course of his employment;
14 and
15 (b) Subsequently aggravates, precipitates
16 or accelerates the injury in a manner that
17 does not arise out of and in the course of
18 his employment,

19 shall be deemed to be an injury by accident
20 that is compensable pursuant to the
21 provisions of chapters 616A to 616D,
22 inclusive, of NRS, unless the insurer can
23 prove by a preponderance of the evidence that
24 the injury described in paragraph (a) is not
25 a substantial contributing cause of the
26 resulting condition.

27 Emphasis added.

28 The Claimant received minimal medical attention at the
industrial clinic before notice of claim denial. Upon affirmance
of claim acceptance and remand for benefits provision, the issue
of all specific involved industrial injuries/aggravations should
be considered during claim administration and medical
investigation, with an appealable determination to Claimant on
denial of alleged nonindustrial conditions. He has not been able
to request payment for bills, and further medical
evaluations/treatment due to two stay Orders issued by the
district court below.

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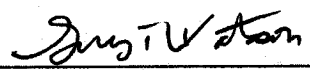
V.

CONCLUSION

The district court judge below properly affirmed provision of benefits. The Findings of Fact and Conclusions of Law of the appeals officer support a compensable claim pursuant to NRS 616C.150(1).

DATED this 21 day of March, 2011.

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APPENDIX



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Chairs

A chair that is well-designed and appropriately adjusted is an essential element of a safe and productive computer workstation. A good chair provides necessary support to the back, legs, buttocks, and arms, while reducing exposures to awkward postures, contact stress, and forceful exertions.

Increased adjustability ensures a better fit for the user, provides adequate support in a variety of sitting postures, and allows variability of sitting positions throughout the workday. This is particularly important if the chair has multiple users.

To ensure that the chair will provide adequate support, it is important that you try out different chairs before purchasing one.

The following parts of the chair are important elements to consider in creating a safe and productive workstation:

- [Backrest](#)
- [Seat](#)
- [Armrest](#)
- [Base](#)

Chair Quick Tips

- The backrest should conform to the natural curvature of your spine, and provide adequate lumbar support.
- The seat should be comfortable and allow your feet to rest flat on the floor or footrest.
- Armrests, if provided, should be soft, allow your shoulders to relax and your elbows to stay close to your body.
- The chair should have a five-leg base with casters that allow easy movement along the floor.

You should adjust your chair along with appropriately placing your monitor, keyboard, and desk.

[TOP](#)

Backrest

Potential Hazard

- Poor back support and inappropriate postures may result from inadequate backrest size, material, positioning, or use. Working in these postures may lead to back pain and fatigue. For example, a chair without a suitable or adjustable backrest will not provide adequate lumbar support or help maintain the natural S-shape curvature of the spine.

Possible Solutions

- If your current chair does not have a lumbar support, use a rolled up towel or a removable back support cushion to temporarily provide support and maintain the natural curve of the spine.
- Use a chair with a backrest that is easily adjustable and able to support the back in a variety of seated postures. A backrest should have the following:

- A lumbar support that is height adjustable so it can be appropriately placed to fit the lower back. The outward curve of the backrest should fit into the small of the back.
 - An adjustment that allows the user to recline at least 15 degrees from the vertical. The backrest should lock in place or be tension adjustable to provide adequate resistance to lower back movement.
 - A device enabling it to move forward and backward. This will allow shorter users to sit with their backs against the backrest without the front edge of the seat pan contacting their knees. Taller users will be able to sit with their backs against the backrest while still having their buttocks and thighs fully supported.
- Note:** some chair designs provide this adjustability by adjusting the position of the seat pan.

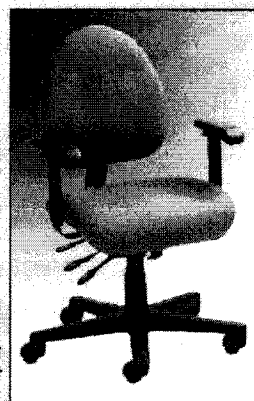


Figure 1.
Adjustable chair and backrest

Seat



Potential Hazard

- Using a chair with a seat that is too high may force you to work with your feet unsupported or encourage you to move forward in the chair to a point where your back is unsupported making it more difficult to maintain the S-shape of the spine (Figure 2). These awkward postures can lead to fatigue, restricted circulation, swelling, numbness, and pain.

Possible Solutions

- If the seat cannot be lowered (for example, it would make the keyboard or monitor too high), use a footrest to provide stable support for the feet (Figure 3).
- Provide a chair with a seat pan that is adjustable and large enough to provide support in a variety of seated postures. It is recommended that the seat should be
 - Height adjustable, especially when shared by a number of users. The chair height is appropriate when the entire sole of the foot can rest on the floor with the back of the knee slightly higher than the seat of the chair (Figure 4).
 - Padded and have a rounded, "waterfall" edge (Figure 5).
 - Wide enough to accommodate the majority of hip sizes. Chairs with oversize seat pans should be provided for larger users.

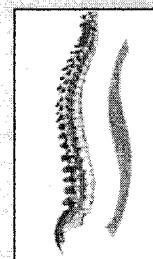


Figure 2.
Natural S-curve of the spine

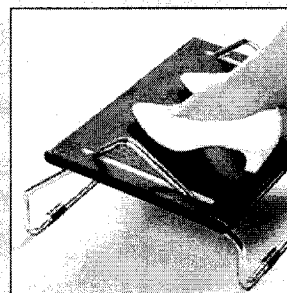


Figure 3.
Footrest

Potential Hazard

- An inappropriately sized seat pan can be uncomfortable, provide inadequate support to the legs, and restrict movement. One that is too short can place excess pressure on the buttocks of taller users, one that is too long can place excess pressure on the knee area of shorter users and minimize back support. One that is too small can restrict movement and provide inadequate support. Prolonged use can restrict blood flow to the legs and create irritation and pain.



Figure 4.
Knee slightly higher than the seat of the chair

Possible Solutions

- Seat pan should be "depth" adjustable to adequately support taller users while allowing shorter users to sit with their back fully supported. The seat pan should provide support for most of the thigh without contact between the back of the user's knee and the front edge of the seat pan.
- Provide a footrest, which may elevate the knee slightly to relieve pressure on the back of the leg.
- Provide a chair that is sized to fit small or large users. **Note:** this is especially important if the chair is to be shared by several users.

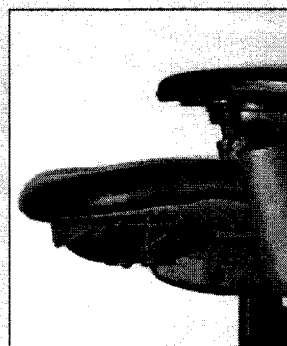


Figure 5.
Seat pan with a rounded, "waterfall" edge

Armrest

Note: Using an armrest is up to you and the system integrators. Consider factors such as the amount of time during the workday that the user performs computer work, whether the user is experiencing or has experienced a musculoskeletal disorder (MSD) or symptoms, and user preference.

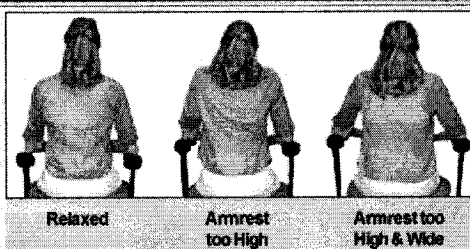


Figure 6.
Shoulders in various positions

Potential Hazards

- Armrests that are not adjustable, or those that have not been properly adjusted, may expose you to awkward postures or fail to provide adequate support. For example armrests that are:
 - **Too low** may cause you to lean over to the side to rest one forearm. This can result in uneven and awkward postures, fatiguing the neck, shoulders, and back.
 - **Too high** may cause you to maintain raised shoulders (Figure 6), which can result in muscle tension and fatigue in the neck and shoulders.
 - **Too wide** (Figure 6) cause you to reach with the elbow and bend forward for support. Reaching pulls the arm from the body and can result in muscle fatigue in the shoulders and neck.
 - **Too close** can restrict movement in and out of the chair.
 - **Too large** or inappropriately placed may interfere with the positioning of the chair. If the chair cannot be placed close enough to the keyboard, you may need to reach and lean forward in your chair. This can fatigue and strain the lower back, arm, and shoulder.
- Armrests that are made of hard materials or that have sharp corners can irritate the nerves and blood vessels located in the forearm. This irritation can create pain or tingling in the fingers, hand, and arm.

Possible Solutions

- If your armrests cannot be properly adjusted, or if they interfere with your workstation, remove them, or stop using them.
- Position adjustable armrests so they support your lower arm and allow your upper arm to remain close to the torso. Properly adjusted armrests will be
 - Wide enough to allow easy entrance and exit from the chair,
 - Close enough to provide support for your lower arms while keeping your upper arms close to the



Figure 7.

body,

Office chair with adjustable armrests

- Low enough so your shoulders are relaxed during use (Figure 6) (Adjust your armrests so they just make contact with your lower arms when positioned comfortably at your sides.), and
- High enough to provide support for your lower arms when positioned comfortably at your sides. You may be able to add padding to the top of your armrests if they are too low and not adjustable.
- Armrests should be large enough to support most of your lower arm but small enough so they do not interfere with chair positioning.
- Armrests should be made of a soft material and have rounded edges.

Base



Potential Hazard

- Chairs with four or fewer legs may provide inadequate support and are prone to tipping.
- Inappropriate choice of casters, or a chair without casters, can make positioning the chair in relation to the desk difficult. This increases reaching and bending to access computer components, which can lead to muscle strain, and fatigue.

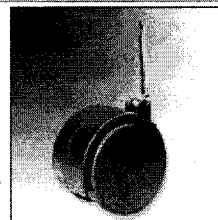


Figure 8.
Chair caster

Possible Solutions

- Chairs should have a strong, five-legged base.
- Ensure that chairs have casters that are appropriate for the type of flooring at the workstation.

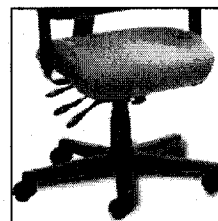


Figure 9.
Chair with five-leg base

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that service of the within and foregoing RESPONDENT'S ANSWERING BRIEF was made this day by depositing a true and correct copy thereof in the United States Mail with first class postage fully prepaid thereon, addressed to:

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GARY MOGG
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DATED: 3-22-11

SIGNED: V.A.

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding

RESPONDENT'S ANSWERING BRIEF

filed in District Court Case Number 55818

X Does not contain the Social Security Number of any person.

-OR-

 Contains the Social security Number of a person as required by:

A. A specific State or Federal law, to wit:

-or-

B. For the administration of a public program or for an application for a Federal or State grant.

Gary Watson
Signature

3-21-11
Date

GARY T. WATSON, ESO., deputy Nevada Attorney for Injured Workers
Print Name

Attorney for Respondent
Title