IN THE SUPREME COURT OF THE STATE OF NEVADA

ISRAEL BAIGUEN, an individual, Appellant, vs. HARRAH'S LAS VEGAS, LLC, a Nevada Domestic Limited-Liability Company, dba HARRAH'S CASINO HOTEL, LAS VEGAS; HARRAH'S LAS VEGAS, INC. dba HARRAH'S CASINO HOTEL, LAS VEGAS; CAESARS ENTERTAINMENT CORPORATION, a Nevada Foreign Corporation, dba HARRAH'S CASINO HOTEL, LAS VEGAS; DOES I through X, inclusive; and, ROE CORPORATIONS I though X, inclusive, Respondents.	Supreme Court No. 70204 Appeal from Clark County District Court Case No. A708544

RESPONDENT'S OPENING SUPPLEMENTAL BRIEF

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INTRODUCTION[1]

A detailed rendition of the facts is set forth in Respondent's Answering Brief. Appellant, Israel Baiguen, was an employee of Respondent, Harrah's. On October 19, 2012, while in the employee parking garage and then in the Housekeeping Department of Harrah's, Baiguen exhibited physical symptoms that were potentially consistent with the beginning of a stroke. (App. Vol. 1 00066:5-25; 00069:2 – 00070:20; 00071:16 – 00073:14).[2] Baiguen's co-workers, not recognizing the severity of what might have been occurring, arranged to take him home instead of seeking medical assistance. (App. Vol. 1 00096:1-17). Two days later, he was seen by his significant other, taken to the hospital, and diagnosed as having suffered a stroke. (App. Vol. 1 0004 ¶ V; 00054:13-17; 00055:21 – 00056:7).

Baiguen filed a negligence action in the District Court. It is not alleged that Harrah's negligence caused the stroke. Rather, Baiguen seeks to recover for various alleged negligent acts or omissions of Harrah's employees, as itemized in Paragraph VIII of the Complaint, such as alleged

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[1]Respondent's Answering Brief fulfills the requirements of NRAP 28(b). Certain items, such as a routing statement, will not be repeated in this Opening Supplemental Brief.

[2]"App. Vol. 1" refers to Appellant's Appendix, Vol. 1.

inadequate training, a lack of effective procedures, and a failure to call for medical assistance, which Baiguen claims potentially exacerbated the consequences of the stroke. (App. Vol. 1 0005 ¶ VIII).[3]

ISSUE PRESENTED FOR REVIEW[4]

Whether, when an employee suffers a medical emergency during work, an employer's failure to timely seek medical assistance for the employee is an act arising out of employment, such that the Nevada Industrial Insurance Act's exclusive remedy provision will preclude finding the employer liable for negligence?

SUMMARY OF ARGUMENT

The Nevada Industrial Insurance Act ("NIIA"), found in NRS Chapters 616A to 616D, provides "the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the employment." *Wood v. Safeway, Inc.,* 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (citation

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[3]*See also* Appellant's Opening Brief at 8-9 ("[t]he injury for which Mr. Baiguen seeks compensation in this case is the loss of chance from recovery of the underlying stroke resulting from the Defendants' negligence in *responding* to the obvious signs of stroke exhibited by Israel Baiguen on the afternoon of October 19, 2012") (emphasis added).

[4]This is the issue for which the Court requested supplemental briefing. *See Baiguen v. Harrah's Las Vegas, LLC*, Docket No. 70204 (Order Granting Petition for Review and Directing Supplemental Briefing, June 27, 2017).

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and internal quotation marks omitted). Applying the "increased-risk" test, the Court of Appeals incorrectly found that Baiguen's alleged injuries could not be considered as employment-related and arising from his employment. *See Baiguen v. Harrah's Las Vegas, LLC*, Docket No. 70204 (Order of Reversal and Remand, Feb. 27, 2017), at 4 (the "Order").[5]

For an injury to "arise out of employment," there must be a "link between the workplace conditions and how those conditions caused the injury." *Rio Suite Hotel & Casino v. Gorsky,* 113 Nev. 600, 604, 939 P.2d 1043, 1046 (1997). In particular, the injury must be "fairly traceable to the nature of employment or the workplace environment." *Id.* Baiguen's alleged injury is unquestionably traceable and linked to the Harrah's workplace because it is claimed to arise out of the alleged acts or omissions of Harrah's employees.

No tension exists between prior rulings of this Court that an employer may have a duty to aid an employee in peril[6] and a finding that worker's compensation provides the exclusive remedy for Baiguen's

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[5]The Court of Appeals correctly affirmed the District Court's finding that Baiguen's injury occurred "in the course of the employment." *See* Order at 3. Since the Court has not requested briefing on this issue, it will not be discussed herein.

[6]*See e.g., Lee v. GNLV Corp.,* 117 Nev. 291, 295, 22 P.3d 209, 212 (2001).

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alleged injuries. Baiguen was not left without a potential remedy; it is simply not in the form of a negligence action.

ARGUMENT

Baiguen's Alleged Injury Arose Out Of His Employment

The NIIA provides "the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the employment." *Wood,* 121 Nev. at 732, 121 P.3d at 1031 (citation and internal quotation marks omitted). "[D]etermining 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," with risks being categorized as "those that are solely employment related, those that are purely personal, and those that are neutral." *Rio All Suite Hotel & Casino v. Phillips,* 126 Nev. 346, 350-51, 240 P.3d 2, 5 (2010) (citations and internal quotation marks omitted). Employment-related risks arise out of one's employment. *Id.*

For an injury to "arise out of employment," there must be a "link between the workplace conditions and how those conditions caused the injury." *Gorsky,* 113 Nev. at 604, 939 P.2d at 1046. In particular, the injury must be "fairly traceable to the nature of employment or the workplace environment." *Id.* The Court of Appeals incorrectly found that

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"Baiguen's injuries . . . did not 'arise' from [his] employment." *See* Order at 4.

Baiguen does not contend that Harrah's negligence or something inherent to the workplace *caused* him to suffer his stroke. Rather, the alleged negligence arose *after* the stroke supposedly started from the claimed failure of Harrah's employees to properly respond to Baiguen's stroke symptoms by calling 911 or otherwise getting him to the hospital in time for treatment. This alleged negligence is clearly linked or traceable to the Harrah's workplace. It is tied to Harrah's alleged failure to properly train its employees on how to respond to stroke symptoms and/or the employees' alleged failure to execute on any training by calling 911 or otherwise obtaining medical assistance for Baiguen. If Baiguen had suffered the same stroke while working for a different employer, with different employees in a different work environment, the outcome might have been different.

Under Baiguen's own theory of the case, his alleged injuries are inextricably connected with the Harrah's workplace. This is demonstrated by *Dugan v. American Express Travel Related Services Company, Inc.*, 912 P.2d 1322 (Ariz. App. 1995). Dugan had a "heart event" at work. Her co-workers tried to call 911, but could not do so because the company "had

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blocked that number in favor of an in-house emergency number." *Id.* at 1325. "Due to the inability to reach [911] . . ., emergency medical assistance was delayed, and Mrs. Dugan suffered prolonged oxygen deprivation . . . resulting in severe, irreversible brain damage." *Id.* Dugan filed a negligence lawsuit.

Similarly, here, Baiguen perhaps exhibited stroke symptoms while in the workplace. He claims there was a delay in receiving medical treatment due to decisions made by Harrah's employees, resulting in severe, irreversible injuries, and he has brought a negligence action.

In *Dugan*, the lower court granted summary judgment to the employer, regarding "Mrs. Dugan's brain injury as an aggravation of a pre-existing physical condition, the damages from which are covered by worker's compensation." *Id.* at 1326. The appellate court affirmed, holding:

> [T]he parties agree that Mrs. Dugan's heart event is non-compensable because there was no employment-related injury, stress or exertion which substantially contributed to this episode. Nonetheless, even under the plaintiffs' theory, Mrs. Dugan's brain injury was not an uninterrupted consequence of her heart event, [but] . . . caused in whole or in part by an intervening incident – the delay in emergency medical attention caused by [the employer's] action in blocking [911] access . . .

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> [T]he delay in emergency medical attention caused by [the employer's] bar to [911] telephone access combined with Mrs. Dugan's non-compensable, pre-existing heart condition to cause, at least in part, her severe brain injury. This inability to reach emergency assistance through [911] constitutes an 'accident' for purposes of [Arizona's worker's compensation statute]."

Id. at 1328-29.

Here, the parties similarly agree that Baiguen's stroke itself is not covered by the NIIA. However, Baiguen's theory of the case is that the long-term effects of the stroke were exacerbated by a delay in receiving medical treatment (or at least the delay denied him the opportunity to receive t-PA, which might have allowed him to avoid or mitigate the long-term consequences of the stroke). Thus, as in *Dugan*, his claim is exclusively covered by the NIIA because Baiguen's present condition (according to him) resulted from a combination of his non-compensable, pre-existing condition and the alleged negligent acts or omissions of Harrah's employees.[7]

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[7]*Dugan* was recently followed in *Martinez v. Scottsdale Healthcare Corporation*, No. 1 CA-CV 15-0599, 2017 WL 344260 (Ariz. App. Jan. 24, 2017), in which summary judgment for the employer on an employee's negligence claim was affirmed based on worker's compensation exclusivity. In *Martinez,* the alleged negligence was that the employer's failure to "notify [the employee] of the results of [his] chest x-ray . . .

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Finding That Baiguen's Exclusive Remedy Falls Under Worker's Compensation Is Not Inconsistent With Any Obligation To Come To The Aid Of Employees In Peril

The Court of Appeals noted that "as both an employer and a landowner, Harrah's possesses an affirmative duty to aid those on its premises who are in peril." *See* Order at 5, n.2 (citation and internal quotation marks omitted). This Court has stated that "where a special relationship exists between the parties, such as with an innkeeper-guest, teacher-student or employer-employee, an affirmative duty to aid others in peril is imposed by law." *Lee,* 117 Nev. at 295, 22 P.3d at 212.

Regardless of whether Harrah's may have had a duty to aid Baiguen if he was in peril, Baiguen's remedy for any failure to discharge this duty is under the worker's compensation laws, and not in the form of an action for negligence.[8] "It is unquestionably the purpose of worker's

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deprive[d] him of the opportunity to discover and treat his cancer earlier." *Id.* at *3. Similarly, Baiguen contends Harrah's failure to get him treatment deprived him of the opportunity to have his stroke treated in a timely manner.

[8]There is no known Nevada Supreme Court case addressing whether an employer's alleged negligent failure to seek medical assistance for an employee experiencing a serious medical condition falls within the exclusivity provisions of the NIIA. *King v. Penrod Drilling Company* concerned an employee who, among other claims, alleged that the employer aggravated his injuries from a workplace fall by "fail[ing] to provide him with emergency medical care or transportation to a medical care facility." 652 F.Supp. 1331, 1332 (D. Nev. 1987). Predicting how this Court would resolve the issue, *King* granted summary judgment on a

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compensation laws to provide economic assistance to persons who suffer disability or death as a result of their employment." *Poremba v. S. Nev. Paving*, 132 Nev., Adv. Op. 24, 369 P.3d 357, 359 (2016) (citations and internal quotation marks omitted).

Any alleged negligence of Harrah's in this case arose out of Baiguen's employment. The Nevada Legislature has not exempted instances of an employer negligently failing to come to the aid of an employee in peril from the exclusivity provisions of the NIIA. There is no reason the negligence alleged in this case should be treated differently for worker's compensation exclusivity purposes than other forms of negligence (e.g., such as a fall caused by the employer negligently maintaining the condition of a floor). To hold otherwise would undermine the purpose of the NIIA[9] and result in a deluge of negligence claims against employers and a waste of judicial resources, both where the underlying injury is caused by the workplace and then supposedly exacerbated by the employer (e.g., an employee breaks his or her leg and

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claim "for negligent failure to provide medical treatment or transportation" based on the employee's remedy being exclusively under the NIIA. *Id.* at 1334-35.

[9]*See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("The NIIA . . . provides a general method for workers to be compensated for work-related injuries without the necessity of suing their employers and proving negligence.").

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claims the injury was aggravated because the employer delayed getting treatment), or for purely personal conditions that manifest while the employee is at work and are alleged to have not been properly responded to or treated (such as a seizure, hypertensive emergency or heart attack).

CONCLUSION

Based on the foregoing, Harrah's respectfully requests that this Court reverse the Order of the Court of Appeals and affirm the granting of summary judgment by the District Court, based on its holding that the NIIA provides the exclusive remedy for Baiguen in this case because his injuries arose out of and in the course of his employment.[10]

Respectfully submitted,

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[10]In Respondent's Answering Brief, Harrah's explained why summary judgment should be affirmed even if the risk faced by Baiguen in the workplace was "neutral" instead of employment-related. Since the Court did not request supplemental briefing on this issue, these arguments will not be repeated or supplemented.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that Respondent's Opening Supplemental Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

2. I further certify that Respondent's Opening Supplemental Brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read Respondent's Opening Supplemental 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 Respondent's Opening Supplemental Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

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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 26th day of July 2017.

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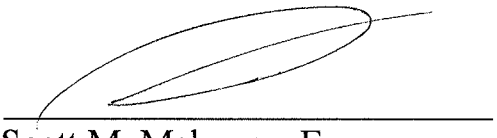
By: 

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Respondent Harrah's Opening Supplemental Brief was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada and by mailing a true and correct copy, addressed as follows:

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Dated: July 26, 2017

By: /s/ Sarah Griffin
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