IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

KAYCEAN BUMA, AS THE SURVIVING SPOUSE, AND DELANEY BUMA, AS THE SURVIVING CHILD OF JASON BUMA, (DECEASED)

Appellants,

vs.

PROVIDENCE CORP. DEVELOPMENT D/B/A MILLER HEIMAN, INC., AND GALLAGHER BASSETT SERVICES, INC.,

Respondents.
_____/

Docket No. 73632

APPELLANT'S OPENING BRIEF

Appeal from July 24, 2017 Order Denying Petition for Judicial Review
Regarding Denial of Workers Compensation Death Benefits,
Second Judicial District Court,
The Honorable Barry L. Breslow, Dept. 8, Case No. CV17-00423.

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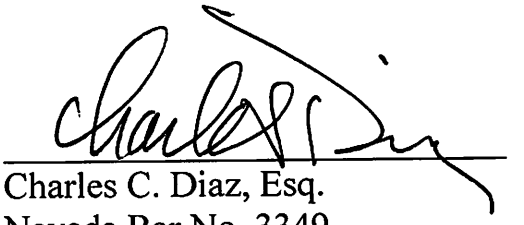
N.R.A.P.26.1 DISCLOSURE

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

Kacean Buma and Delaney Buma are individuals. No corporation exists that can be identified as a parent corporation or that owns 10% or more of any of the parties stock.

Charles C. Diaz, Esq., is a partner in the law firm of Diaz & Galt, LLC, and represents Kacean Buma and Delaney Buma, the appellants in this matter. Charles C. Diaz has appeared as attorney of record for appellants in all proceedings in this matter including at administrative hearings at the Department of Administration at the Hearing Office, Appeals Office, and at the Second Judicial District Court.

DATED this 4th day of January, 2018.



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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal from the district court's denial of the Appellants' Petition for Judicial Review pursuant to NRAP 3A(b)(1) and NRS 233B.150.

ROUTING STATEMENT

This case should be retained by the Nevada Supreme Court pursuant to NRAP 17(a)(14) as it is a matter, raising as its principle issue, a question of statewide public importance involving the application of the traveling employee doctrine. That doctrine is of importance to all Nevada employers whose employees are required to travel in the course and scope of their employment and to all Nevada employees who must travel in the course and scope of their employment. The issue has not been addressed by the Nevada Supreme Court.

STATEMENT OF THE ISSUES

Whether the district court erred in not finding that the appeals officer's decision of February 07, 2017 is contrary to the substantial weight of the evidence, is arbitrary and capricious, and errs as a matter of law, by not correctly applying the 'traveling employee doctrine' or the 'personal comfort doctrine'.

STATEMENT OF THE CASE

This matter comes before the Court as a contested worker's compensation claim. This appeal is based on the worker's compensation insurer's denial of death

benefits to the heirs of Jason Buma, who died in an ATV accident while he was on a business trip for his employer, Miller Heiman, Inc. (hereinafter Herman Miller). At the time of his death, Mr. Buma was employed as a vice president of sales by Miller Heiman, Inc.

Mr. Buma's statutory heirs are his wife, Kaycean Buma, and Delaney Buma, the couple's 15-year-old daughter. They seek death benefits pursuant to NRS 616C.505 as a result of the death of Mr. Buma in an accident that occurred within the course and scope of Mr. Buma's employment.

Gallagher Bassett is the third party administrator (insurer) handling the worker's compensation claim for compensation brought by Mr. Buma's heirs. The insurer denied Mr. Buma's heirs' request for workers compensation death benefits. The insurer's denial of benefits is based on NRS616B.612 and NRS 616C.150, generally stating, that Mr. Buma's accident and death were "outside the course and scope of his employment." [cite] The insurer also based its denial of benefits on NRS 617.440, alleging that no "disease" or condition existed that could be considered for coverage. AA 46.

The denial of benefits was appealed to the hearing officer and then to the appeals officer, which denied death benefits in its February 7, 2017 Decision and Order. AA 7-21.

Appellants filed a Petition for Judicial Review in the Second Judicial

District Court on February 28, 2017. The Court filed its Briefing Schedule on May 10, 2017. In accordance with the briefing schedule, Appellants filed an Opening Brief on June 08, 2017. Respondents filed an Answering Brief on July 03, 2017. The Appellant's Reply Brief was due on August 02, 2017. The district court denied Appellants the ability to file a Reply by prematurely filing its Order Denying Petition for Judicial Review on July 24, 2017. In the second sentence of its Order, the district court erroneously stated that the petition was fully briefed. AA 1.

This appeal follows.

STATEMENT OF FACTS

Stated simply, Miller Heiman is a provider of sales training to Fortune 500 companies and corporations to assist them in increasing productivity. Jason Buma was an employee of Miller Heiman. His job duties required him to travel extensively to meet with potential clients, give sales presentations, and oversee training teams.

On March 29, 2015, Mr. Buma travelled to the state of Texas to join his colleague Michael O'Callaghan, to prepare and make two presentations to potential clients and to attend an oil and gas convention on behalf of his employer. The presentations were scheduled to take place on March 30, 2015, in Houston, Texas, the morning after his arrival.

Michael O'Callaghan was an independent contractor for Miller Heiman. Mr. O'Callaghan and Mr. Buma had a professional relationship and regularly worked together on behalf of Miller Heiman to make presentations to potential new clients and to work on projects and proposals. Mr. Buma had arranged air travel to Texas to allow him to spend the night at Mr. O'Callaghan's ranch, which was located in the small town of Carmine just outside of Houston, Texas, in order to prepare for their presentations on behalf of Miller Heiman the morning following.

After traveling most of the day, Mr. Buma arrived at Mr. O'Callaghan's ranch at approximately 3:30 p.m. He and Mr. O'Callaghan had planned to go to dinner that evening and prepare for the next day. Before dinner, to unwind from the day's travel, the two went for a short ATV ride around the ranch property. During that ride, the ATV that Mr. Buma was riding overturned. The injuries suffered in that accident caused his death.

Mr. Buma traveled to Texas for the sole purpose of performing his job duties for Miller Heiman. He intended to stay at Mr. O'Callaghan's ranch for the sole purpose of preparing for the two presentations that were scheduled for the next day and to attend the oil and gas convention in Houston, Texas.

1. Kaycean Buma's testimony.

Kaycean Buma was the only witness who testified at the April 13, 2016

appeals hearing. However, the Appeals Officer admitted into evidence a transcript of a recorded statement of Mr. Michael O'Callaghan and a written investigative report, taken by a private investigator hired by the employer, with no objection by either party. Mr. O'Callaghan was Mr. Buma's co-worker, host, and the owner of the ranch where Mr. Buma was staying at the time of his death.

Mrs. Buma stated that she and Mr. Buma had been married for 18 years and their daughter Delaney was 15 years old. AA 199:16-25. Mr. Buma held a bachelors degree and had worked in the corporate world for most of his professional life in high level sales positions: as President of Corporate Vision; and as regional manager for H&R Block. He originally worked for Miller Heiman in 1998 and than went back to work for them in 2012. AA 200:12-24; AA 147.

Mrs. Buma explained that Miller Heiman "sells sales training to different companies to help them improve their productivity." She explained that Miller Heiman's clientele includes Fortune 500 companies, both national and international, such as, Dresser-Rand, Halliburton, Disney, Foster Farms, etc. AA 201:2-8

Mr. Buma was a vice-president of sales. His job duties required him to travel often and included meeting with potential new clients to make sales presentations. He was also responsible for overseeing the training teams sent to companies, which had purchased sales programs from Heiman Miller. And, was

responsible for overseeing and managing the activities of independent representatives who worked for Miller Heiman around the world. Mrs. Buma testified that 40%-50% of Mr. Buma's working time involved traveling. He had no clients in Nevada. AA 203:4,13. AA 203:5-10.

When asked if there were any bounds to Mr. Buma's work hours, Mrs. Buma stated he was on-call all of the time. She testified that when he was not traveling, Mr. Buma worked primarily from home. She testified that she observed him replying to emails at 6:00 am and would take calls at 5:00 pm and sometimes up till 9:00 or 10:00 at night and would take "weekend calls…vacation calls…calls while hiking." AA 205, 206.

Mrs. Buma stated that Mr. Buma always stayed in hotels when he traveled except when he attended the Oil and Gas Industry Conference in Houston, when he would stay with his co-worker, Michael O'Callaghan at his ranch in Carmine, Texas. AA 203:15-24. The company reimbursed all of Mr. Buma's travel expenses. AA 204:9-14.

On March 29, 2015 Mr. Buma flew to Houston the day before the Oil and Gas Industry Conference began. Mrs. Buma testified, "[T]hat he was flying in the day before to work with Mickey, Michael, on a presentation that they were giving the next morning early." AA 206:13-15. That day, Mrs. Buma dropped him off at the airport "a little before 5:00 am in the morning." AA 207:1

Mrs. Buma described what she knew of Mr. O'Callaghan's ranch.

> It's fairly big. You know, he's got a couple of houses on it, one where people can--like a guesthouse, which is where Jason was staying. ..
>
> You know, it's got some fishing and some hunting on it, that kind of thing.
>
> I think it's got a big pond that's always stocked with fish, and they can hunt on the property.

AA 208:11-20

Mrs. Buma testified that Mr. O'Callaghan and Mr. Buma "…..worked together a lot. I mean every other week." AA 210:17-22. She specifically remembered that her husband had stayed at Mr. O'Callaghan's the year before for the Oil and Gas Conference. AA 212:1-4

Mrs. Buma concluded her testimony by confirming that Mr. Buma had never stayed at Mr. O'Callaghan's ranch for pleasure. AA 212:8-10.

2. Michael O'Callaghan's recorded statements.

In the course of an investigation conducted by Miller Heiman, Mr. O'Callaghan was interviewed by an investigator at his ranch in Carmine, Texas. His recorded statement verified that he had worked with Mr. Buma for "approximately three years." AA 132:11

> ..It was quite common for him to come and stay here at the ranch, and then we would drive in and out for our meetings. It gave us more time to strategize and plan, things like that." and stated that in fact he had stayed at the ranch several times in the prior years in order to

> work with Mr. O'Callaghan before and during the Oil and Gas Industry Conference.

AA 133:8-17.

Mr. O'Callaghan explained his professional relationship with Mr. Buma as business partners. "We would partner up and chase opportunities, manage accounts, close deals…" AA 132:4-8.

Mr. O'Callaghan described his ranch as being 74-75 acres with a few other buildings that were bedrooms and storage along with a few acre pond. AA133:1-6.

Mr. O'Callaghan described the events of the late afternoon leading up to Mr. Buma's death. Mr. Buma arrived at the ranch about 3:30 pm and they "visited for a little while, and then we were going to dinner. He was going to take my wife and I out to dinner like he normally did when he came in. And he wanted to take a ride on the ATV's which we had also done previously, and so we decided to take a quick ride on the ATV's before going to dinner." AA 134:15-21.

Mr. O'Callaghan states they had been riding about 20 minutes and he did not witness the accident.

> We rode around the ranch there's some trails out here…and then he wanted to ride to the end of Hercules Road and back, and we were going to dinner. Hercules road is a dead end road that goes about a mile. Accident happened as he was going around the curve.

AA 140.

This road is described as a "caliche road...It's a rock or aggregate that they

put down." AA 136:7-13. It's a dead end county road and nobody else lives on this road. "Traffic's pretty rare." AA 142:2-4.

Although Mr. O'Callaghan was behind Mr. Buma he did not actually see the accident as he had gone around a curve in road. Mr. O'Callaghan found Mr. Buma lying in the middle of the gravel road where he died. Apparently the ATV had rolled because it was quite damaged and it was facing the wrong direction but still running. AA 135:13-24.

3. The Appeals Officer's Decision.

In its Decision and Order of February 07, 2017, denying benefits, the appeals officer made several factual and legal errors.

In paragraphs 5 and 17 of its Findings of Fact, the appeals officer found that, "Mr. O'Callaghan was not an employee of Miller Heiman, Inc., and was the owner of his own company. Mr. O'Callaghan was an independent consultant who would work with Miller Heiman, Inc." AA 8, 10. This finding is not based on any relevant evidence. It is misleading, as it fails to acknowledge that Mr. Buma and Mr. O'Callaghan were working together on presentations to two potential new clients on behalf of Miller Heiman, Inc. and intended to attend the oil and gas convention together the next day. The only reason Mr. Buma was staying at O'Callaghan's ranch, instead of a hotel, was to allow him and Mr. O'Callaghan time to prepare the next day's presentations. AA 132, AA 209.

The appeals officer's findings, that "there were no company events on March 29, 2015" [the date of the injury] and that Buma "was not required to meet with clients until March 30, 2015 at 8:30 and 9:30 a.m.", are also misleading. These findings are ludicrous in light of the totality of the circumstances. As previously noted, the uncontradicted testimony and evidence confirmed that Mr. Buma was required to be at the convention in Houston, Texas by 8:30 am on March 30. He was required to fly across the country to get to Texas. Although not at issue, Mr. Buma was required to arrive in Texas the day before his morning presentations. Further, he needed to work on these presentations with his co-worker, Mr. O'Callaghan, in advance. AA 132, AA 209.

The appeals officer found that the accident did not occur on the employer's property and that Buma's employer had "no control over where the Claimant stayed or when he arrived." AA 13, 15. Armed with these findings, the appeals officer erroneously implied that Mr. Buma was not staying at the ranch for the employer's benefit, and that he arrived long before the convention. Neither is true. Buma arrived at Mr. O'Callaghan's ranch the afternoon of the day before the convention and stayed at Mr. O'Callaghan's ranch for the sole purpose of preparing with his co-worker for presentations on his employer's behalf. AA 132, AA 209.

The appeals officer based her denial of benefits on the 'coming and going

rule'. But, this rule is insufficient to analyze the case of a traveling employee. AA 13, 14. The appeals officer also based her decision on the 'benefit to the employer rule', (AA 14-16), but does not acknowledge that the facts demonstrate that Mr. Buma was only in Texas and only at the ranch for the benefit of his employer. AA 132, AA 209. Alarmingly, the appeals officer does not acknowledge or address the 'traveling employee doctrine' even though it was heavily relied upon by Mr. Buma's heirs in their argument for benefits. Consistently, the appeals officer did not even acknowledge that an employee's personal activity could ever be within the course of employment. AA 16, 17.

The appeals officer emphasized that benefits should be denied because Buma "chose to stay at his friend's ranch home…rather than a hotel." AA 17. Despite the evidence to the contrary, the appeals officer does not acknowledge that it was not merely a friend's ranch, but a co-worker, and Mr. Buma and Mr. O'Callaghan were working together to prepare presentations the two had scheduled for the following morning, for the benefit of the employer. AA 132, AA 209.

The appeals officer also misunderstands and misapplies the 'increased risk' test, AA 19. Specifically, the appeals officer's decision never acknowledges that traveling employees are subjected to increased risk simply by the nature of their work and by having to be on the road and in unfamiliar conditions.

The District Court's Decision.

The fundamental errors in this case are highlighted by the district court's premature decision denying the Petition for Judicial Review without full briefing, while erroneously recounting in its Order that the petition was fully briefed. AA 1 The district court expressly declined to apply the 'traveling employee doctrine' and also found that the 'Personal Comfort Doctrine' did not "extend" to the instant case. AA 3-4.

Citing to *Evans v. Southwest Gas Corp*. 108 Nev. 1002, 1005-06, 842 P.2d 719 (1992) in its attempt to apply the narrowest standard possible, the district court erroneously pronounced: "[i]f an employee who is outside the scope of normal employment they must be performing an errand or confer a distinct benefit for the employer for it to fall within the course of that employee's work." AA Id at 3. The Court not only appears confused but makes an erroneous statement of the law.

The *Evans* Court actually stated that, "Generally, an employee who is traveling to or from work is outside the scope of his or her employment unless the employee is performing an errand for the employer or otherwise conferring a benefit upon the employer." *Id., citing Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980). This standard is obviously not applicable to an employee who travels as an integral part of his job as Mr. Buma did. See NRS 616B.612(3),

infra ("Travel for which an employee receives wages *shall* … be deemed in the course of employment.").

The district court decision contains similar errors of law and fact, when it denied the Petition on the grounds that (1) Buma "did not have any business activities at the ranch"; (2) "the accident did not occur on the Employer's property"; (3) "riding an ATV was not part of Buma's job duties"; and (4) "the ATV was not owned by the Employer." AA 4. The finding is factually erroneous because Buma did have business at the ranch, as it was undisputed that he was there to work with his co-worker in preparation for their presentations early the next morning. AA 132, AA 209. Moreover, the other three findings are erroneous as a matter of law, because these factors are not applicable to traveling employees.

The district court's decision is rife with errors of fact and law, which inherently render it arbitrary, capricious, and an abuse of discretion, requiring that it be overturned.

SUMMARY OF ARGUMENT

Jason Buma traveled to Houston, Texas, on March 29, 2015, for the business purposes of making two presentations to new clients with his colleague Michael O'Callaghan and attending an oil and gas convention. Both of these activities were on behalf of his employer, Miller Heiman, Inc. Mr. Buma was staying at Mr. O'Callaghan's ranch for the sole reason that the two could prepare

for their presentations the next day at the convention. Shortly after arriving at Mr. O'Callaghan's ranch, Mr. Buma and Mr. O'Callaghan decided to take an ATV ride around the area of the ranch before they went to dinner. Mr. Buma had an accident while riding the ATV that caused his death.

Mr. Buma was not an hourly employee, but a vice-president of the company. He was in Houston to solicit new clients and to attend a conference. These activities were part of his job duties. Pursuant to NRS 616B.612(3), it is mandatory that his death while in Texas is compensable, unless there is some legal exception that applies. The appeals officer's approach to this case was exactly the opposite of what the statute requires. Indeed, in its legal analysis, common sense would dictate that the district court and the appeals officer should have started with the application of the statute, and yet neither one mentioned NRS 616B.612(3). This omission is an error as a matter of law.

As for whether the factual aspects of the appeals officer's decision are supported by substantial evidence, one need look no further than the appeals officer's unreasonable attempt to minimize the fact that Mr. Buma was in Texas, and at Mr. O'Callaghan's ranch solely to prepare for and make presentations to two potential new clients and attend an oil and gas convention in behalf of his employer. The appeals officer's painful reasoning that Mr. Buma "was not

required to meet with clients until March 30, 2015 at 8:30 a.m…." underscores the dubious nature of the reasoning undertaken by the appeals officer.

Mr. Buma's death is compensable under the workers compensation statutory scheme in Nevada because he was a traveling employee. The evidence established that Mr. Buma's sole purpose for being at Mr. O'Callaghan's ranch was for the benefit of his employer. The brief ATV ride with his co-worker was not an unreasonable personal departure or deviation, but was akin to a walk around hotel grounds while traveling on business.

The appeals officer's decision denying death benefits to Mr. Buma's heirs and the district court's decision affirming that decision were in error because neither decision is supported by substantial evidence, both decisions are clearly erroneous and contain errors of fact and law, and both are contrary to the law governing traveling employees. Accordingly, this Court must reverse the district court's decision.

LEGAL AUTHORITIES

THE DISTRICT COURT ERRED IN DENYING THE PETITION FOR JUDICIAL REVIEW BECAUSE THE APPEALS OFFICER'S DECISION IS CONTRARY TO THE SUBSTANTIAL WEIGHT OF THE EVIDENCE, IS ARBITRARY AND CAPRICIOUS, AND ERRS AS A MATTER OF LAW.

Supporting Facts.

Jason Buma traveled to Houston, Texas, on March 29, 2015, for the sole

business purpose of furthering his employer's business by making two presentations to potential new clients and attending an oil and gas convention on the following day. AA 132, AA 209. Mr. Buma was staying at his co-worker Michael O'Callaghan's ranch for the sole reason that the two could prepare for their presentations at the convention. AA 132, AA 209. While at the ranch, Mr. Buma died in an ATV accident while he and his co-worker were taking a break before dinner. AA 134.

Mr. Buma's death is compensable under the workers compensation statutory scheme in Nevada because he was a traveling employee and the accident occurred in the course and scope of his employment. NRS 616C.150, NRS 616B.612. The evidence established that the only reason Mr. Buma's was staying at Mr. O'Callaghan's ranch was for the benefit of his employer. The brief ATV ride with his co-worker was not an unreasonable personal departure or deviation under the circumstances, but was akin to a walk around hotel grounds while traveling on business.

As set forth in the Statement of Facts, the appeals officer made numerous mistakes of law and fact. She refused to apply the 'traveling employee doctrine' and NRS 616B.612(3). She misconstrued numerous facts not relevant to the issues presented. For instance, the appeals officer relied upon the irrelevant fact that, "There was no company event held at the location of the accident in question on

March 29, 2015… His next scheduled work activities were the next day at 8:30 a.m. and 9:30 a.m." AA 17.

This factual finding ignores the very nature of the 'traveling employee doctrine', the nature of Mr. Buma's work, the fact that he was on the ranch to prepare with his co-worker for those morning presentations, and the reality that Mr. Buma had to travel halfway across the country from Reno, Nevada to Houston, Texas for the convention. Common sense dictates that the latest he could have responsibly arrived at Mr. O'Callaghan's ranch was the day before the convention, which was the day of the accident. Accordingly, the appeals officer's finding that Mr. Buma "was not required to meet with clients until March 30, 2015 at 8:30 a.m…." underscores the dubious nature of that decision.

The appeals officer misunderstood the facts and the law and erred as a matter of law in her application of the facts to the law. The district court followed suit, making the same or similar errors, as more fully set forth in the Statement of Facts.

Standard of Review

The standard of review is whether the agency's decision was clearly erroneous or an arbitrary abuse of discretion. NRS 233B.135(3)(e) and (f); *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). The court must reverse an agency decision that is "clearly erroneous in light of

reliable, probative, and substantial evidence on the whole record." *Day v. Washoe County Sch. Dist.*, 121 Nev. 387, 389, 116 P.3d 68, 69 (2005).

To be valid, the agency's decision must be supported by substantial evidence in the record. *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). Substantial evidence has been defined as that evidence "which a reasonable mind might accept as adequate to support a conclusion." *Schepcoff v. SIIS*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

The reviewing court has the authority to completely set aside a decision, which is arbitrary or capricious in light of the record. *Ranieri v. Catholic Community Services*, 111 Nev. 1057, 1061, 901 P.2d 158, 161(1995).

Questions of law are reviewed de novo. *See SIIS v. United Exposition Services Co.*, 109 Nev. 28, 20, 846 P.2d 294, 295(1993).

Legal Authorities.

1. The District Court and the Appeals Officer Erred as a Matter of Law By Not Applying a Controlling Statute.

"Travel for which an employee receives wages *shall* … be deemed in the course of employment." NRS 616B.612(3)(emphasis added). It is a well settled principal of statutory construction that the word "shall" makes the provision mandatory, not discretionary. *See State v. American Bankers Insurance Company*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990); *Sengbusch v. Fuller*, 103 Nev. 580, 582, 747 P.2d 240, 241 (1987).

Travel was an integral part of Jason Buma's job. He was in Texas and at Mr. O'Callaghan's ranch on March 29, 2015 for two reasons: to prepare with Mr. O'Callaghan to make separate presentations to two potential clients for his employer's services and to attend an oil and gas convention with Mr. O'Callaghan on behalf of his employer. Mr. Buma was not an hourly employee, but a vice-president of the company. The purpose of his traveling to Texas and his presence at Mr. O'Callaghan's ranch was for the sole benefit of his employer. AA 132, AA 209.

Pursuant to NRS 616B.612(3), it is mandatory that the ATV accident which, caused Mr. Buma's death while traveling to Houston, Texas is compensable as a worker's compensation claim, unless there is some legal exception that applies. The approach taken by the appeals officer and the district court was exactly the opposite of the mandate of the statute. It makes sense that the appeals officer and the district court's analysis should have started with the application of this statute. And yet, it is not mentioned in either decision. This is an error as a matter of law.

Instead of beginning her analysis with the application of NRS 616B.612(3), the appeals officer analyzed this case under multiple different legal theories, many of which are entirely inapplicable or were misapplied. These include: 'injury on employer's property'; the 'coming and going rule'; 'benefit to employer';

'preparation for employment'; 'reimbursement for employee travel', 'recreational activity'; and 'exercise'. AA 13-18. And yet, the appeals officer only devoted the equivalent of a footnote at the end of its decision to the 'traveling employee doctrine', which is the foundation for Mr. Buma's heir's claim for death benefits. AA 18.

The district court's analysis was similarly flawed. The district court refused to apply the 'traveling employee doctrine' at all. It denied the Petition for Judicial Review on the grounds: (1) Buma "did not have any business activities at the ranch"; (2) "the accident did not occur on the Employer's property"; (3) "riding an ATV was not part of Buma's job duties"; and (4) "the ATV was not owned by the Employer." AA 4. But a common sense approach to the facts demonstrates that Buma did have business at the ranch. It was undisputed that he was there to work with his co-worker in preparation for their presentations early the next morning. AA 132, AA 209. Moreover, the other three findings are erroneous because these factors are not applicable to the issue presented or to an analysis of traveling employees.

2. The Traveling Employee Doctrine.

Pursuant to NRS 616C.150(1), in order to establish a compensable worker's compensation claim, an employee has the burden to establish that an injury arose out of and in the course of employment. The injured employee must establish a

causal connection 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). The majority of jurisdictions in the country have acknowledged that, by necessity, the course of employment for an employee who travels for his job is broader in scope than it is for an employee who goes to a single location for work everyday.

This Court is asked to acknowledge and apply the 'traveling employee doctrine' in the instant case, and to find that the district court erred as a matter of law in expressly refusing to apply it.

The traveling employee exception is recognized by most jurisdictions in the country. Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. Traveling employees are employees for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties, as differentiated from employees who commute daily from home to a single workplace. See, Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law Desk Edition § 25 Traveling Employees.

The travel necessary for a ‘traveling employee’ is deemed a work-related risk. Traveling employees differ from ordinary commuters, and are exposed, by virtue of their employment, to risks greater than those encountered by the traveling public. See, *Kolson v. District of Columbia Dep't of Empl. Servs*., 699 A.2d 357, 1997 D.C. App. LEXIS 187 (D.C. 1997). Traveling employees are employees for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties, as differentiated from employees who commute daily from home to a single workplace. Traveling employees' travel is deemed a work-related risk. *Boyce v. Potter*, 642 A.2d 1342 (Me., 1994); *Brown v. Palmer Constr. Co.*, 295 A.2d 263, 264 (Me.1972)

The ‘traveling employee doctrine’, also known as the "continuous coverage" rule, is the majority view among jurisdictions throughout the United States. 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 25.00 (1996); *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572, 575 (Tex.Ct.App.1986).

Under the ‘traveling employee doctrine’, when a traveling employee slips in the street, or is struck by an automobile when traveling on foot or is involved in an accident while driving between the hotel and a restaurant, the injury has been held compensable. 2 Larson & Larson, *supra*, § 25.03[1], at 25-4 to 25-4.1. Also under the doctrine, the majority rule does not preclude personal choice as to certain

activities engaged in while traveling for work. *See, e.g.*, 2 Larson & Larson, *supra,* § 25.03[1], at 25-4.1 (stating that an accident is compensable even though occasioned by an extended trip to fulfill the employee's desire to eat at a particular restaurant).

To constitute a deviation which would exclude coverage, the activity must be "so remote from customary or reasonable practice that . . . [it] cannot be said to be [an] incident[] of the employment." 2 Larson & Larson, *supra*, § 21.08[1], at 21-43. "The danger alone should not disqualify the activity, if it is usual, normal or reasonable in the circumstances." *Id.* § 21.08[4][b], at 21-47.

A. Fact Patterns Compensable Under Traveling Employee Doctrine.

1. Death on a Boat Ride While Waiting On A Plane.

In *Schneider v. United Whelan Drug Stores*, 284 App. Div. 1072, 135 N.Y.S.2d 875 (1954), an employee who had completed his business in Florida, accepted a boat ride while he was waiting for his plane and was drowned. The accident was held to be compensable. The court in *Schneider* reasoned, “when an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of the injury was engaged in a reasonable activity.” *Id*, 135 N.Y.S.2d at 876.

2. Injury While Skiing.

In *CBS, Inc. v. Labor & Indus. Review Comm'n*, 219 Wis.2d 564, 579 N.W.2d 668 (1998), the claimant was a member of a television crew, providing coverage of the 1994 Winter Olympics. In his off time, the crew member went skiing and injured his knee. The court held that the injury was compensable under the traveling employee doctrine. The court reasoned that traveling employees are not required to remain in their hotel rooms when not working in order to avoid the risk of "deviating" from their employment. *Id, citing Hansen v. Industrial Comm'n*, 258 Wis. 623, 46 N.W.2d 754 (1951).

3. Death While Fishing or Boating After Work.

In *Dow v. Collins*, 22 A.D.2d 250, 254 N.Y.S.2d 554 (App.Div. 1964), Dow, a welder, was engaged in constructing a steel dock on Buck Island in Lake Placid. Unlike the other workers, who were staying in a house on the mainland, he had permission to stay on the island with his equipment. Dow's boat was found early one morning around 1 a.m., spinning in a circle off the South coast of the island. There was fishing gear in the boat. Dow was never found.

The employer argued that Dow was engaged in a purely personal endeavor at the time of his death. The Court disagreed. Citing to *Schneider, supra*, the Dow court held that an employee who must remain away from his home retains his or

her employment status while indulging in normal activities at the location of the work. *Id*.

4. Strolling About the Grounds While Off Duty.

In *Carroll v. Westport Sanitarium*, 131 Conn. 334, 39 A.2d 892 (1944), a servant was injured while walking around the premises while off duty, and the court held that the injury was compensable.

5. Fixing a Dash Light in a Personal Car While Waiting For Work to Start.

In *Ingraham v. Lane Construction Corporation*, 285 App.Div. 572, 139 N.Y.S.2d 347, aff'd, 309 N.Y. 899, 131 N.E.2d 577 (1955), the court awarded compensation to an employee who was fixing a dash light in his friend's car while waiting for mud to be cleared from a job site, when the screwdriver slipped and blinded him in one eye.

6. Sightseeing After Business Seminar Over.

In *Wisconsin Elec. Power Co. v. Labor and Indus. Review Comm'n*, 226 Wis.2d 778, 595 N.W.2d 23 (1999), the court found that injuries to an employee were compensable when he and his wife were killed while embarking from the hotel to do some sightseeing after his business seminar was over. The court reasoned that, "sightseeing while on a business trip in and of itself is not a deviation, but rather reasonable recreation incidental to living." *Id*.

/ / /

7. Jaywalking After Lunch.

In *Bergmann Precision, Inc. v. Industrial Comm'n*, 199 Ariz. 164 (2000), a traveling salesman was injured while jaywalking across the street after stopping for lunch. The court found that the break was not a personal deviation from the course of respondent's employment, and that the employee's failure to use the crosswalk was not so unreasonable that it amounted to a deviation from the course of employment.

The *Bergmann* court explained that, "while a fixed site worker's departure from work could defeat the "in the course of employment" requirement of compensability, the rule for overnight traveling workers is different. Such workers remain within the course of employment continuously during their travel, even when eating and sleeping, except when a 'distinct departure on a personal errand' has occurred." *Id, citing* 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 25.01, at 25-1 to 25-2 (2000).

Despite the insurer's argument that the injury should not be compensable because the claimant created the risks by his choice of restaurants and by crossing the road outside the crosswalk, the court unequivocally found that the jaywalking was not so unreasonable as to amount to a personal deviation from the course of employment. Id, citing 2 Larson & Larson, *supra*, § 21.08[1], at 21-43; § 21.08[4][b], at 21-47.

8. Side Trip to a Tavern.

In the case of *Delk v. Industrial Commission*, 74 Ariz. 378, 249 P.2d 943 (1952), a cattle inspector returning from an employment mission deviated from his regular route home, stopping at 'Pike's Place', which was a tavern and dance hall, and remained there two or three hours. After leaving the place of entertainment but before he got back to his regular route homeward, the accident occurred. This court held it a compensable accident. See also *Sherrill & LaFollette v. Herring*, 78 Ariz. 332, 336-37, 279 P.2d 907, 909-10 (1955), in which the court held that the injury was in the course of employment when the driver completed diversion to a tavern and returned to travel required by employment and then caused accident by running a stop sign.

9. Coffee Break.

In *Meredith v. Jefferson County Prop. Valuation Adm'r*, 19 S.W.3d 106, 2000 Ky. LEXIS 56 (Ky. 2000), the Court reversed an administrative law judge's decision and ruled that an accident which occurred while an employee had stopped for coffee while waiting for an appointment was compensable. The Court noted that there was no evidence to support the proposition that the employee was prohibited from taking a break for coffee during a time when he was waiting.

10. Death While Returning From Lunch Away from the Hotel.

In *Thornton v. Hartford Acci. & Indem. Co.*, 198 Ga. 786, 32 S.E.2d 816,

1945 Ga. LEXIS 434 (Ga. 1945), the decedent was returning to his hotel room after eating a meal at a cafe across the street from the hotel, when he fell and suffered a skull fracture. The only question was whether the accidental injury sustained by the decedent arose "out of and in the course of" his employment.

The court held that the fact that the decedent had left the hotel and gone across the street for a meal did not preclude the relationship of employer and employee, nor take him outside the scope of his employment. The court recognized that the scope of employment of a traveling salesman was wider than that of an ordinary employee.

11. Injury While Traversing Lava Rocks in Hawaii.

In *Insulated Panel Co. v. Indus. Comm'n*, 318 Ill. App. 3d 100, 743 N.E.2d 1038, 2001.(Ill. App. Ct. 2d Dist. 2001), the claimant fell and broke his leg while traversing lava rocks on a day-long sightseeing excursion on the island of Maui, Hawaii. He and two other employees, as well as the president of the company, were in Hawaii on business. While it was undisputed that claimant was a traveling employee when he was injured, the employer argued that claimant's injury did not arise out of and in the course of employment.

The court found that the activity that caused the injury was reasonable and foreseeable, and therefore compensable. The court reasoned that even if the recreational activities of a traveling employee fall outside the scope of

employment, any injuries incurred during those activities were compensable as long as the recreational activity and the employee's conduct were reasonable and foreseeable.

Other Examples.

See also Wiseman v. Industrial Accident Comm'n, 46 Cal.2d 570, 297 P.2d 649, 651 (1956) (traveling employee's death suffered in hotel fire held compensable even though employee in company of mistress); *Bedwell v. Brandywine Carpet Cleaners*, 684 A.2d 302, 306 (Del.Super.Ct.1996) (traveling employee's injuries incurred during lunch break held compensable); *Gray v. Eastern Airlines, Inc*., 475 So.2d 1288, 1290 (Fla.Dist.Ct.App.1985) (flight attendant's injuries incurred while playing basketball game during scheduled layover held compensable); *Blakeway v. Lefebure Corp.*, 393 So.2d 928, 930-31 (La.Ct.App.1981) (injury caused by employee's diving into shallow end of hotel swimming pool held compensable when employee was required by employer to stay in hotel for two-week seminar); *Appeal of Griffin*, 140 N.H. 650, 671 A.2d 541, 544 (1996) (reversing a finding that traveling employee's injury sustained in altercation with coworker in company car was not compensable); *Savin Corp. v. McBride*, 134 Or.App. 321, 894 P.2d 1261, 1263-64 (1995) (traveling employee's trip to bank while on business trip was not personal errand since it was necessitated by travel); *Roman v. Workmen's Compensation Appeal Bd*., 150

Pa.Cmwlth. 628, 616 A.2d 128, 131 (1992) (traveling construction worker's injury sustained during lunch break a few miles away from construction site held compensable).

B. Summary Regarding Traveling Employee Doctrine.

Here, the accident that caused Mr. Buma's death must be analyzed in the context of his status as a traveling employee. Riding an ATV around the ranch where he was staying to work with his colleague may or may not be definable as a recreational activity or just the reasonable mode of transportation to travel around the 75 acre ranch. Pursuant to *Insulated Panel,* Mr. Buma's accident should be deemed compensable under Nevada's worker's compensation laws if the act of riding the ATV with his co-worker/host, was reasonable and foreseeable under the circumstances. No evidence was presented that Mr. Buma was not allowed to take a short break with Mr. O'Callaghan to see the ranch, after traveling all day to Carmine, Texas for the sole purpose of work. It is submitted that Mr. Buma's riding an ATV with his co-worker, Mr. O'Callaghan on his large ranch is a "reasonable and foreseeable" activity under these circumstances.

3. The Personal Comfort Doctrine.

Under the 'personal comfort doctrine', a worker who engages in acts that minister to personal comfort does not thereby leave the course of employment unless the extent of the deviation is so substantial that an intent to abandon the job

temporarily may be inferred or the method chosen is so unusual and unreasonable that the act cannot be considered incidental to the course of employment. 2 LARSON & LARSON, *supra,* ch. 21. The 'personal comfort doctrine' applies to conduct such as eating, resting, drinking, going to the bathroom, smoking, and seeking fresh air, coolness, or warmth. 2 LARSON & LASON, *supra*, §§ 21.02-.07. Mr. Buma's act of taking a brief ride on his co-workers ATV, before working on their presentation for his employer, and after traveling all day on behalf of his employer, was a reasonable personal comfort break under the circumstances.

1. Putting Feet Up on the Desk When You Shouldn't Be.

In *Fitzgeralds Casino/Hotel v. Mogg*, No. 55818, 2011 Nev. Unpub. LEXIS 1780, at *5-6 (Nov. 18, 2011)[1], Gary Mogg was injured when he fell over in his chair as he attempted to put his feet on his desk while working. The Court held

[1] Up until January 1, 2016, SCR 123 prohibited the citation of an unpublished opinion of the Nevada Supreme Court. That rule has been repealed. Rule 36 of the Nevada Rules of Appellate Procedure has been amended to include a provision permitting citation of unpublished cases issued after January 1, 2016. The unpublished opinions cited to in this closing argument are done so merely to demonstrate the Nevada Supreme Court's thinking on the issues presented and are not cited as precedent.

that the injury was compensable and acknowledged that Nevada has adopted the common-law personal comfort doctrine, "which permits compensation under a workers' compensation scheme when an employee is injured while engaging in a reasonable activity designed for personal comfort…" *Id*, citing *Costley v. Nevada Ind. Ins. Com.*, 53 Nev. 219, 296 P. 1011 (1931) (holding that a miner's injuries sustained while erecting a tent on the employer's premises the day before commencing work arose out of and in the course and scope of employment).

The court cautioned that some activities undertaken for personal comfort are not compensable if they are "unreasonable or extraordinary deviations." *Id*, citing *Arp v. Parkdale Mills, Inc.*, 150 N.C. App. 266, 563 S.E.2d 62, 69-71 (N.C. Ct. App. 2002)(Tyson, J. dissenting), *citing* 2 Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law § 21.08, 21-43.

2. Eating Lunch In A Cafeteria, While Clocked Out Of Work.

In *Sodexo v. Chappell*, No. 58121, 2013 Nev. Unpub. LEXIS 299, at *1-6 (Feb. 28, 2013), a housekeeper at a hospital was injured when she tripped and fell over a chair in the hospital cafeteria during her lunch hour after she had clocked out. The Nevada Supreme Court again recognized that Nevada had adopted the common-law personal comfort doctrine -- which permits compensation for workers injured while engaging in reasonable activities designed for personal comfort, such as stretching, bathroom breaks, or meal breaks – and therefore

found that her injury was within the scope of her employment. *Id*, *citing Ball-Foster Glass Container Co. v. Giovanelli*, 177 P.3d 692, 700 (Wash. 2008)(and cited elsewhere in this Opening Brief); *also citing Dixon v. SIIS*, 111 Nev. 994, 997-98, 899 P.2d 571, 573-74 (1995) (affirming workers' compensation for employee injured on lunch break while exercising with a bicycle).

3. Injuries Walking Across Multilane Thoroughfare to a Park to Hear Music.

In *Ball-Foster Glass Container Co. v. Giovanelli***,** 163 Wn.2d 133, 177 P.3d 692 (2008)(relied upon by the Nevada Supreme Court in *Sodexo, supra*) the employee, Giovanelli, was working on a job as a firebrick mason eight hours from his home. The company paid for him to stay at a hotel nearby and paid for his travel to and from his home. On the Sunday he was injured, Giovanelli was not scheduled to work. He was leaving the hotel with a co-worker and crossing the street towards a park where they had seen a sign that read, “Music in the Park.” He was hit by a vehicle and suffered serious injuries, including multiple fractures and permanent blindness.

The court found that Giovanelli was a traveling employee and that his Sunday stroll to the park did not constitute a distinct personal errand. The court looked to the personal comfort doctrine to make its decision. *Bergmann Precision, Inc. v. Indus. Comm'n,* 199 Ariz. 164, 15 P.3d 276 (Ct.App.2000). "Compensation in such areas is predicated on the premise that these acts do not take the employee

out of the scope of employment because they are necessary to his health and comfort." *N. & L. Auto Parts Co. v. Doman,* 111 So.2d 270, 272 (Fla.Dist.Ct.App.1959).

The court in Giovenelli also explained, "The nontraveling employee may satisfy his personal needs without leaving the comfort of home. In contrast, the traveling employee must face the perils of the street in order to satisfy basic needs, including sleeping, eating, and seeking fresh air and exercise." *Id,* 177 P.3d at 701.

4. A Case of First Impression for Nevada.

It appears that as of this filing, the Nevada Supreme Court has not had the opportunity to address the application of NRS 616B.612(3) or the 'traveling employee doctrine'. Nevertheless, the Nevada Supreme Court has historically considered and relied upon Professor Larson's Treatise on Workers Compensation. See, *Currier v. State Indus. Ins. Sys.*, 114 Nev. 328, 956 P.2d 810, 810 (1998); *Riverboat Hotel Casino v. Harold's Club,* 113 Nev. 1025, 1026, 944 P.2d 819, 820 (1997); *Falline v. GNLV Corp*., 107 Nev. 1004, 823 P.2d 888, 889 (1991); *Breen v. Caesars Palace,* 102 Nev. 79, 80, 715 P.2d 1070, 1070 (1986); *Nev. Indus. Comm'n v. Hildebrand,* 100 Nev. 47, 49, 675 P.2d 401, 402 (1984). (The Nevada Supreme Court has cited to Larson's treatise on Worker's Compensation Law in at least twelve additional opinions.)

In the instant case, Mr. Buma was on a business trip that included preparing for and making presentations for his employer in Houston with his co-worker, Michael O'Callaghan on the day after he arrived at his ranch. The evidence established that Mr. Buma's sole purpose for being at Mr. O'Callaghan's ranch was for the benefit of his employer. Mr. Buma's job duties required him to drive into Houston to attend the Oil and Gas Conference with Mr. O'Callaghan for the benefit of his employer, every day for meetings and presentations.

Mr. Buma was most certainly under his employer's control during this period of time. Like all traveling employees, Mr. Buma was necessarily exposed to a greater risk of harm while he was traveling for the benefit of his employer. Mr. Buma was injured while at his co-worker's ranch when he took a break with his co-worker before going to dinner. Mr. Buma's act of taking a brief ride with his co-worker on an ATV, on the premises where he was staying solely for work-related reasons, and after traveling all day was not an unreasonable nor extraordinary personal deviation, and was reasonable under the circumstances.

CONCLUSION

The undisputed testimony and evidence demonstrates that all of Mr. Buma's clients were outside the State of Nevada where he actually lived and had an office. That on the day of his death Mr. Buma was fulfilling the duties of his job by traveling to Huston, Texas and thereafter to Carmine, Texas for the sole

purpose of work. By definition, Mr. Buma was a traveling employee. The Nevada statute on point mandates that Buma's activities were within the course of his employment: "Travel for which an employee receives wages *shall* … be deemed in the course of employment." NRS 616B.612(3).

Moreover, staying at his co-workers ranch in Carmine, Texas was reasonable and for the benefit of his employer. As Mr. O'Callaghan described, it essentially allowed them to plan, work and strategize for the next days of presentations and meetings with potential clients at the Oil and Gas Industry Conference. There is no evidence to suggest that Mr. Buma's employer was unaware that Mr. Buma stayed at Mr. O'Callaghan's ranch. On the contrary, the evidence revealed that he had stayed at Mr. O'Callaghan's ranch two times in the prior two years for these conferences. A further benefit to the company was that Mr. Buma incurred no lodging expenses when he stayed at Mr. O'Callaghan's ranch.

The aforementioned cases from the question as follows: As a traveling employee, was Mr. Buma still within the course and scope of his employment when he went for a quick ATV ride on Mr. O'Callaghan's ranch before dinner?

It is submitted that Mr. Buma was in the course and scope of his employment when his death occurred because, he was a traveling employee simply attending to a personal comfort by enjoying a short break and taking a quick ATV ride. His

risk of injury was neither increased or decreased by staying on the ranch because obviously staying in a big metropolis like Houston brings it's own set of special risks. Mr. Buma and Mr. O'Callaghan's riding ATV's around the 75-acre ranch was a reasonable diversion under the circumstances and most likely, the regular form of transportation to get from one area of the ranch to another.

Leisure activity that allows an employee to relax has certainly evolved over the years and is no longer strictly confined to walks in the park. Mr. Buma had been traveling all day by plane and automobile and after meeting with Mr. O'Callaghan for approximately one and one half hours asked to take a break and ride the ATV's.

This was not an unreasonable activity when viewed from the "totality of the circumstances" and the "personal comfort doctrine". Employees do not have to lock themselves in their rooms to remain within the course and scope of employment while traveling. See, *McDonald v. State Highway Dep't,* 127 Ga. App. 171, 176, 192 S.E.2d 919 (1972).

For all of the above stated reasons we ask the Court to adopt the traveling employee doctrine and find that Jason Buma was in the course and scope of his employment when he died. That coupled with NRS 616B.612(3) and the state of the law of the majority of jurisdictions around the country, that injuries and death

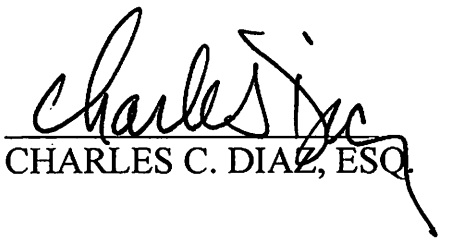
benefits are reasonably awarded in this case, and in all cases, involving employees who travel for the benefit of their employers.

AFFIRMATION

I affirm that this document does not contain the social security number of any person.

DATED this 4th day of January, 2018.

DIAZ & GALT, LLC.



CHARLES C. DIAZ, ESQ.

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this Opening 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 is proportionately spaced, has a typeface of 14 points or more and contains 8,623 words.

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

DATED this 4th day of January, 2018.

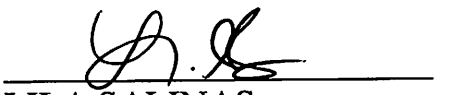
Charles C. Diaz, Esq.

CORRECTED CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I HEREBY CERTIFY I am an employee of Diaz & Galt, LLC and that on this date, I served a true and correct copy of the within **APPELLANT'S OPENING BRIEF** via U.S. Mail at Reno, Nevada, as indicated, to the following:

John Lavery, Esq.
Lee Davis, Esq.
Lewis, Brisbois, Bisgaard, & Smith, LLP.
2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, NV 89102

DATED this 4th day of January, 2018.



LILA SALINAS