**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.

No. 73632

/

# APPELLANT'S REPLY 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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## SUMMARY OF ARGUMENT ON REPLY

Respondents' Answering Brief contains little besides a regurgitation of the Appeals Officer's decision that was the subject of Appellants' Petition for Judicial Review at the district court. The Answering Brief does not adequately address the traveling employee doctrine as it applies to the specific facts of this case, but instead falls back on rote recitations of inapplicable legal concepts relevant only to non-traveling employees.

NRS 616B.612(3) mandates that: "Travel for which an employee receives wages *shall* ... be deemed in the course of employment." Under this statute, Buma's death is compensable under the workers compensation statutory scheme in Nevada because he was a traveling employee. Respondents want this Court to ignore NRS 616B.612(3) at all costs. To that end, despite the fact that the statute is the controlling legal authority in Nevada on the subject, Respondents devote a mere two sentences in their brief to it, assuring the Court there's nothing to see here. This Court must not be fooled. The truth is that NRS 616B.612(3) -- along with the breadth of legal authority on the traveling employee doctrine provided in the Opening Brief – are the heart of this case, and must be thoroughly considered in order to decide the issues presented.

The evidence established that Mr. Buma's sole purpose for being at Mr. O'Callaghan's ranch in Houston, TX, was for the benefit of his employer. The

brief ATV ride with his co-worker, while taking a break before dinner, 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 Buma's heirs and the district court's decision affirming the same were in error because they are not supported by substantial evidence, are clearly erroneous, are contrary to the law governing traveling employees, and failed to even consider NRS 616B.612(3). Accordingly, this Court must reverse the district court's decision and remand with specific instructions to follow the traveling employee doctrine and award death benefits to Appellants under the doctrine.

## LEGAL AUTHORITY

**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.**

**Standard of Review.**

Respondents mischaracterize the standard of review. The appeals officer's decision is not given blanket deference. To begin, as partially acknowledged by Respondents, 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). But more importantly, questions of law are reviewed de novo. *See SIIS v. United Exposition Services Co.*, 109 Nev. 28, 20, 846 P.2d 294, 295(1993).

The Nevada Supreme Court has addressed this standard in some detail. *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 188 P.3d 1084 (2008), including the part where the court recognized that "pure questions of law" would be reviewed *de novo*. *Id.*, at 1087-88. Such questions of law include whether the correct test was employed. The subsequent question is whether the appeals officer properly applied the correct test. And last, there is whether the appeals officer's decision is thereby supported by substantial evidence. 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).

In the case at bar, the appeals officer misconstrued the facts, did not employ the correct legal test, did not even reference NRS 616B.612(3), and misapplied other tests. In short, the appeals officer's decision is not one that reasonable minds might accept as adequate.

**Legal Authorities.**

**A. <u>Travel *Shall* Be Deemed in the Course of Employment –NRS 616B.612(3).</u>**

Respondents want this Court to focus as little as possible on the weight of NRS 616B.612(3) in this matter. That is why, though it is the most important legal rule in the case, Respondents limited their discussion of the statute to a two-sentence paragraph buried towards the end of their Answering Brief. (Answer, p. 32). Instead, Respondents attempt to redirect the Court attention back to

inapplicable concepts like whether the employee was on the employer's premises. (Answer, p. 20-21). Appellants will address these concepts, and their lack of applicability, *infra*.

To recount, NRS 616B.612(3) reads: "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." NRS 616B.612(3) (emphasis added). In questions of statutory construction, it is well-settled 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. On the date in question, Buma was in Houston, Texas for the sole reason of attending an oil and gas convention on behalf of his employer. Buma was not an hourly employee, but a Vice-President of the company. He was in Houston to solicit new clients. This was part of his job. Pursuant to NRS 616B.612(3), it is mandatory that his death while in Houston, Texas is compensable, unless there is some legal exception that applies. The district court's and the appeals officer's approach to this case was exactly the opposite of what the statute requires. Indeed, both should have started with NRS 616B.612(3), and yet neither even mentions it. This is an error as a matter of law.

The appeals officer, like Respondents in their Answering Brief, analyzed this case under multiple legal theories, many of which are entirely inapplicable or were misapplied. These include: Injury on Employer's Property; Coming and Going Rule; Benefit to Employer; Preparation for Employment; Reimbursement for Employee Travel, Recreational Activity; and Exercise. AA 13-20. The appeals officer devoted the equivalent of a footnote at the end of its decision to the Traveling Employee Doctrine -- which is the essence of the claim -- summarily dismissing it. AA 18. The district court summarily dismissed the traveling employee and the personal comfort doctrines, without adequate analyses, and without reference to NRS 616B.612(3). AA 4-5.

**B. Contrary to the District Court's Findings, the Appeals Officer's Decision Not Supported by Substantial Evidence.**

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 Buma was in Houston, and at the ranch in question, specifically and solely to prepare for and attend the oil and gas convention. The appeals officer's emphasis that Buma "was not required to meet with clients until March 30, 2015 at 8:30 a.m...." underscores the dubious nature of the decision in question. AA 09.

Likewise, the appeals officer erroneously denied the claim, in part, because, "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 finding belies the very nature of the traveling employee doctrine, the nature of Buma's work, the fact that he was on the ranch to prepare with his co-worker for those morning meetings, and the reality that Buma had to travel halfway across the country from Reno, Nevada to Houston, Texas for the convention and the latest he could have responsibly arrived was the day before the convention, the day of the accident.

An objective review of the record shows that Buma more than proved by a preponderance of the evidence that the death arose out of and in the course of employment. In other words, Buma easily showed that it was more likely than not that his death occurred out of and in the course of employment as a traveling employee.

**C. Erroneous Application of Various Legal Tests.**

**Premises Test.**

Respondents first refer to whether the accident occurred on the employer's premises. (Answer, pp. 20-21). Of course, this standard is wholly inapplicable to the case at bar, because an employee traveling to a convention several states away, on behalf of his employer, will never be on the "premises" of a static workplace. The appeals officer used this test, as well. AA 13. This is an error as a matter of law, and it further underscores the unreasonableness of the appeals officer's

decision.

**Coming and Going Rule.**

Respondents, like the appeals officer rely heavily upon the "coming and going" rule to deny Buma's claim, but did not acknowledge most of the well-established exceptions to the rule. (Answer, pp. 21-22); AA 13-14. The coming and going rule involves questions of whether employees are covered while commuting to and from work. Obviously the rule is inapplicable to Buma's case, as he was not commuting, but traveling to another state as an employee, on company business.

One exception is discussed in *D & C Builders v. Cullinane*, 98 Nev. 67, 639 P.2d 544 (1982), a case not discussed by the appeals officer or Respondents. In *Cullinane*, the employee, in the course and scope of his employment, was responsible for procuring supplies for his employer. This job duty included traveling away from the job site. He was injured during his lunch hour while traveling to purchase supplies. To complicate matters, he also intended to visit a friend during this time. The Court found that the employee was considered to have a bona fide business purpose and was therefore acting within the course and scope of his employment. That case also recognized the "dual-purpose" exception, where there is a bona fide business purpose that also involves a personal act. The appeals officer erred in not recognizing the applicability of this exception.

**Off Duty & Law Enforcement Exceptions.**

Both Respondents and the appeals officer use the case of *Tighe v. Las Vegas Metro. Police Dept.*, 110 Nev. 632, 877 P.2d 1032 (1994), in support of the denial of Buma's claim. (Answer, p. 22); AA 14. This is problematic for two reasons: (1) the specific "law enforcement" exception to the coming and going rule is obviously inapplicable to Buma's case, as that case involves a police officer driving an undercover police car after his shift; however (2) both of them conveniently skip over some of the essential facts of the case, which are applicable. Namely, that the nature of an off-duty police officer and a traveling employee are also similar. The policeman is not a usual off duty employee, because at any moment he or she may be thrust into duty. Likewise, a traveling employee is not "off duty." The very nature of a traveling employee's work means that they are on location -- wherever that may be -- as part of their job. And until they arrive back home, they are essentially in the course and scope of their employment. NRS 616B.612(3).

Additional facts in the *Tighe* case are even more beneficial to the instant case. After ending his shift at 2:00 a.m., officer Tighe met with other officers at restaurant to discuss work and enjoy dinner. It was uncontroverted that Tighe consumed a moderate amount of beer with his dinner. Tighe left the restaurant at 4:30 a.m. and while on his way home, he was involved in an accident. The

Nevada Supreme Court did not find Tighe's dinner and beer with his colleagues was a purely personal diversion, nor even that his consumption of alcohol was sufficient to deny him workers compensation benefits. *Tighe*, 877 P.2d at 1034, 1036.

These facts, and the court's reasoning, are easily applicable to the instant case, in which Buma, a traveling employee, was staying with a co-worker for the express purpose of preparing for meeting at a convention the very next morning, and was injured on that co-worker's ranch. Buma was not off duty. The evidence was also uncontroverted that Buma was pretty much always "on call," and that he would take business calls at all hours of the day or night, even while hiking. AA 205-06. Buma's presence at his co-worker's ranch – like the early morning dinner with Tighe's fellow officers – was for the purpose of work and for the benefit of his employer. The appeals officer erred as a matter of law in its misinterpretation and misapplication of the *Tighe* case.

**Special Errand Test.**

The appeals officer also used the "special errand" exception to deny Buma's claim, relying upon *Bob Allyn Masonry v. Murphy,* 124 Nev. 279, 183 P.3d 126 (2008). AA 15-16. Respondents also use this case under an "accidents while not at work" test (Answer, pp. 23-24), but this is wholly inapplicable to a traveling employee, whose sole reason for travel is work-related. A traveling

employee does not fall under the special errand exception, unless one was to consider the entire business trip a special errand. Accordingly, the case and the exception are inapposite and the appeals officer erred in using it to deny Buma's claim.

**Preparation for Work Test.**

Both Respondents and the appeals officer considered the "preparation for work" exception set forth in *Costly v. NIC*, 53 Nev. 219, 296 Pac. 1011 (1931) (Answer, pp. 24-25); AA 16, but deny that it is applicable to Buma, because his accident did not occur on the employer's premises. Like the earlier premises test, this is plainly flawed reasoning and erroneous as a matter of law and common sense.

In *Costly*, a miner was injured while setting up his tent on his employer's premises the day before he was to start work for the mine. The court found that he was injured in the course of his employment. The appeal's officer's denial of Buma's claim -- because Buma, unlike Costly, was not on his employer's premises -- is disingenuous at best. There is no way a traveling employee can be on his employer's premises, and the same does not preclude benefits. *See* NRS 616B.612(3). Just like Costly, Buma was on location in Texas at his employer's behest and was preparing for work the next morning. The appeals officer erred as

a matter of law in not applying this exception, along with the traveling employee doctrine, to Buma's claim.

**Whether Employee Paid for Travel.**

The issue of whether travel expenses were paid by Buma's employer, as relied upon by the appeals officer and Respondents, is another red herring. Because travel was an integral part of Buma's job (up to 50% of his time (AA 203) it is mostly irrelevant whether Buma was paid for his travel expenses, as that exception usually involves commuters. *See Jourdan v. SIIS*, 109 Nev. 497, 853 P.2d 99 (1993). Nevertheless, it is uncontroverted that Buma was either reimbursed for such expenses and/or was given a company credit card to cover those expenses. AA 204. Under NRS 616B.612(3), Buma received wages for his travel (it was 50% of his job), and therefore his trip to Houston to attend the oil and gas convention "shall...be deemed in the course of employment." *Id.* AA 203-207. The appeals officer's failure to consider this specific statute when making its decision – and instead denying the claim based upon inapplicable exceptions and case law -- is erroneous as a matter of law.

**Exercise / Recreation Test.**

Next, the appeals officer used the exercise or recreational activity exception in *Washoe County v. Hunt*, 109 Nev. 823, 858 P.2d 46 (1993), to support the denial of Buma's claim. AA 18-19. In *Hunt*, a police officer was jogging on his

own time when injured and the court found that the activity was not covered. This case is inapposite because it has nothing to do with the traveling employee doctrine. The appeals officer erred as a matter of law in using it to deny Buma's claim without regard to NRS 616B.612(3).

**D. Traveling Employees: Controlling & Persuasive Legal Authorities.**

Respondents criticize Appellants for citing to numerous non-Nevada cases in the Opening Brief, arguing that these cases do not involve the "legal standards in Nevada." (Answer, p. 27). As expressly acknowledged in the Opening Brief, there is a noticeable dearth of decisions in Nevada on the subject of traveling employees. Nevertheless, in addition to being codified at NRS 616B.612(3), the traveling employee doctrine – as explained in the Opening Brief -- 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).

Again, the most glaring error is that the statute that is directly on point, NRS 616B.612(3), was wholly ignored by the district court and the appeals officer, and summarily dismissed by Respondents. Instead, they each relied upon cases like *Rio All Suites Hotel and Casino v. Phillips*, 126 Nev. __, 240 P.3d 2 (2010) and *Mitchell v. Clark County School District*, 121 Nev. 179, 111 P.3d 1104 (2005). These cases do not involve the traveling employee doctrine, and so their

analysis of what activity falls within the course and scope of employment is inapposite to the instant case.

The "nature of employment" for Jason Buma necessarily involved travel, as much as 50% of the time, including being out of familiar surroundings and placed at greater risk than being at home or on his employer's premises. Under the traveling employee doctrine, Buma's "workplace conditions" as a traveling employee cannot be compared to workplace conditions on the premises of an employer, where the employer can control those conditions. Instead, Buma is naturally exposed to a much broader range of conditions than one who works on premises.

Finally, as set forth in the Opening Brief, a traveling employee is, by the nature of his work, exposed to "increased risks" because of the nature of travel. See, Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law Desk Edition § 25 Traveling Employees. Traveling employees' travel is deemed a work-related risk. They 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)

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. Id. 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 reasonable under the circumstances.

## CONCLUSION

Respondents do not present any authorities on point in their Answering Brief to refute the errors set forth in the Opening Brief. Instead their Answer is virtually indistinguishable from the decision of the appeals officer below, reiterating the facts and the legal arguments nearly verbatim.

Travel was an integral part of Jason Buma's job. On the date in question, Buma was in Texas for the sole reason of attending an oil and gas convention on behalf of his employer. Buma was at a local ranch, to prepare with a co-worker for a presentation the next day. This was an integral part of his job. Pursuant to NRS

616B.612(3), it is mandatory that his death while on the ranch is compensable, unless there is some legal exception that applies. In their legal analyses, both the district court and the appeals officer should have started with NRS 616B.612(3), and yet neither even mentioned the statute. This is a fatal error as a matter of law.

The evidence established that Mr. Buma's sole purpose for being at Mr. O'Callaghan's ranch in Houston, TX, was for the benefit of his employer. The brief ATV ride with his co-worker, while taking a break before dinner, 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 Buma's heirs and the district court's decision affirming the same were in error because they are not supported by substantial evidence, are clearly erroneous, are contrary to the law governing traveling employees, and failed to even consider NRS 616B.612(3). Accordingly, this Court must reverse the district court's decision and remand with specific instructions to follow the traveling employee doctrine and award death benefits to Appellants under the doctrine.

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## AFFIRMATION

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

DATED this 6th day of April, 2018.

DIAZ & GALT, LLC.

CHARLES C. DIAZ, ESQ.

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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) because the Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, version 14.4.8, in 14 point Times New Roman font.

2. I further certify that this Reply 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 only 3,457 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 6th day of April, 2018.

DIAZ & GALT, LLC.

CHARLES C. DIAZ, ESQ.

## 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 REPLY BRIEF** via U.S. Mail at Reno, Nevada to the following:

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DATED this 6th day of April, 2018.

LILA SALINAS