**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| KACEANN BUMA, AS SURVIVING SPOUSE, AND DELANEY BUMA, AS SURVIVING CHILD OF JASON BUMA, (DECEASED),<br><br>Appellants,<br><br>v.<br><br>PROVIDENCE CORP. DEVELOPMENT D/B/A MILLER HEIMAN, INC., and GALLAGHER BASSETT SERVICES, INC.,<br><br>Respondent. | Case No.: 73623 |



# RESPONDENTS' ANSWERING BRIEF

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## NRAP 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:

1. The Respondents, Providence Corp. Development dba Miller Heiman, Inc., and Gallagher Bassett Services Inc., are publicly traded holding companies; Gallagher Bassett Services Inc., is the operating subsidiary which performs the third-party claims administrations services, and is wholly-owned (100%) by the parent company, Gallagher Bassett Services Inc.

2. The undersigned counsel of record for Providence Corp. Development dba Miller Heiman, Inc., and Gallagher Bassett Services Inc., is the only attorney who has appeared on its behalf in this matter, both before this court and in the District Court. Attorney Lee E. Davis, Esq., appeared for Providence Corp. Development dba Miller Heiman, Inc., and Gallagher Bassett Services Inc., in the administrative proceedings before the Appeals Officer.

These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Submitted this ____ day of June, 2017.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
LEE E. DAVIS, ESQ.
Attorneys for Respondents, Providence Corp. Development dba Miller Heiman, Inc., and Gallagher Bassett Services Inc.

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## I.

## STATEMENT OF THE ISSUES

1. What is the proper standard for review on this case?

2. Whether the February 7, 2017 Appeals Officer's Decision and Order is supported by substantial evidence in the Record?

3. Whether the Appeals Officer's Decision and Order properly found that the Claimant was not entitled to a compensable workers compensation claim.

4. Whether the District Court's Order Denying Petition for Judicial Review filed on July 24, 2017 and Notice of Entry of Order Filed on July 25, 2017 denying Mr. Buma's appeal was proper?

## II.

## STATEMENT OF THE CASE

This is an appeal which originated from an Appeals Officer's February 7, 2017 Decision and Order affirming the denial of Mr. Buma's claim for benefits.

The deceased Claimant, Jason Buma ("Claimant" or "Appellant"), met his unfortunate demise on March 29, 2015, as the result of an ATV accident at a friend's house where he was visiting prior to a company meeting in Houston, Texas, the next day. Mr. Buma's friend was not employed with the company that Mr. Buma worked for but would participate in some events that Mr. Buma performed for his Employer.

A claim denial determination was issued on June 25, 2015. Claimant's surviving spouse ("Mrs. Buma" or "Petitioner") filed an appeal of the June 25, 2015, claim denial on August 13, 2015.

The Hearing Officer issued a Decision and Order on October 23, 2015 affirming claim denial. Mrs. Buma appealed that decision to the Appeals Officer. The Appeals Officer issued a written decision on February 7, 2017 with the following listed on the first page of the decision:

> The above-captioned appeal came on for hearing before Appeals Officer LORNA L. WARD, ESQ. The surviving spouse ("Mrs. Buma") of Claimant, JASON BUMA ("Claimant"), was represented by CHARLES DIAZ, ESQ., of DIAZ & GALT. Third-Party Administrator, GALLAGHER BASSETT, on behalf of CNA CLAIMPLUS ("Administrator"), and the Employer, PROVIDENCE CORP. DEVELOPMENT, dba MILLER HEIMAN, INC. were represented by LEE E. DAVIS, ESQ., of LEWIS BRISBOIS BISGAARD & SMITH LLP.

The Appeals Officer's decision and order concluded:

> The Appeals Officer finds that none of the cases cited by the Claimant can be stretched to include the ATV ride as work related. The ATV ride neither occurred in the course of nor arose out of his employment. The Larson's "traveling employee" doctrine does not apply to the specific facts of this case. The ATV ride was clearly "a distinct departure on a personal errand." The risks associated with an ATV ride were not "associated with the necessity of eating, sleeping, and ministering to personal needs away from home." Nor was Claimant "subjected to hazards he would otherwise have the option of avoiding." Claimant was not under his employer's control while at his friend's ranch, nor was the ATV ride prior to dinner "a reasonable activity designed for personal comfort, such as stretching or using the restroom." The ATV ride was an unreasonable or extraordinary deviation. Even if it could be said that the ATV ride occurred in the course of his employment, it fails to meet the requirements outlined in Phillips.
>
> The Claimant relies on a misinterpretation of the Phillips case to bolster his argument that the ATV ride arose out of his employment. Phillips explains that the first step is to determine the type of risk faced by the employee. There are three types of risks: solely employment related, purely personal and those that are neutral.

> The ATV ride is clearly not an employment related risk and therefore either the ride is purely personal (and therefore not work related) or a neutral risk. If a neutral risk, the Nevada Supreme Court has opined that it must be evaluated under the "increased risk test."
>
> "Under the increased risk test, an employee may recover if she is exposed to a risk greater than that to which the general public is exposed." Phillips 126 Nev. Adv. Op. No. 34, page 10. Claimant was not exposed to greater risk that the general public during an ATV ride. The question is not whether an ATV ride is inherently dangerous, but rather was the ATV ride riskier for Claimant than the general public involved in the same activity.
>
> In the case before this Bar the Claimant cannot establish a connection between the Claimant's use of a recreational vehicle and his employment. There simply is no connection or benefit to the Employer from the Claimant's use of an ATV.

On or about March 2, 2017, Ms. Buma filed her Petition for Judicial Review of the Appeals Officer's February 7, 2017 Decision and Order. A motion was filed by the Respondents arguing that the Petition For Judicial Review should be dismissed based on Petitioner's violation of NRS 233B since Petitioner had committed a violation of that statute by failing to name all of the parties in the administrative proceeding . An opposition was filed by the Petitioner to that motion.

On July 24, 2017, the District Court denied Appellant's Petition for Judicial Review and affirmed the February 7, 2017 Decision and Order. The Appellant filed the subject appeal.

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## III.

## STATEMENT OF THE FACTS

**NOTE: THESE FACTS WERE TAKEN DIRECTLY FROM THE APPEALS OFFICER'S DECISION AND ORDER. (AA 7-21.)**

## FINDINGS OF FACT

1. The deceased Claimant met his unfortunate demise on March 29, 2015, as the result of an ATV accident at a co-worker's house where he was visiting prior to a company meeting in Houston, Texas, the next day. (Exhibit "1" at p. 1.)

2. The deceased Claimant was employed for Miller Heiman, Inc., as a Vice President of Sales. He did not have any ownership interest in this company or its parent company.

3. The Claimant planned to meet with his client at an Oil and Gas Convention in Houston Texas on March 30, 2015. The Claimant made his own travel arrangements and chose the location of his lodging. The Claimant would either be reimbursed by the Employer or the Employer had provided to the Claimant a corporate credit card to use.

4. The day before the Convention, the Claimant stayed with his friend, Michael O'Callaghan, at his home. The Claimant had stayed with him on a couple of previous occasions.

5. 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.

6. On March 29, 2015, Claimant died as the result of an ATV accident at Mr. O'Callaghan's property. "ATV" is defined as an "all terrain vehicle", also known as quad, quad bike, three-wheeler, four-wheeler or quadricycle. Miller Heiman, Inc., did not own or provide the ATV to the Claimant to use and had no connection to the ATV incident.

7. On May 11, 2015, legal counsel for Mrs. Buma and the Buma's daughter sent a letter of representation to the Third-Party Administrator seeking death benefits. The letter enclosed a copy of the Claimant's Death Certificate, Claimant and Mrs. Buma's Marriage Certificate, and a Texas Peace Officer's Crash Report, as well as emergency service reports. (Exhibit "1" at pp. 2-18.)

8. On June 8, 2015, in response to questions from the adjuster, the Employer noted that: (1) there were no company events on March 29, 2015, at the location where Claimant's accident occurred; (2) Claimant was not required to ride the ATV for work purposes; and (3)

Claimant was not required to meet with clients until March 30, 2015 at 8:30 a.m. and 9:30 a.m. (Exhibit "1" at pp. 19-21.)

9. A claim denial determination was issued on June 25, 2015. (Exhibit "1" at pp. 22-23.)

10. An Acknowledgement Letter was sent by the adjuster to the Claimant's estate which asked that any medical bills be sent to her attention. (Exhibit "1" at p. 24.)

11. Further investigation took place at the location of the unfortunate accident on June 30, 2015. The property was owned by Claimant's co-worker, Mr. O'Callaghan. Mr. O'Callaghan provided the ATV used by Claimant. Mr. O'Callaghan verified that Claimant was riding the ATV at Claimant's request for recreational purposes only, with no related work purpose. A recorded statement of Mr. O'Callaghan again corroborated the recreational, purely personal purpose of the ATV ride. (Exhibit "1" at pp. 25-46.)

12. Mrs. Buma filed an appeal of the June 25, 2015, claim denial on August 13, 2015. (Exhibit "1" at p. 47.)

13. The Hearing Officer issued a Decision and Order on October 23, 2015 affirming claim denial. (Exhibit "1" at pp. 48-50.)

14. Mrs. Buma appealed that decision to the Appeals Officer to generate the instant appeal.

15. This hearing followed.

16. Miller Heiman, Inc., is in the business of providing Sales Training. The Employer's website is titled, "The Sales Performance Company" and explains its comprehensive strategy for complex sales as:

> Strategic Selling® helps organizations develop comprehensive strategies to win sales opportunities. The program delivers a selling process and action plan to successfully sell solutions that require approval from multiple decision makers in the customer's organization.
>
> Strategic Selling® provides visibility into sales opportunities, documenting plans with the program's Blue Sheet. This involves first identifying all key players in the customer's organization, understanding each player's degree of influence and their reasons for buying, and uncovering essential information. Salespeople and organizations will be equipped to evaluate their competitive position, address the business and personal motives of each decision maker in the client organization, and differentiate their company by leveraging its unique strengths.

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17. At the time of the hearing Ms. Buma testified that Mr. Buma planned to meet with his client at an Oil and Gas Convention in Houston Texas on March 30, 2015. Mr. Buma made his own travel arraignments and chose the location of his lodging. Mr. Buma would either be reimbursed by the Employer or the Employer had provided to the Claimant a corporate credit card to use. Ms. Buma further testified that the day before the Convention her husband ("the Claimant") stayed with his friend, Mr. O'Callaghan at his home. Mr. Buma had stayed with him on a couple of times before. 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 that would work with MILLER HEIMAN, INC.

18. The parties presented their closing arguments first orally and then in writing. At the time of the hearing the Claimant argued that his death was covered as a compensable workers compensation claim pursuant to NRS616C.150. The Claimant argued that the accident which caused the Claimant's death was as a direct relationship to his employment as the Claimant was staying at his friends home so that the two could be preparing for the presentation that the Claimant was to participate for his Employer the next day. The Claimant argued that the act of driving the recreational vehicle was closely associated with the act of preparing for the presentation that the Claimant was required to attend for his work.

The Administrator argued that the Claimant was not covered under the workers' compensation act at the time of the Claimant's death since: (a) the Claimant died as a result of a recreational activity that was not authorized or required by his Employer; and (b) the Claimant's death occurred before the Claimant was presenting for the presentation for his Employer and that the Coming and Going Rule would preclude the Claimant's death as being covered under workers' compensation. The Administrator further argued that the very activity that caused the unfortunate death of Mr. Buma did not "arise out of" Mr. Buma's employment.

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The Appeals Officer found the following in her decision:

1. The Workers Compensation Act was written into law in Nevada to provide employees a means to receive medical care and benefits without the Employee being required to prove in a civil or tort action that established that the Employee had either intentionally or through the Employer's negligence caused the harm to their Employee.

However the Nevada Workers Compensation Act requires that the Employee ("Claimant") must establish that the injury was connected to his or her employment. The Nevada Supreme Court has held that the fact that the injury occurred on the employer's premise is not sufficient to make an injury a compensable claim.

The Court in Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605, 939 P.2d 1043 (1997) held that the "Nevada Industrial Insurance Act is not a mechanism which makes administrators absolutely liable for injuries suffered by employees who are on the job." The Court concluded by stating, "The requirements of 'arising out of and in the course of employment' make it clear that a claimant must establish more than being at work and suffering an injury in order to recover."

2. The Nevada Workers Compensation Act has placed the burden on the Claimant to establish this connection. It is the Claimant, not the Administrator, who has the burden of proving his case, and that is by a preponderance of all the evidence. State Indus. Ins. Sys. v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Comp. Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

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

NRS 616A.010 makes it clear that:

> A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

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The evidence supported the Administrator's claim denial determination.

3. NRS 616B.612(1) requires an employer to provide compensation in accordance with the terms of the Nevada Industrial Insurance Act[4] for any employee injuries "arising out of and in the course of the employment." NRS 616C.150(1) provides that an injured employee is not entitled to receive workers' compensation unless he establishes by a preponderance of the evidence that his injury arose out of and in the course of his employment.

Our Nevada Supreme Court has held that an Employer is not liable for all injuries that an employee may sustain while employed.

> We previously have explained that the language of the statute reveals that legislators did not intend the Nevada Industrial Insurance Act to make employers absolutely liable for any injury that might happen while an employee was working. Rather, the statute requires a claimant to "establish more than merely being at work and suffering an injury in order to recover.

MGM Mirage v Cotton, 121 Nev. Adv. Op 39 (2005).

**Injury on Employer's property**

If the accident occurs on the Employer's property the Nevada Supreme Court has held that an accident within a reasonable time period before and after the work time is covered as a work injury. MGM Mirage v Cotton 121 Nev. Adv. Op 39 (2005).

> In this appeal, we consider whether an employee, who suffers an injury connected to the work environment and on the employer's premises while arriving to or departing from work, is eligible for workers' compensation benefits. Generally, under the "going and coming" rule, employees are not entitled to workers' compensation for injuries sustained while traveling to or from work. We now adopt a premises-related exception to the " going and coming" rule. Thus, we hold that an employee who is injured on the employer's premises within a reasonable interval before or after work may be eligible for workers' compensation.

However in this case the Claimant was not injured on the Employer's premise or within a reasonable time period before or after the employee's employment . In this case the Claimant died while he was riding a recreational vehicle that was not owned, maintained by the Employer.

The first issue to be looked at is where is the location of the accident that caused the Claimant's death? The accident did not occur on the premise of the Employer. That is not in dispute by any of the parties. The Claimant's employment did require him to travel out of

state to attend a sales presentation the day after the Claimant's accident and death.

**Coming and Going Rule**

This issue is covered by case law under what is commonly known as the "Coming and Going Rule". This rule holds that workers' compensation was not intended to protect against perils coming to and/or leaving work. There are, however, exceptions to that rule.

If an injury occurs off the employer's premises, it is typically not considered compensable, subject to several exceptions. The underlying principle of these exceptions is that the "course of employment" should extend to any injury which occurred at a point where the employee was within range of dangers associated with his employment.

**Benefit to Employer**

One exception to the Coming and Going Rule is referred to as the Employer's Conveyance exception,. This general rule is that when the journey to or from work is made in the employer's conveyance, the journey is in the course of employment. Examples of this rule is usually seen where the Employee is using the Company's vehicle or that the Employer pays for the Claimant's use of his own vehicle.

The reason for this exception is that the Claimant is placed at risks of the employment, since the risk are under the employer's control. Courts look at factors such as (a) does the Claimant drive a company vehicle, (b) does the Employer pay for the Claimant's gas or mileage if the Claimant drives his own vehicle, (c) is the Claimant on call. The Court would look at the nature of the employment and the type of business as factors in determining if the Claimant was on call, or (d) does the Claimant's act of driving provide to the Employer a benefit.

In Evans v. Southwest Gas Corp., 108 Nev. 1002, 842 P.2d 719 (1992), the Supreme Court held an employee may still be within the course and scope of his employment when the travel to or from work confers a **distinct benefit** upon the employer or the employer exercised significant control over the employee, who was on call. The claimant going shopping and to dinner did not confer any benefits whatsoever upon the Employer.

In Evans v. Southwest Gas, the employee was provided a hand held radio and a radio in his van. 108 Nev. 1002 (1992). The employee was allowed to take the van home in order to respond to emergencies. He would be notified of those emergencies via the radio or the hand held radio. The employee was required to take the van home to respond to emergencies.

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Likewise, in Tighe v. Las Vegas Metropolitan Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994), the Court found that an undercover narcotics officer who was driving home and subject to his employer's control at the time of the accident, was entitled to worker's compensation benefits. The Tighe Court created the "law enforcement" exception.

The Tighe Court further explained the Nevada position on this issue. 110 Nev. 632 (1994). The Court held that exceptions to the going and coming rule include Evans and Tighe because the employee was "subject to his employer's control" and was driving the employer's vehicle. The key to both of these cases is control. Evans mentions the two forms of radios and Tighe cites to the employee's car radio and beeper. The Court even stated that since Tighe was driving a police vehicle equipped with a police radio, he was "on call". Id. at 636. Interestingly, the Court also held that "Tighe made no diversion for personal purposes, nor can we reweigh the evidence". Id.

In this case the Employer had no control over where the Claimant stayed at or when he arrived. The only requirement was that he was present at the Oil and Gas Convention in Houston Texas on March 30.

A more recent Nevada Supreme Court case that looked at this issue is Bob Allyn Masonry v Murphy 124 Nev. Adv. Op. No 27 (2008). In this case the Court looked at a Claimant that was injured while departing from the job site. The Court held that the Claimant's injuries should be covered as a workers compensation claim.

The Court held:

> On his day off, respondent David Murphy, at his employer's request, delivered equipment from his employer's construction yard to his employer's job site. After departing from the job site, he was injured in an automobile accident. In this opinion, we consider whether the injuries of an employee who, like Murphy, is involved in a vehicular accident while on the return journey of a special errand undertaken at the employer's request, arise out of and in the course of employment, entitling the employee to workers' compensation benefits. In so doing, we adopt the street-risk rule, which provides that, when an employee is required to drive as a component of employment, the risks and hazards associated with the roadways are incident to that employment, and thus injuries sustained due to risks associated with those roadways arise out of the employment. We also clarify that our workers' compensation jurisprudence includes an employee's return journey within the special errand exception to the going and coming rule, which provides that, even though going and coming from work generally is not in the course of employment, an employee is acting within the

> course of employment when completing a "special errand" for the employer. Thus, depending upon the facts, an employee's injuries sustained in a vehicular accident during the return journey of a special errand may arise out of and in the course of employment.

In the case before this Bar the Claimant was not performing a special errand for the Employer at the time of his death while operating an ATV. Additionally the accident was not on public roads but on his friend's property.

**Preparation for Employment**

The Claimant has argued that the Claimant was staying at his friends ranch to benefit the Claimant's employment because it allowed the Claimant an opportunity to prepare with his friend and fellow participant for the next day presentation which benefited the Claimant's employer's interest.

The Nevada Supreme Court looked at a case where an employee was injured while preparing the area for him to stay while he perform his job duties for his Employer the next day. Costley v NIC 53 Nev. 219, 296 Pac. 1011 (1931) The Nevada Supreme Court held that a miner hurt while setting up his tent on Employer's premise day before he was to start work was incidental to employment. The difference with this case and Costley is Buma's accident did not occur on the Employer's premise or the act of performing a recreational activity while riding the vehicle did not constitute preparing for the presentation for the next day. The act that caused the Claimant's death was operating a recreational vehicle and not conversing with his friend in the preparation of the next day event. It was purely a personal activity with no benefit to his Employer.

Moreover operating the ATV was not a requirement of the Claimant's employment nor did the Claimant's death arise out of a hazard arising from or incidental to the Claimant's employment. Finally the Claimant's Employer did not own, maintain or provide the recreational vehicle to the Claimant.

**Employer reimburses for Employee's travel**

The Claimant next argues that his travel is paid for by his Employer. Therefore the Claimant would be covered under the Nevada Workers Compensation Act during the entire time period that the Claimant traveled for his Employer and until he reaches back at his home.

However the Claimant chose to stay at his friend's ranch home and the Employer did not require the Claimant to stay over at the ranch home rather than a hotel. The Claimant's decision where to stay was the Claimant's own discretion and the Employer had no input.

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The Claimant cannot prove that the Employer had any control over the Claimant's actions or behavior while the Claimant stayed with his friend.

Therefore the Claimant's accident did not occur while the Claimant was performing a job duty and was not during an act that the Claimant was performing that would constitute performing a job duty during the course and scope of employment. The Claimant's claim should be denied under this analysis.

4. The Claimant met his unfortunate demise during a purely recreational ATV ride at a friend's home. There was no company event held at the location of the accident on March 29, 2015, and there was no requirement that Claimant ride the ATV as part of his work responsibilities. His next scheduled work activities were the next day at 8:30 a.m. and 9:30 a.m.

In Nevada, the Supreme Court has defined the term "arose out of," as contained in NRS 616C.150, to mean that there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury.

The Nevada Supreme Court has held that:

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work . . . the injured employee must establish a link between the workplace conditions and how those conditions caused the injury . . . a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment.
>
> Rio Suite Hotel v. Gorsky, 113 Nev. 600 (1997).

The origin of the unfortunate fatal ATV riding accident had no associated industrial risk or hazard arising out of the course and scope of the employment of Claimant.

**Recreational activity**

The Claimant will next argue that the use of the ATV was a recreational event and benefited the Employer. The Nevada Supreme Court held in Nevada Industrial Commn v Dixon 77 Nev. 296, 362 P.2nd 577 (1961) that an employee injured while riding a bike that was provided by the Employer on her lunch break was covered under workers compensation because the Employer "encouraged" and it was a regular incident of employment.

The case before this Bar is distinguishable. In the case before this Bar the Employer did not provide to the Claimant the ATV nor did they encourage it. It simply was not a regular incident of employment.

**Exercise**

The Claimant may then argue that a recreational activity helped the Claimant relax which would benefit his Employer's interest since the Claimant would perform better the next day after he was fully relaxed.

The Nevada Supreme Court has looked at the issue of an employee voluntarily exercising to improve the employees health and whether that activity has a benefit to the Employer.

The Nevada Supreme Court held in Washoe County v Hunt 109 Nev. 823, 858 P. 2nd 46 (1993) that a police officer jogging on his own time was not covered as a work related injury.

The Appeals Officer finds that none of the cases cited by the Claimant can be stretched to include the ATV ride as work related. The ATV ride neither occurred in the course of nor arose out of his employment. The Larson's "traveling employee" doctrine does not apply to the specific facts of this case. The ATV ride was clearly "a distinct departure on a personal errand." The risks associated with an ATV ride were not "associated with the necessity of eating, sleeping, and ministering to personal needs away from home." Nor was Claimant "subjected to hazards he would otherwise have the option of avoiding." Claimant was not under his employer's control while at his friend's ranch, nor was the ATV ride prior to dinner "a reasonable activity designed for personal comfort, such as stretching or using the restroom." The ATV ride was an unreasonable or extraordinary deviation. Even if it could be said that the ATV ride occurred in the course of his employment, it fails to meet the requirements outlined in Phillips.

The Claimant relies on a misinterpretation of the Phillips case to bolster his argument that the ATV ride arose out of his employment. Phillips explains that the first step is to determine the type of risk faced by the employee. There are three types of risks: solely employment related, purely personal and those that are neutral.

The ATV ride is clearly not an employment related risk and therefore either the ride is purely personal (and therefore not work related) or a neutral risk. If a neutral risk, the Nevada Supreme Court has opined that it must be evaluated under the "increased risk test."

"Under the increased risk test, an employee may recover if she is exposed to a risk greater than that to which the general public is exposed." Phillips 126 Nev. Adv. Op. No. 34, page 10. Claimant was not exposed to greater risk that the general public during an ATV ride. The question is not whether an ATV ride is inherently dangerous, but rather was the ATV ride riskier for Claimant than the general public involved in the same activity.

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> In the case before this Bar the Claimant cannot establish a connection between the Claimant's use of a recreational vehicle and his employment. There simply is no connection or benefit to the Employer from the Claimant's use of an ATV.

(AA. 7-21.)

## IV.

## ARGUMENT

### 1. THE PROPER STANDARD FOR REVIEW IN THIS CASE IS DEFERENCE TO THE APPEALS OFFICER'S DECISION.

The reviewing Court is limited by NRS 233B.135 to whether there is substantial evidence to support findings of fact, and the reviewing Court may not substitute its judgment for that of the appeals officer on matter of weight or credibility or issues of fact. Apeceche v. White Pine Cnty., 96 Nev. 723, 615 P.2d 975 (1980).

Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. The statute allowing that the decision of an agency may be reversed if unsupported by substantial evidence in view of the entire record as submitted does not permit the reviewing court to pass on credibility or to reverse an administrative decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it. State, Emp't Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497 (1986).

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Most issues are not purely questions of law, but rather are issues involving the finding of facts and the application of those facts to the law. Deference is to be given by the reviewing Court to conclusions of law made by the appeals officer. Jones v. Rosier, 102 Nev. 215, 719 P.2d 805 (1986); State Indus. Ins. Sys. v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992).

On issues of law it is appropriate for the reviewing Court to make an independent judgment, rather than a more deferential standard of review. Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 849 P.2d 267 (1993). A "pure legal question" is a question that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the Court. An example of a pure legal question might be a challenge to the facial validity of a statute. Beavers v. State, Dep't of Motor Vehicles and Pub. Safety, 109 Nev. 435, 438 n.1, 851 P.2d 432 (1993). Matters of procedure are issues of law. Nyberg v. Nevada Indus. Comm'n, 100 Nev. 322, 324, 683 P.2d 3 (1984). The reviewing Court may undertake independent review of the administrative construction of a statute. State Indus. Ins. Sys. v. Campbell, 109 Nev. 997, 999, 862 P.2d 1184 (1993).

Hilton, *supra*, states:

> Substantial evidence was well defined in Robertson Transp. Co. v. P.S.C., 159 N.W. 2d 636, 638 (Wis. 1968):
>
> 1. [S]ubstantial evidence [does] not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions. We [equate] substantial quality of evidence which a reasonable man

> could accept as adequate to support a conclusion. And, in this process, sec. 227.20 (1) (d) Stats. providing that the decision of an agency may be reversed if unsupported by substantial evidence in view of the entire record as submitted does not permit this court to pass on credibility or to reverse and administrative decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it.

[Emphasis added.]

**2. THE FEBRUARY 7, 2017 APPEALS OFFICER'S DECISION AND ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.**

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 the determination below. State Indus. Ins. Sys. v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990). Pursuant to NRS 233B.135(3), this reviewing Court shall not substitute its judgment for that of the agency as to the weight of evidence on question of fact. This Court's role in reviewing an administrative decision is to determine whether the agency's decision was arbitrary or capricious and, thus, an abuse of discretion. Jourden v. State Indus. Ins. Sys., 109 Nev. 497, 853 P.2d 99 (1993). The Decision and Order of Appeals Officer Nielsen is deemed reasonable and lawful until reversed or set aside in whole or in part by this Court.

Substantial evidence has been defined as "[s]omething of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to induce conviction." Peardon v. Peardon, 65 Nev. 717, 765, 102 P.2d 309 (1948). A witness' sworn testimony before an

administrative agency can constitute substantial evidence. Washoe Cnty. v. John A. Dermody, Inc., 99 Nev. 608, 668 P.2d 280 (1993).

The Appeals Officer has full power and authority to determine the facts presented at administrative hearings and to construe and apply the applicable laws. Nevada Indus. Comm'n v. Reese, 93 Nev. 115, 120, 560 P.2d 1352 (1977).

The Appeals Officer's findings are supported by the substantial evidence in the Record. The issue of whether the Appeals Officer should have found that Claimant had established a compensable workers' compensation claim cannot be re-weighed by this Court on judicial review.

## 3. THE APPEALS OFFICER'S DECISION AND ORDER PROPERLY FOUND THAT CLAIMANT WAS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS

### A. Claimant in a workers' compensation claim has the burden of proof to establish an entitlement to his requested benefits.

The Nevada Supreme Court previously held that the Nevada Industrial Insurance Act should be construed broadly and liberally, to protect the interest of the injured worker. Reasonable, liberal and practical construction was preferable to a narrow one, since the purpose of the Act was to give compensation, not deny it. *See*, Nevada Indus. Comm'n v. Peck, 100 Nev. 376, 381 (1984).

However, Section 11 of Senate Bill 316, adopted on June 18, 1993, and codified at NRS 616A.010, determined that claims shall be decided on their merits and not according to the principle of common law that requires statutes governing

workers' compensation to be liberally construed because they are remedial in nature.

For the accomplishment of these purposes, issues shall not be interpreted or construed broadly or liberally in favor of an injured employee, or to favor the rights and interests of an employer.

In attempting to prove his case, Claimant has the burden of going beyond speculation and conjecture. That means that Claimant and his wife must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, *supra*; SIIS v. Khweiss, *supra*; SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, §80.33(a).

NRS 616A.010 makes it clear that:

> A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

Based upon the evidence presented, Claimant's death was not as a result of his employment under his workers' compensation claim.

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**B. The determination to deny Claimant benefits was proper.**

The Workers Compensation Act was written into law in Nevada to provide employees a means to receive medical care and benefits without the employee being required to prove in a civil or tort action that established that the employee had either intentionally or through the employer's negligence caused the harm to their employee.

However, the Nevada Workers Compensation Act requires that the employee ("Claimant") must establish that the injury was connected to his or her employment. The Nevada Supreme Court has held that the fact that an injury occurred on the employer's premise is not alone sufficient to make an injury a compensable claim.

This Court held in Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605, 939 P.2d 1043 (1997) that the "Nevada Industrial Insurance Act is not a mechanism which makes administrators absolutely liable for injuries suffered by employees who are on the job." This Court concluded by stating, "The requirements of 'arising out of and in the course of employment' make it clear that a claimant must establish more than being at work and suffering an injury in order to recover."

The Nevada Workers Compensation Act has placed the burden on the Claimant to establish this connection. A claimant must satisfy his or her burden

meeting multiple elements. The first element is that a claimant must establish that the injury occurred while "in the course of employment".

## IN COURSE OF EMPLOYMENT

NRS 616B.612(1) requires an employer to provide compensation in accordance with the terms of the Nevada Industrial Insurance Act[4] for any employee injuries "arising out of and in the course of the employment." NRS 616C.150(1) provides that an injured employee is not entitled to receive workers' compensation unless he establishes by a preponderance of the evidence that his injury arose out of and in the course of his employment.

This Court has held that an employer is not liable for all injuries that an employee may sustain while employed.

> We previously have explained that the language of the statute reveals that legislators did not intend the Nevada Industrial Insurance Act to make employers absolutely liable for any injury that might happen while an employee was working. Rather, the statute requires a claimant to "establish more than merely being at work and suffering an injury in order to recover.

MGM Mirage v. Cotton, 121 Nev. 396, 116 P.3d 56 (2005).

Defining what is "in the course of employment" is not a simple task. This Court has addressed that issue under many different fact patterns.

### *ACCIDENT ON THE PREMISE*

If the accident occurs on the employer's property, the accident must have occurred within a reasonable time period before and after the work time is covered as a work injury. Cotton, *supra.*

In the case before this Court, the Claimant was not injured on the Employer's premises nor within a reasonable time period before or after the employee's employment. The act of operating a recreational vehicle occurred at Mr. Buma's friend's house and the day before Mr. Buma was to speak on behalf of his Employer.

***ACCIDENT OFF OF THE EMPLOYER'S PREMISE***

The argument that has been brought by the Appellant is Mr. Buma's employment required him to travel out of state to attend a sales presentation and therefore any injury that he suffered during his travel should be covered under the Worker's Compensation Act.

This issue is covered by case law under what is commonly known as the "Coming and Going Rule". This rule generally holds that workers' compensation was not intended to protect against perils coming to and/or leaving work. There are, however, exceptions to that rule. The underlying principle of these exceptions is that the "course of employment" should extend to any injury which occurred at a point where the employee was within range of dangers associated with his employment.

One exception to the "Coming and Going Rule" is referred to as the Employer's Conveyance exception. This general rule is that when the journey to or from work is made in the employer's conveyance, the journey is in the course of

employment. Examples of this rule is usually seen where the employee is using the company's vehicle or that the employer pays for the employee's use of his own vehicle. The reason for this exception is that the employee is placed at risks of the employment, since the risk are under the employer's control.

In Evans v. Southwest Gas Corp., 108 Nev. 1002, 842 P.2d 719 (1992), this Court held an employee may still be within the course and scope of his employment when the travel to or from work confers a **distinct benefit** upon the employer or the employer exercised significant control over the employee, who was on call. In Evans, the employee was provided a hand held radio and a radio in his van. 108 Nev. 1002 (1992). The employee was allowed to take the van home in order to respond to emergencies. He would be notified of those emergencies via the radio or the hand held radio. The employee was required to take the van home to respond to emergencies.

In Tighe v. Las Vegas Metro. Police Dept., 110 Nev. 632, 877 P.2d. 1032 (1994), this Court held that an undercover narcotics officer who was driving home and subject to his employer's control at the time of the accident, was entitled to worker's compensation benefits. The Tighe Court created the "law enforcement" exception.

The Tighe Court further explained the Nevada position on this issue. 110 Nev. 632 (1994). This Court held that exceptions to the Coming and Going Rule

include Evans and Tighe because the employee was "subject to his employer's control" and was driving the employer's vehicle. The key to both of these cases is control. Evans mentions the two forms of radios and Tighe cites to the employee's car radio and beeper. The Court even stated that since Tighe was driving a police vehicle equipped with a police radio, he was "on call". Id. at 636.

In the case before this Court, the Employer had no control over where the Claimant stayed or when he arrived. The only requirement was that he was present at the Oil and Gas Convention in Houston, Texas, on March 30. Therefore, none of these exceptions to the "Coming and Going Rule" that would apply to find that Claimant's claim was compensable.

***ACCIDENTS WHILE NOT AT WORK***

This Court held that a claimant injured on his day off was covered as a workers' compensation claim since he was involved in a motor vehicle accident while performing a special errand for his employer. Bob Allyn Masonry v. Murphy, 124 Nev. 279, 183 P.3d 193 (2008) and was injured while departing from the job site. This Court held that the claimant's injuries should be covered as a workers' compensation claim.

> In so doing, we adopt the street-risk rule, which provides that, when an employee is required to drive as a component of employment, the risks and hazards associated with the roadways are incident to that employment, and thus injuries sustained due to risks associated with those roadways arise out of the employment. We also clarify that our workers' compensation jurisprudence includes an employee's return journey within the special errand exception to the going and coming rule, which provides that, even though going and coming from work

> generally is not in the course of employment, an employee is acting within the course of employment when completing a "special errand" for the employer.

In the case before this Court, Claimant was not performing a special errand for the Employer at the time of his death while operating an ATV. Additionally, the accident was not on public roads but on his friend's property and Claimant was not required to drive recreational vehicles by his employer for his employment.

***ACCIDENTS WHILE PREPARING FOR WORK***

The Appellant has argued that Mr. Buma was staying at his friend's ranch to benefit his employment because it allowed him an opportunity to prepare with his friend and fellow participant for the next day's presentation, which benefitted the Claimant's employer's interest.

This Court looked at a case where an employee was injured while preparing the area for him to stay while he performed his job duties for his employer for the next day. Costley v. NIC, 53 Nev. 219, 296 Pac. 1011 (1931). The finding was that a miner injured while setting up his tent on his employer's premise the day before he was to start work was incidental to employment. The difference with this case and Costley is Claimant's accident did not occur on the Employer's premise nor did the act of performing a recreational activity while riding the vehicle constitute preparing for the presentation for the next day. The act that caused Mr. Buma's death was operating a recreational vehicle and not conversing

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with his friend in the preparation of the next day event. Operating a recreational vehicle was purely a personal activity with no benefit to his Employer.

Therefore, none of the Nevada Supreme Court cases pertaining to the preparation of employment would apply to find that Claimant's claim was compensable.

***PAYMENT OF TRAVEL EXPENSES ALONE DOES NOT MAKE THIS A COMPENSABLE CLAIM***

The Appellant argues that the is compensable since his Employer reimburses and pays for his travel and therefore any injuries sustained before, during and after the completion of the scheduled event should be covered under the Worker's Compensation Act.

However, Mr. Buma's possible injuries while traveling by plane are a different and separate issue than Mr. Buma's injuries sustained while staying at his friend's home. Additionally, this argument ignores the actual event that caused Mr. Buma's injuries and the fact that the act of operating a recreational vehicle has no connection to Mr. Buma's employment.

The Appellant cannot prove that the Employer had any control over Mr. Buma's actions or activities while he stayed with his friend. Therefore, there cannot be a finding that Mr. Buma's act of operating a recreational vehicle was performed "in the course of employment".

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However, for the sake of argument, assuming that the Appellant had established that the recreational activity incident was "in the course of employment", the Appellant must further establish that his death was as a result of both: (1) in the course of employment; and (2) arose out of employment. An injury arising out of employment is a separate and distinct element that must also be met.

***ARISING OUT OF EMPLOYMENT***

The Claimant met his unfortunate death during a purely recreational ATV ride at a friend's home. There was no company event held at the location of the accident on March 29, 2015, and there was no requirement that Claimant ride the ATV as part of his work responsibilities. His next scheduled work activities were to begin the next day in the morning.

This Court has defined the term "arose out of," as contained in NRS 616C.150, as establishing a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury.

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work . . . the injured employee must establish a link between the workplace conditions and how those conditions caused the injury . . . a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment.

Rio Suite Hotel v. Gorsky. [Emphasis added.]

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The origin of the unfortunate fatal ATV riding accident had no associated industrial risk or hazard arising out of the course and scope of the employment of Claimant.

The Appellant has argued that the use of the ATV was similar to a relaxing walk at a hotel grounds. The argument is that a recreational activity helped the Claimant relax which would benefit his employer's interest since the Claimant would perform better the next day after he was fully relaxed.

This Court has looked at the issue of an employee voluntarily exercising to improve the employee's health and whether that activity has a benefit to the employer. In Washoe County v. Hunt, 109 Nev. 823, 858 P.2d 46 (1993), a police officer jogging on his own time was not covered as a work-related injury.

Appellant argues that this claim should be accepted based on cases listed in the Opening Brief. However, these cases are not from Nevada nor do the cases discuss the legal standards in Nevada. Many of these cases concern an accident that occurred within a short time period from work, such as returning back to the hotel room after a meal, or having coffee. Moreover, these cases only really address whether the injured worker's accident was within the "course of employment" and not the issue of whether the hazard that caused injury to a Claimant "arose out of employment".

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Other cases in the Opening Brief include sightseeing, fishing and skiing when the employee was not performing his or her job duties. The Appellant argues that the "Traveling Employee Doctrine" applies to the case before this Court since the doctrine does not place any limits to the activity or requires a relationship to his employment. These cases are from other jurisdictions and do not find a relationship to employment when the employee is performing a personal activity such as eating, resting, or drinking.

The Appellant relies on the "Personal Comfort Doctrine" but agrees that the cases are outside of Nevada. None of these cases address the requirement that an injured worker must establish that the injury sustained "arouse out of employment".

In Nevada there are multiple cases that have defined and explain the element of "arising out of employment". This Court first established that there must be a connection between the hazard that injured the employee and the employment Rio Suite Hotel & Casino v. Gorsky. Later, this Court looked at the issue in Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005):

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. However, if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of the claimant's employment. Finally, resolving whether an injury arose out of employment is examined by a totality of the circumstances.

This Court in Rio All Suite Hotel and Casino v. Phillips, 126 Nev. _, 240 P.3d 2 (2010) clarified Mitchell. It indicated that:

> The appeals officer found that Phillips' case was 'distinguishable' from Mitchell because Phillips' injury did not result from an 'unexplained fall.' Without elaborating, the appeals officer also stated that '[t]he Mitchell [c]ourt mentions the inherent dangerousness of stairways.' . . . [The Court in Rio further discussed Mitchell: "The employee argued that because she did not have a health affliction that caused her to fall and 'because staircases are inherently dangerous,' her injury "arose out of her employment." . . . The appeals officer determined that the employee's fall did not arise out of her employment, and the district court denied her petition for judicial review."... [Our finding in Mitchell was that] "[T]he employee must show that 'the origin of the injury is related to some risk involved within the scope of employment . . . thus, because the [Mitchell] employee could not explain how the conditions of her employment caused her to fall . . . we determined that the appeals officer correctly concluded that she failed to demonstrate the requisite 'causal connection.

The origin of the unfortunate fatal ATV riding accident had no associated industrial risk or hazard arising out of the course and scope of the employment of Claimant.

In Phillips, this Court looked at types of hazards and their relationship to the employee's employment and held that injuries sustained from a personal risk are not compensable.

> Personal risks are those that are "so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." 1 Larson & Larson, *supra,* § 4.02, at 4-2. For example, "a fall caused by the [employee's] personal condition," such as a bad knee, epilepsy, or multiple sclerosis, is a personal risk. *Mitchell,* 121 Nev. at 181 n. 7, 111 P.3d at 1106 n. 7; *see also Gorsky,* 113 Nev. at 604-05, 939 P.2d at 1046 (determining that substantial evidence supported the appeals officer's determination that the employee's injury did not arise out of his employment, as the evidence indicated that his fall was due to his multiple sclerosis). As such, an employee's injury resulting from a personal risk is not

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compensable. *See Gorsky,* [240 P.3d 6] 113 Nev. at 603, 605, 939 P.2d at 1045, 1046; *see also Bentt,* 979 A.2d at 1232; *Herring,* 188 P.3d at 146; 1 Larson & Larson, *supra,* at 4-1, ch. 4.

Finally, neutral risks are those that are "of neither distinctly employment nor distinctly personal character." 1 Larson & Larson, *supra,* § 4.03, at 4-2. *See also Mitchell,* 121 Nev. at 181 n. 7, 111 P.3d at 1106 n. 7 ("An unexplained fall, originating neither from employment conditions nor from conditions personal to the [employee], is considered to be caused by a neutral risk."). Here, Phillips' injury occurred while traversing a staircase that was free of defects, and there is no evidence that a risk personal to Phillips caused her fall. Thus, we conclude that Phillips' risk of injury falls within the neutral-risk category.

To determine whether an injury caused by a neutral risk "arose out of employment, courts typically apply one of the following three tests: increased-risk test, actual-risk test, or positional-risk test. *See, e.g., Herring,* 188 P.3d at 146; *see also* 1 Larson & Larson, *supra,* § 3.01, at 3-4. The most widely utilized is the increased-risk test, *see* 1 Larson & Larson, *supra,* § 3.03, at 3-4.1, which "examines whether the employment exposed the claimant to a risk greater than that to which the general public was exposed." *Herring,* 188 P.3d at 146. The actual-risk test ignores whether the risk is common to the public and permits an employee to recover for his injury "when the employer subjects the worker to the very risk that injures him." *Id.* Finally, the positional-risk test is a "but for" approach that evaluates "whether the claimant would have been injured *'but for* the fact that the conditions and obligations of the employment placed [the] claimant in the position where he was injured.'" *Mitchell,* 121 Nev. at 182, 111 P.3d at 1106 (alterations in original) (quoting 1 Larson & Larson, *supra,* § 3.05, at 3-6). We take this opportunity to provide guidance and clarity to the bench and bar by adopting a single test to be applied when determining whether an injury caused by a neutral risk "arose out of employment.

This Court required that an employee's injuries were deemed to be work related under the Increased Risk Doctrine.

Under the increased-risk test, an employee may recover if she is subjected "to a risk greater than that to which the general public [is] exposed." *Herring,* 188 P.3d at 146. Even if a risk to which the employee is exposed "is [not] *qualitatively* ... peculiar to the employment," the injury may be compensable as long as she faces an "increased *quantity* of a risk." 1 Larson & Larson, *supra,* § 3.03, at 3-4.1. Thus, when an employee "is exposed to a common risk more frequently than the general public," there may be an increased risk. *Nascote Industries v. Industrial Com'n,* 353 Ill.App.3d 1056, 289 Ill.Dec. 755, 820 N.E.2d 531, 535 (2004); *see also* 1 Larson & Larson, *supra,* § 3.03, at 3-4.1. We conclude that the increased-risk test strikes an adequate balance between the employee's right to

> receive compensation for a work-related injury and the employer's right not to be held liable for every injury suffered by an employee in the workplace. Maintaining such a balance satisfies the requirement in NRS 616A.010 that Nevada's workers' compensation laws be interpreted in a neutral manner.

The origin of the unfortunate fatal ATV riding accident had no associated industrial risk or hazard arising out of the course and scope of the employment of Claimant.

The Appellant spends a great deal of time in the Opening Brief re-arguing the facts that were before the Appeals Officer. This Court has long held that this Court cannot re-weigh the evidence that was before the Appeals Officer.

This Court's role in reviewing an administrative decision is to determine whether the agency's decision was arbitrary or capricious and, thus, an abuse of discretion. Jourden v. State Indus. Ins. Sys., 109 Nev. 497, 853 P.2d 99 (1993).

The Appellant also focuses the argument on the element of "in the course of employment" but ignores the additional requirement to establish that operating a recreational vehicle constitutes "arising out of employment". Instead, the Appellant alleges that both the Appeals Officer and District Court committed multiple legal errors. Appellant argues that the "traveling employee doctrine" should have been applied and implying that the issuing of looking at whether the actual event which caused Mr. Buma's death was from a hazard that the Employer had control over and "arouse out of employment".

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The Appellant further confuses the legal analysis by arguing that the "ATV accident which, caused Mr. Buma's death while traveling to Houston, Texas…". The use of the ATV vehicle was not during Mr. Buma's travels but after he had arrived at his friend's house. This is entirely different factual situation from if Mr. Buma had died while he was traveling to Texas. Mr. Buma was not operating the ATV to transport himself to the work event or even to travele from Nevada to Texas.

The final attempt to confuse the legal analysis is to rely on NRS616B.612(3) which reads in parts as:

> Travel for which an employee receives wages shall, for the purposes of chapters 616A to 616D, inclusive, of NRS, be deemed in the course of employment.

This is a simple argument which ignores the language of the statute which requires that an employee must meet the requirements of NRS 616A to 616D. NRS 616C.150 is included in this requirement and the establishment that an injury was both "in the course of employment" and "arising out of employment".

The Appellant has not been able to establish that Mr. Buma operating a ATV was an activity and hazard that Mr. Buma was exposed to as a result of his travel from Nevada to Texas. The Appellant cannot establish that the Employer caused him to be exposed to a greater hazard since operating a ATV was a normal and necessary requirement and element of his employment.

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Instead, the Appellant attempts to argue that this Court should ignore all of the cases that address "arising out of employment" element of NRS 616C.150 and make the standard that the event was not an unreasonable or extraordinary activity.

This simply is not the law or an actual understanding of the requirements of meeting the element of "arising out of employment".

The Appeals Officer did not commit an abuse of discretion or an error of law when she held that Claimant had failed to establish an entitlement to a compensable claim.

## V.

## CONCLUSION

This Court's review of the Record on Appeal will show that the Decision and Order of the Appeals Officer below is supported by substantial and reliable evidence. Additionally, this Court's review of the Record on Appeal will show that the Appeals Officer's Decision and Order does not contain an error of law or an abuse of discretion.

Respondents, PROVIDENCE CORP. DEVELOPMENT dba MILLER HEIMAN, INC., and GALLAGHER BASSETT SERVICES, INC., therefore

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respectfully request entry of this Court's Order affirming said Decision and Order in its entirety and dismissing the Appeal.

DATED this 23rd day of February, 2018.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 software in 14-point Times New Roman font.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the document type volume limitation does not exceed 11,585 words [per WORD's word count utility, this document, including tables of content and authorities, addendums, footnotes.]

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of February, 2018.

LEWIS BRISBOIS BISGAARD & SMITH

By: _____

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## ROUTING STATEMENT – RETENTION IN THE SUPREME COURT

This case is presumptively retained for the Supreme Court to "hear and decide" because is raises "as a principal issue a question of first impression involving the … Nevada constitution" and because it raises "as a principal issue a question of statewide public importance." NRAP 17(a)(13)-(14). One of the issues in this case presents whether an undocumented worker is entitled to workers' compensation temporary total disability benefits. This statement is made pursuant to NRAP 28(a)(5).

## CERTIFICATE OF SERVICE

I declare, under penalty of perjury, that I am over the age of eighteen (18) years, am not a party to, nor interested in, this action, am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that I caused to be served a true and correct copy of the foregoing **RESPONDENTS', PROVIDENCE CORP. DEVELOPMENT dba MILLER HEIMAN, INC., AND GALLAGHER BASSETT SERVICES INC., ANSWERING BRIEF** by the method indicated:

**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Charles Diaz, Esq.
Diaz & Galt LLC
443 Marsh Avenue
Reno, NV 89509

DATED this 23rd day of February, 2018.

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

## AFFIRMATION

**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding Respondents' Answering Brief based on NAC 616C.580(4) in Case No. 66920:

☒ 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:

(State specific law.)

**- or -**

B. For the administration of a public program or for an application for a federal or state grant.

Lee E. Davis, Esq.
Attorneys for Respondents

2/23/18
Date