2515

Evan Beavers, Esq. (NV Bar #3399)
Clark G. Leslie, Esq., Sr. Deputy (NV Bar #10124)
1000 East William Street, Suite 208
Carson City, Nevada 89701
(775) 684-7555; (775) 684-7575
cleslie@naiw.nv.gov
Attorney for Petitioner, Susan Hopkins

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CASE NO. CV20-01650

CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION,

DEPT. NO. 15

Respondents.
_____/

NOTICE OF APPEAL

Notice is hereby given that Susan Hopkins, Petitioner above named, by and through her attorney, Clark G. Leslie, Esq., Sr. Deputy, Nevada Attorney for Injured Workers, hereby appeals to the Supreme Court of Nevada from the Order Affirming Appeals Officer's Decision and Order entered in this action on the 22nd day of April, 2021, wherein the subsequent Notice of Entry of Order was filed on the 23rd day of April, 2021, which is attached hereto as Exhibit 1.

. . .

. . .

. . .

The Nevada Attorney for Injured Workers is a state agency exempt from fees and therefore is filing no cost bond.

DATED this 5th day of May, 2021.

NEVADA ATTORNEY FOR INJURED WORKERS

Clark G. Leslie, Esq., Sr. Deputy
Nevada Bar No. 10124
1000 E. William Street, Suite 208
Carson City, Nevada 89701
(775) 684-7555
Attorneys for Petitioner, Susan Hopkins

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding:

NOTICE OF APPEAL filed in Case Number: CV20-01650

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

-OR-

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

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

_____

-or-

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

Signature

5/5/21
Date

Clark G. Leslie, Esq., Sr. Deputy
Nevada Attorney for Injured Workers
Attorney for Appellant, Susan Hopkins

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date, the foregoing **NOTICE OF APPEAL** was electronically submitted to the Court for the Second Judicial District by using the eFlex system, resulting in electronic service to the following user:

LUCAS FOLETTA ESQ
LISA M WILTSHIRE ALSTEAD ESQ
MCDONALD CARANO LLP
100 W LIBERTY ST 10TH FLOOR
RENO NV 89501

and that on this date, I deposited for mailing at Carson City, Nevada a true and correct copy of the attached document addressed to:

SUSAN HOPKINS
11660 ANTHEM DRIVE
SPARKS NV 89441

and that on this date, I prepared for hand-delivery a true and correct copy of the attached document addressed to:

APPEALS OFFICE
DEPARTMENT OF ADMINISTRATION
1050 EAST WILLIAM STREET, SUITE 450
CARSON CITY NV 89701

DATED: 5/6/21

SIGNED: B Wilson

INDEX OF EXHIBITS

Exhibit	Description	Pages
1	Notice of Entry of Order	15

EXHIBIT 1

EXHIBIT 1

CODE: 2540
Lucas M. Foletta, Esq. (#12154)
Lisa Wiltshire Alstead, Esq. (#10470)
McDONALD CARANO LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501
(775) 788-2000
lfoletta@mcdonaldcarano.com
lwiltshire@mcdonaldcarano.com

Attorneys for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

SUSAN HOPKINS,

Petitioner,

vs.

CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION;

Respondents,

Case No.: CV20-01650

Dept. No.: 15

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on April 22, 2021, the above-entitled Court entered its Order of Affirmance Denying Petition for Judicial Review. A true and correct copy of the Order is attached hereto.

//

//

//

//

//

Affirmation

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding document does not contain the social security number of any person.

Dated: April 23, 2021.

McDONALD CARANO LLP

By: */s/ Lucas M. Foletta*
Lucas M. Foletta, Esq. (NSBN 12154)
Lisa Wiltshire Alstead, Esq. (NSBN 10470)
100 West Liberty Street, 10th Floor
Reno, NV 89501

Attorneys for Respondents
Washoe County and Cannon Cochran Management Services, Inc.

McDONALD CARANO
100 WEST LIBERTY STREET TENTH FLOOR • RENO NEVADA 89501
PHONE 775 788 2000 • FAX 775 788 2020

McDONALD CARANO
100 WEST LIBERTY STREET, TENTH FLOOR • RENO, NEVADA 89501
PHONE 775.788.2000 • FAX 775.788.2020

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on April 23, 2021, I certify that I electronically filed the foregoing with the Clerk of the Court which served the following parties electronically:

Clark G. Leslie, Esq.
Nevada Attorney for Injured Workers
1000 E. William St., Ste. 208
Carson City, NV 89701

/s/ Carole Davis
An Employee of McDonald Carano LLP

2700
Lucas Foletta
Nevada Bar No. 12154
McDONALD CARANO LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89505
Telephone: (775) 788-2000

Attorney for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CITY OF RENO, CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION,

Respondents.

Case No: CV20-01650

Dept. No: 15

ORDER OF AFFIRMANCE DENYING PETITION FOR JUDICIAL REVIEW

Presently before the Court is a Petition for Judicial Review ("Petition") filed by Petitioner Susan Hopkins ("Hopkins" or "Petitioner") on October 14, 2020, seeking reversal of an Appeals Officer Decision. The Petition arises out of a contested industrial insurance claim. Petitioner filed her Opening Brief on December 21, 2020. Respondents Washoe County ("County" or "Employer") and its third-party administrator Cannon Cochran Management Services, Inc. ("CCMSI," and together with the County, "Respondents") filed their Answering Brief on January 1, 2020. Petitioner filed her Reply Brief on February 18, 2021. The Court heard oral argument on March 3, 2021.

Upon careful review of the record, written briefs, and oral argument, the Court finds good cause to deny the Petition, and affirms the Appeals Officer Decision filed on September 25, 2020 with the Nevada Department of Administration Appeals Office regarding the denial of Petitioner's workers' compensation claim.

APPLICABLE FACTS

Petitioner works as an office support specialist for the Washoe County Health District in the environmental health services division. (ROA 21.) The Health District offices are located adjacent to the Washoe County Fairgrounds and the Reno-Sparks Livestock Events Center ("RSLEC"). (ROA 46.) Petitioner often chose to walk at the RSLEC during her breaks. (ROA 21-22.) On September 23, 2019, Employer warned 9th Street employees, including Petitioner, who walked during breaks to avoid the area of the RSLEC due to construction and heavy equipment in and around the area. (ROA 45-46.) The email did not require employees to walk during their breaks and warned "[a]s always use caution and be aware of your surroundings." (ROA 45.)

On September 24, 2019, Petitioner took her morning break from work. (ROA 21, 23-24.) Petitioner's break was paid. (ROA at 21.) She chose to go for a walk during her break. (ROA 24.) She exited the back door of her workplace and, approximately 50 to 75 feet outside the door, she tripped over a raised sidewalk and fell. (ROA 24-25.) Petitioner then returned to her office and to her desk with the assistance of her co-workers. (ROA 26.)

On the day of her injury, Petitioner treated at Reno Orthopedic Clinic and completed a Form C-4 claim for workers' compensation and report of initial treatment. (ROA 57-58.) Her supervisor completed notice of injury and report of injury forms. (ROA 59-61.) On September 27, 2019, Petitioner returned for follow-up at Reno Orthopedic Clinic and was diagnosed with left hip strain and a non-displaced fracture of the right great toe. (ROA 69-72.) On October 3, 2019, CCMSI issued a determination letter denying the workers' compensation claim on the basis that Petitioner did not meet her burden to establish that the injury arose out of and in the course of her employment. (ROA 80.)

Petitioner appealed CCMSI's October 3, 2019 determination to the Hearings Division of the Department of Administration, and on November 14, 2019 the Hearing Officer entered a Decision and Order remanding the determination and instructing the insurer to review new documentation submitted by Petitioner and issue a new determination regarding claim compensability. (ROA 38-39.) Pursuant to the Hearing Officer Decision, CCMSI reviewed the documentation and issued a

new determination letter on December 5, 2019, denying the claim under NRS 616C.150 for failure to establish that the injury arose out of and in the course of employment. (ROA 92-93.)

Petitioner appealed CCMSI's December 5, 2019 determination letter, and a hearing was conducted before a Hearings Officer on January 13, 2020. (ROA 95.) The Hearing Officer issued a Decision and Order affirming the determinations and finding "the evidence fails to support that the injury arose out of the Claimant's employment and the conditions thereof." (ROA 95.)

An appeal hearing was held on August 6, 2020. (ROA 9-43.) Petitioner provided witness testimony at the appeal hearing and Exhibits 1 and 2 were admitted into evidence. (ROA 18-29, 44-98.) On September 25, 2020, the Appeals Officer issued a Decision finding no causal connection between Claimant's injury and the nature of her work or workplace. (ROA 3.) The Appeals Officer found Claimant's "walking and tripping was not an employment related risk because the Petitioner was walking for her own recreation and enjoyment. The Employer did not create an employment related risk by permitting the Petitioner to walk around a public office facility that was open to the public." (ROA 6.) The Appeals Officer concluded that "[t]he weight of the evidence and legal authority support legal conclusion that the Petitioner failed to satisfy NRS 616C.150(1), and she did not suffer a compensable industrial injury on September 24, 2019." (ROA 7.) On October 14, 2020, Petitioner filed the instant petition for judicial review seeking review by this Court of the September 25, 2020 Appeals Officer Decision.

STANDARD OF REVIEW

A court may set aside a final decision of an agency if the decision is clearly erroneous in view of the substantial evidence, arbitrary, capricious, in violation of statute, characterized by an abuse of discretion or affected by error of law. NRS 233B.135(3); *Ranieri v. Catholic Community Services*, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). In reviewing a mixed question of law and fact, an appellate court gives deference to the lower court's findings of fact but independently reviews whether those facts satisfy the applicable legal standard. *See Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1132 (2008) (abrogated on other grounds by *State v. Eighth Jud. Dist. Ct.*, 134 Nev. 104, 412 P.3d 18 (2018)). An "agency's fact-based conclusions of law 'are entitled to deference, and will not be disturbed if they are supported by substantial evidence.'" *Law Offices of*

Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 78, 383-84 (2008) (internal citation omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion, and [the court] may not reweigh the evidence or revisit an appeals officer's credibility determination." *Id.* at 362, 184 P.3d at 384. While a "district court is free to decide purely legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986) (internal citation omitted).

DISCUSSION

A. The Appeals Officer correctly concluded that Petitioner's injury did not arise out of and in the course of her employment.

Under the Nevada Industrial Insurance Act ("NIIA"):

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

NRS 616C.150(1). As the Appeals Officer observed in the Decision, the NIIA does not make an employer absolutely liable. (ROA 3) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005)).

The Appeals Officer properly applied *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d 1043 (1997) to determine whether Petitioner's injury "arose out of" and "in the course of" her employment. The Nevada Supreme Court has held that an injury arises out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace. *Gorsky*, 113 Nev. at 605, 939 P.2d at 1046. In contrast, whether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties. *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. Both of these factors must be satisfied in order for an injury to be compensable under the NIIA. *See MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) (explaining "that the inquiry is two-fold").

i. The Appeals Officer properly applied the facts to the law in finding that Petitioner's injury did not "Arise Out of" her employment.

In order for an injury to "arise out of" employment under NRS 616C.150(1), "the employee must show that the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d. 2, 5 (2010) (quoting *Mitchell v. Clark Cty. Sch. Dist.*,121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). To "arise out of the claimant's employment" the injury must be "fairly traceable to the nature of the employment or workplace environment." *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. The Appeals Officer properly applied these holdings to consider whether Petitioner's injury "arose of out" her employment. (ROA 5.)

The Appeals Officer considered the four types of workplace risk relevant to workers' compensation under Nevada law: (1) employment risk, (2) personal risk, (3) neutral risk, and (4) mixed risk. *See Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. Adv. Rep. 71, 426 P.3d 586, 588 (2018). Employment risks arise out of the employment. *Id.* at 590. They are solely related to the employment and include obvious industrial injuries. *See Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017) (classic employment risks include "machinery breaking, objects falling, explosives exploding tractor tipping, fingers getting caught in gears, excavations caving in, and so on" as well as "occupational diseases"). Personal risks do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Personal risks include injuries caused by personal conditions and illnesses, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis." *Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* Larson supra § 4.02, 4-2 (examples of personal risks include dying a natural death the effects of disease or internal weakness and death by "mortal personal enemy").

A neutral risk is a risk that is neither an employment risk nor a personal one, such as a fall that is not attributable to premise defects or a personal condition. *Phillips*, 126 Nev. at 351, 240 P.3d at 5; see also Larson, supra § 4.03, at 4-2 (examples of neutral risks include hit by a stray bullet out of nowhere, bit by a mad dog stabbed by a lunatic running amuck," acts of God and unknown causes). A neutral risk arises out of the employment if the employee was

subjected to a greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at 353, 240 P.3d at 7 (adopting the increased-risk test).

In *Phillips*, the claimant fell and broke her ankle on the stairs to the employee break room. *Id.* The claimant was required to use that staircase by her employer and the staircase was not accessible to the general public. *Id* at 354. Thus, the Nevada Supreme Court applied the neutral risk analysis to the claimant's injury and found that it arose out of her employment and was therefore compensable because "the frequency with which she was required to use the stairs subjected her to a significantly greater risk of injury than the risk faced by the general public." *Id.*

Here, Petitioner contends that, like the claimant in *Phillips*, she was "essentially 'funneled' or 'conveyed'" to the sidewalk where she tripped and fell. (Opening Br. at 20.) This comparison is not apt. The sidewalk where Petitioner was injured was accessible to the public, and the Employer did not require Petitioner to walk on that sidewalk for her mandatory break period. Thus, *Phillips* is distinguishable, and the Appeals Officer did not err by finding that Petitioner was not exposed to a neutral risk that subjected her to an increased risk of injury as compared with the general public.

Rather, the Appeals Officer properly found that the Employer did not create an employment risk by permitting Petitioner to walk around an office complex in an area that was open to the public. (ROA 6.) At the time of her injury, Petitioner was walking for her own recreation and enjoyment outside of her workplace. (ROA 21-22.) While the Employer was aware that its employees walked during break periods and warned of unsafe locations for walking, it neither required Petitioner to walk during her break, nor did it require her to walk in the area where she was injured. (ROA 22, 45.) Thus, the Appeals Officer's conclusion that Petitioner failed to prove by preponderance of evidence that her injury "arose out of" her employment is supported by the substantial evidence.

ii. The Appeals Officer properly applied the facts to the law in finding that Petitioner was not "In the Course of Employment" when she was injured.

While Petitioner contends she was in the course of her employment when walking during her mandatory break time, in an area deemed safe by the Employer who was aware that employees walked during breaks, the Appeals Officer concluded that "when the Petitioner was walking during

her break, she was walking for her own personal enjoyment and health." (ROA 3.). The Appeals Officer found that, under *Gorsky*, Petitioner was not reasonably performing her work duties and therefore she was not in the course of her employment when the injury occurred. *Id.* This is supported by the substantial evidence which shows that Petitioner chose to walk during her breaks and the Employer did not require her to walk during breaks. (ROA 24, 45.) Contrary to Petitioner's assertion, the Appeals Officer did consider the fact that Petitioner was on a mandatory break when she was injured, and also the fact that the Employer had sent an email showing that it was aware some employees chose to walk during their breaks and warning them that some areas near the workplace were unsafe for walking due to construction and the presence of heavy equipment. These facts are not inconsistent with the Appeals Officer's finding that Petitioner was not reasonably performing her work duties when she was injured. Thus, a reasonable person could conclude that, under Nevada law, Petitioner was not in the course of her employment when the injury occurred.

iii. The Appeals Officer properly concluded that the personal comfort doctrine does not apply here.

Petitioner argues that the personal comfort doctrine for traveling employees recognized in *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Rep. 60 (Dec. 12, 2019), applies to this case because walking while on a mandatory break is a form of being away from the physical workplace but still under the control of the Employer. (Opening Br. at 14.) This reading of *Buma* was properly rejected by the Appeals Officer.

In *Buma*, the Nevada Supreme Court adopted the personal comfort rule, which extends coverage under workers' compensation law, for a traveling employee "because of the risks associated with travel away from home." *Buma*, 135 Nev. Adv. Op. 60, 453 P.3d at 909 (citing *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wash.2d 133, 177 P.3d 692, 701 (Wash. 2008)). "Under the personal comfort rule, an employee remains in the course of employment during personal comfort activities unless the departure from the employee's work-related duties 'is so substantial that an intent to abandon the job temporarily may be inferred . . . .'" *Id.* at 909

(quoting *Ball-Foster*, 177 P.3d at 700). Thus, *Buma* permits a traveling employee to tend to reasonable recreation needs during downtime without leaving the course of employment.

The Appeals Officer properly concluded that *Buma* does not apply to the instant case. Petitioner was not traveling on behalf of the Employer at the time of her trip and fall injury. Petitioner cannot be deemed under the employer's control for purposes of qualifying for the personal comfort doctrine because she was not traveling. Therefore, the Appeals Officer correctly found the Petitioner cannot rely upon *Buma* to satisfy the course of employment requirement in NRS 616C.150.

iv. The employer benefit exception to the "Going and Coming" Rule does not apply here.

Petitioner contends that her injury falls under an exception to the "'going and coming' rule" which "precludes compensation for most employee injuries that occur during travel to or from work," because walking during her break conferred a benefit on the Employer. *MGM Mirage*, 121 Nev. at 399, 116 P.3d at 58. In support of her position, Petitioner cites a document provided to County employees which advised employers to provide a map of walking routes around the office and prompted employees to seek information from the Centers for Disease Control and Prevention's Healthier Worksite Initiative programs designed to benefit the employer by reducing time lost from work due to illness or disease. (*See* Opening Br. at 17, *citing* ROA 124.) This document, however, is from Washoe County's public website and is a resource from the Washoe County Health District to provide information to the general public. (ROA at 92.) While County employees are encouraged to participate in voluntary activities such as walking during their break times, they are not required by the County to do so. *Id.*

Perhaps more importantly, the going and coming case law Petitioner cites does not support the use of the doctrine on the facts presented. The employer benefit exception described in *MGM Mirage v. Cotton* does not extend to a benefit as far removed as reducing time lost from work due to disease. *Nevada Indus. Commission v. Holt*, 83 Nev. 497, 500, 434 P.2d 423 (1967) ("[R]ecreational activity should not be deemed within the course of employment unless a regular incident of employment, or required by the employer, or of direct benefit to the employer beyond

the intangible value of employee health and morale common to all kinds of recreation and social life."). Rather, the Nevada Supreme Court has applied this exception to cases of "distinct" benefit, such as an on-call employee driving his employer's vehicle home for purposes of furthering the employer's business. *See Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 635, 877 P.2d 1032 (Nev. 1994) (citing *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 n.6 (2001)).

In *Tighe*, the employee was an on-call undercover police offer who suffered injuries in an automobile accident while driving home in his employer's vehicle. *Id.* The court found that the employer benefitted from having one of its undercover officers driving an undercover vehicle and therefore the employee was subject to his employer's control at the time of his accident. *Id.* at 636. Similarly, the Petitioner in *Evans* was an on-call service technician driving home in his employer's van and was found to be within the course of his employment because he was furthering his employer's business in taking the van home. *See Evans*, 108 Nev. at 1006, 842 P.2d at 721-22. Here, while there may have been an incidental benefit to the Employer in Petitioner maintaining her health by walking on her break, there was no "distinct" benefit. She was not on call. The Employer did not require her to go for a walk. Therefore, she was not "in the course of" her employment under the employer benefit exception to the "going and coming" rule. Even if the Petitioner was "in the course of" her employment at the time of her injury, the injury did not "arise out of" her employment, as set forth here. Both factors of the two-part inquiry must be satisfied for an injury to be compensable under NRS 616C.150(1). The Appeals Officer's decision in this regard is therefore supported by substantial evidence and was not the product of legal error.

B. The Appeals Officer's conclusion that Petitioner did not show by a preponderance of the evidence that her injury arose out of and in the course of her employment under NRS 616C.150(1) is supported by substantial evidence.

The Appeals Officer Decision is supported by substantial evidence and may not be disturbed on appeal. *See Law Offices of Barry Levinson, P.C.* 124 Nev. at 362, 184 P.3d at 384. "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* The Appeals Officer Decision applies the relevant legal authority and

carefully weighs all the evidence in concluding that Petitioner failed to satisfy NRS 616C.150(1).

The Appeals Officer did not ignore the facts that suggest the Employer had control over the Petitioner at the time of her injury, as argued by Petitioner. Instead, the Appeals Officer considered those facts in arriving at the conclusion that the injury did not "arise out of" and "in the course of" her employment. The Appeals Officer weighed the fact that Petitioner was on a contractually mandated break at the time of her injury, that the Employer was aware of employees walking during break periods, and that the Employer had sent an email to Petitioner warning of unsafe areas for walking. (ROA 2, 4-6.) These facts do not undermine the substantial evidence tending to show that Petitioner was not required to walk during her break, was not performing work duties, was walking for her own recreation and enjoyment, and was walking in an area of her choice not mandated by the Employer at the time of her injury.

A reasonable person could find this evidence sufficient to support the Appeals Officer's conclusion that that Petitioner has not met her burden under NRS616C.150(1) to establish that her injury occurred as a direct result of the duties that arose out of and in the course of her employment and therefore did not suffer a compensable industrial injury. Accordingly, the Appeals Officer Decision is not "[a]ffected by other error of law," is not "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," and is not "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3). Thus, no grounds exist for granting Claimant's Petition for Judicial Review.

///

///

///

///

///

///

///

///

DECISION

As articulated above, the Appeals Officer's Decision was supported by substantial evidence and was not clearly erroneous. Furthermore, the Appeals Officer's Decision was not an abuse of discretion nor was it based on an error of law.

Accordingly, and good cause appearing:

IT IS HEREBY ORDERED that Petitioner's Petition for Judicial Review is DENIED. The Appeals Officer's findings of facts and conclusions of law are hereby affirmed.

IT IS SO ORDERED.

DATED this 22nd day of April, 2021.

DAVID A. HARDY
District Judge

This Court noted the objections to the proposed order and concludes they are unnecessary because the arguments are preserved for further review.

DAH

F I L E D
Electronically
CV20-01650
2021-05-10 10:30:45 AM
Alicia L. Lerud
Clerk of the Court
Transaction # 8435585

Code 4132

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CITY OF RENO, CANNON COCHRAN MANAGEMENT SERVICES, INC. DBA CCMSI; WASHOE COUNTY; AND APPEALS OFFICE OF THE DEPARTMENT OF ADMINISTRATION,

Respondents.

Case No. CV20-01650

Dept. No. 15

_____/

NOTICE OF APPEAL DEFICIENCY

TO: Clerk of the Court, Nevada Supreme Court,
and All Parties or their Respective Counsel Of Record:

On May 6th, 2021, Attorney Clark G. Leslie, Esq. for Susan Hopkins, filed a Notice of Appeal with the Court. The Notice of Appeal did not include a Case Appeal Statement pursuant to NRAP (3)(f)(1).

Pursuant to NRAP 3(a)(3), on May 10th, 2021, the Notice of Appeal was filed with the Nevada Supreme Court. By copy of this notice, Attorney Leslie will be notified of the deficiency electronically.

Dated this 10th day of May, 2021.

Alicia L. Lerud, Interim
Clerk of the Court
By: /s/YViloria
YViloria
Deputy Clerk

CERTIFICATE OF SERVICE

CASE NO. CV20-01650

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 10th day of May, 2021, I electronically filed the Notice of Appeal Deficiency with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

CLARK LESLIE, ESQ. for SUSAN HOPKINS

EVAN BEAVERS, ESQ. for SUSAN HOPKINS

LUCAS FOLETTA, ESQ. for WASHOE COUNTY, CANNON COCHRAN MANAGEMENT SERVICES, INC. D/B/A CCMSI

LISA ALSTEAD, ESQ. for WASHOE COUNTY, CANNON COCHRAN MANAGEMENT SERVICES, INC. D/B/A CCMSI

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada: (none)

/s/YViloria
YViloria
Deputy Clerk

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA
COUNTY OF WASHOE

Case History - CV20-01650

Case Description: SUSAN HOPKINS VS CANNON COCHRAN MGT ETAL (D15)

Case Number: CV20-01650 Case Type: OTHER CIVIL MATTERS - Initially Filed On: 10/14/2020

Parties

Party Type & Name	Party Status
JUDG - DAVID A. HARDY - D15	Active
ATTY - Clark G. Leslie, Esq. - 10124	Active
ATTY - Lisa Wiltshire Alstead, Esq. - 10470	Active
ATTY - Evan Bradley Beavers, Esq. - 3399	Active
ATTY - Lucas Foletta, Esq. - 12154	Active
PETR - SUSAN HOPKINS - @1214085	Active
RESP - CANNON COCHRAN MANAGEMENT SERVICES, INC. D/B/A CCMSI - @1346335	Active
RESP - APPEALS OFFICE OF DEPARTMENT OF ADMINISTRATION - @937720	Active
RESP - WASHOE COUNTY - @828	Active

Disposed Hearings

1 Department: D15 -- Event: Request for Submission -- Scheduled Date & Time: 2/19/2021 at 13:05:00
Extra Event Text: REQUESTED ORAL ARGUMENT (NO ORDER)
Event Disposition: S200 - 3/3/2021

2 Department: D15 -- Event: ORAL ARGUMENTS -- Scheduled Date & Time: 3/3/2021 at 10:30:00
Extra Event Text: ON PETITION FOR JUDICIAL REVIEW
Event Disposition: D840 - 3/3/2021

3 Department: D15 -- Event: Request for Submission -- Scheduled Date & Time: 4/21/2021 at 16:56:00
Extra Event Text: PROPOSED ORDER DENYING PETITION FOR JUDICIAL REVIEW (ORDER ATTACHED)
Event Disposition: S200 - 4/22/2021

Actions

	Filing Date - Docket Code & Description
1	10/14/2020 - 3550 - Petition for Judicial Review Additional Text: PETITION FOR JUDICIAL REVIEW - Transaction 8116120 - Approved By: YVILORIA : 10-14-2020:15:29:14
2	10/16/2020 - 2610 - Notice ... Additional Text: NOTICE OF PETITION FOR JUDICIAL REVIEW - Transaction 8119953 - Approved By: CSULEZIC : 10-16-2020:13:38:17
3	10/16/2020 - NEF - Proof of Electronic Service Additional Text: Transaction 8119990 - Approved By: NOREVIEW : 10-16-2020:13:39:20
4	10/20/2020 - 3960 - Statement Intent Participate Additional Text: STATEMENT OF INTENT TO PARTICIPATE - Transaction 8124068 - Approved By: YVILORIA : 10-20-2020:11:31:03
5	10/20/2020 - NEF - Proof of Electronic Service Additional Text: Transaction 8124093 - Approved By: NOREVIEW : 10-20-2020:11:32:04

Report Does Not Contain Sealed Cases or Confidential Information

6 10/20/2020 - 2880 - Ord for Briefing Schedule

Additional Text: Transaction 8124348 - Approved By: NOREVIEW : 10-20-2020:12:53:22

7 10/20/2020 - NEF - Proof of Electronic Service

Additional Text: Transaction 8124351 - Approved By: NOREVIEW : 10-20-2020:12:54:22

8 11/9/2020 - 1365 - Certificate of Transmittal

Additional Text: Certification of Transmittal - Transaction 8154427 - Approved By: NOREVIEW : 11-09-2020:15:39:50

9 11/9/2020 - 3746 - Record on Appeal

Additional Text: Record on Appeal - Transaction 8154427 - Approved By: NOREVIEW : 11-09-2020:15:39:50

10 11/9/2020 - 4195 - Transmittal of Rec. on Appeal

Additional Text: Transmittal of Record on Appeal - Transaction 8154427 - Approved By: NOREVIEW : 11-09-2020:15:39:50

11 11/9/2020 - NEF - Proof of Electronic Service

Additional Text: Transaction 8154429 - Approved By: NOREVIEW : 11-09-2020:15:40:40

12 11/20/2020 - 2610 - Notice ...

Additional Text: Notice of Transmittal of Record of Proceedings - Transaction 8172456 - Approved By: NMASON : 11-20-2020:14:50:24

13 11/20/2020 - NEF - Proof of Electronic Service

Additional Text: Transaction 8172485 - Approved By: NOREVIEW : 11-20-2020:14:52:17

14 12/21/2020 - 2640 - Opening Brief

Additional Text: Petitioner's Opening Brief - Transaction 8214263 - Approved By: NOREVIEW : 12-21-2020:14:02:08

15 12/21/2020 - NEF - Proof of Electronic Service

Additional Text: Transaction 8214265 - Approved By: NOREVIEW : 12-21-2020:14:03:17

16 1/20/2021 - 1170 - Answering Brief

Additional Text: Respondent's Answering Brief - Transaction 8254969 - Approved By: YVILORIA : 01-20-2021:13:36:17

17 1/20/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8255185 - Approved By: NOREVIEW : 01-20-2021:13:37:16

18 1/21/2021 - 3845 - Request for Hearing

Additional Text: Request for Oral Argument - Transaction 8258454 - Approved By: NOREVIEW : 01-21-2021:16:43:30

19 1/21/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8258456 - Approved By: NOREVIEW : 01-21-2021:16:44:30

20 1/27/2021 - 1250 - Application for Setting

Additional Text: Transaction 8266170 - Approved By: NOREVIEW : 01-27-2021:15:05:17

21 1/27/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8266175 - Approved By: NOREVIEW : 01-27-2021:15:06:17

22 1/29/2021 - 1250E - Application for Setting eFile

Additional Text: ORAL ARGUMENTS ON PETITION FOR JUDICIAL REVIEW 3/3/21 AT 10:00 A.M. - Transaction 8270430 - Approved By: NOREVIEW : 01-29-2021:13:41:25

23 1/29/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8270434 - Approved By: NOREVIEW : 01-29-2021:13:42:31

24 2/18/2021 - 3785 - Reply Brief

Additional Text: Petitioner's Reply Brief - Transaction 8301355 - Approved By: NOREVIEW : 02-18-2021:13:18:42

25 2/18/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8301362 - Approved By: NOREVIEW : 02-18-2021:13:19:42

26 2/18/2021 - 3242 - Ord Setting Hearing

Additional Text: RESETTING ORAL ARGUMENTS TO BEGIN AT 10:30 - Transaction 8302330 - Approved By: NOREVIEW : 02-18-2021:17:16:08

27 2/18/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8302332 - Approved By: NOREVIEW : 02-18-2021:17:17:08

28 2/19/2021 - 3860 - Request for Submission

Additional Text: Transaction 8303489 - Approved By: NOREVIEW : 02-19-2021:13:08:56
DOCUMENT TITLE: REQUESTED ORAL ARGUMENT (NO ORDER)
PARTY SUBMITTING: CLARK LESLIE
DATE SUBMITTED: 2/19/21
SUBMITTED BY: AZAMORA
DATE RECEIVED JUDGE OFFICE:

29 2/19/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8303491 - Approved By: NOREVIEW : 02-19-2021:13:09:58

30 3/3/2021 - S200 - Request for Submission Complet

Additional Text: REQUESTED ORAL ARGUMENT (NO ORDER) - ORAL ARGUMENT HELD

31 3/11/2021 - 4185 - Transcript

Additional Text: 3/3/21 - Oral Arguments - Transaction 8338269 - Approved By: NOREVIEW : 03-11-2021:14:29:21

32 3/11/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8338278 - Approved By: NOREVIEW : 03-11-2021:14:30:27

33 3/12/2021 - MIN - ***Minutes

Additional Text: 3/3/2021 - ORAL ARGUMENTS ON PETITION FOR JUDICIAL REVIEW - Transaction 8340625 - Approved By: NOREVIEW : 03-12-2021:14:54:35

34 3/12/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8340633 - Approved By: NOREVIEW : 03-12-2021:14:55:40

35 4/6/2021 - 2700 - Ord After Hearing...

Additional Text: DIRECTING SUBMISSION OF PROPOSED ORDER - Transaction 8381141 - Approved By: NOREVIEW : 04-06-2021:15:52:19

36 4/6/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8381147 - Approved By: NOREVIEW : 04-06-2021:15:53:19

37 4/21/2021 - 2630 - Objection to ...

Additional Text: Petitioner's Objections to Proposed Order - Transaction 8406547 - Approved By: NMASON : 04-21-2021:15:57:21

38 4/21/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8406678 - Approved By: NOREVIEW : 04-21-2021:15:58:19

39 4/21/2021 - 3860 - Request for Submission

Additional Text: Transaction 8407009 - Approved By: NOREVIEW : 04-21-2021:17:00:11
DOCUMENT TITLE: PROPOSED ORDER DENYING PETITION FOR JUDICIAL REVIEW (ORDER ATTACHED)
PARTY SUBMITTING: LUCAS M FOLETTA
DATE SUBMITTED: 4/21/21
SUBMITTED BY: JBYE
DATE RECEIVED JUDGE OFFICE:

40 4/21/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8407012 - Approved By: NOREVIEW : 04-21-2021:17:00:59

41 4/22/2021 - 2685 - Ord Affirm/Judg/Dism/Remand

Additional Text: ORDER AFFIRMING AND DENYING PETITION FOR JUDICIAL REVIEW - Transaction 8408679 - Approved By: NOREVIEW : 04-22-2021:15:30:22
CITY OF RENO REMIVED FROM CAPTION VIA NOTICE OF CORRECTION ENTERED 4/26/21 - SKP

42 4/22/2021 - S200 - Request for Submission Complet

Additional Text: PROPOSED ORDER DENYING PETITION FOR JUDICIAL REVIEW

43 4/22/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8408684 - Approved By: NOREVIEW : 04-22-2021:15:31:21

44 4/22/2021 - F148 - Judgment Reached (bench)

Additional Text: ORDER/JUDGEMENT ENTERED AFTER HEARING ON PETITION

45 4/23/2021 - 2540 - Notice of Entry of Ord

Additional Text: Transaction 8409966 - Approved By: NOREVIEW : 04-23-2021:12:00:10

46 4/23/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8409968 - Approved By: NOREVIEW : 04-23-2021:12:01:10

47 4/26/2021 - 1485 - Corrected Judgment or Ord

Additional Text: NOTICE OF CORRECTION TO CAPTION OF ORDER OF AFFIRMANCE - Transaction 8413504 - Approved By: NOREVIEW : 04-26-2021:16:53:14

48 4/26/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8413511 - Approved By: NOREVIEW : 04-26-2021:16:54:31

49 4/27/2021 - 2630 - Objection to ...

Additional Text: PETITIONER'S FURTHER OBJECTIONS TO ORDER - Transaction 8414905 - Approved By: CSULEZIC : 04-27-2021:11:56:35
WITHDRAW ON 4/30/21 BY PETITIONER - SKP

50 4/27/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8415015 - Approved By: NOREVIEW : 04-27-2021:11:57:32

51 4/30/2021 - 2490 - Motion ...

Additional Text: PETITIONER'S MOTION TO WITHDRAW OBJECTION - Transaction 8421769 - Approved By: CSULEZIC : 04-30-2021:09:46:48

52 4/30/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8421793 - Approved By: NOREVIEW : 04-30-2021:09:47:45

53 5/6/2021 - 2515 - Notice of Appeal Supreme Court

Additional Text: Transaction 8431549 - Approved By: YVILORIA : 05-06-2021:13:26:22

54 5/6/2021 - NEF - Proof of Electronic Service

Additional Text: Transaction 8431578 - Approved By: NOREVIEW : 05-06-2021:13:27:24

55 5/10/2021 - 1350 - Certificate of Clerk

Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 8435585 - Approved By: NOREVIEW : 05-10-2021:10:33:36

56 5/10/2021 - 4113 - District Ct Deficiency Notice

Additional Text: NOTICE OF APPEAL DEFICIENCY - CASE APPEAL STATEMENT - Transaction 8435585 - Approved By: NOREVIEW : 05-10-2021:10:33:36

2700
Lucas Foletta
Nevada Bar No. 12154
McDONALD CARANO LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89505
Telephone: (775) 788-2000

Attorney for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CITY OF RENO, CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION,

Respondents.

Case No: CV20-01650

Dept. No: 15

ORDER OF AFFIRMANCE DENYING PETITION FOR JUDICIAL REVIEW

Presently before the Court is a Petition for Judicial Review ("Petition") filed by Petitioner Susan Hopkins ("Hopkins" or "Petitioner") on October 14, 2020, seeking reversal of an Appeals Officer Decision. The Petition arises out of a contested industrial insurance claim. Petitioner filed her Opening Brief on December 21, 2020. Respondents Washoe County ("County" or "Employer") and its third-party administrator Cannon Cochran Management Services, Inc. ("CCMSI," and together with the County, "Respondents") filed their Answering Brief on January 1, 2020. Petitioner filed her Reply Brief on February 18, 2021. The Court heard oral argument on March 3, 2021.

Upon careful review of the record, written briefs, and oral argument, the Court finds good cause to deny the Petition, and affirms the Appeals Officer Decision filed on September 25, 2020 with the Nevada Department of Administration Appeals Office regarding the denial of Petitioner's workers' compensation claim.

APPLICABLE FACTS

Petitioner works as an office support specialist for the Washoe County Health District in the environmental health services division. (ROA 21.) The Health District offices are located adjacent to the Washoe County Fairgrounds and the Reno-Sparks Livestock Events Center ("RSLEC"). (ROA 46.) Petitioner often chose to walk at the RSLEC during her breaks. (ROA 21-22.) On September 23, 2019, Employer warned 9th Street employees, including Petitioner, who walked during breaks to avoid the area of the RSLEC due to construction and heavy equipment in and around the area. (ROA 45-46.) The email did not require employees to walk during their breaks and warned "[a]s always use caution and be aware of your surroundings." (ROA 45.)

On September 24, 2019, Petitioner took her morning break from work. (ROA 21, 23-24.) Petitioner's break was paid. (ROA at 21.) She chose to go for a walk during her break. (ROA 24.) She exited the back door of her workplace and, approximately 50 to 75 feet outside the door, she tripped over a raised sidewalk and fell. (ROA 24-25.) Petitioner then returned to her office and to her desk with the assistance of her co-workers. (ROA 26.)

On the day of her injury, Petitioner treated at Reno Orthopedic Clinic and completed a Form C-4 claim for workers' compensation and report of initial treatment. (ROA 57-58.) Her supervisor completed notice of injury and report of injury forms. (ROA 59-61.) On September 27, 2019, Petitioner returned for follow-up at Reno Orthopedic Clinic and was diagnosed with left hip strain and a non-displaced fracture of the right great toe. (ROA 69-72.) On October 3, 2019, CCMSI issued a determination letter denying the workers' compensation claim on the basis that Petitioner did not meet her burden to establish that the injury arose out of and in the course of her employment. (ROA 80.)

Petitioner appealed CCMSI's October 3, 2019 determination to the Hearings Division of the Department of Administration, and on November 14, 2019 the Hearing Officer entered a Decision and Order remanding the determination and instructing the insurer to review new documentation submitted by Petitioner and issue a new determination regarding claim compensability. (ROA 38-39.) Pursuant to the Hearing Officer Decision, CCMSI reviewed the documentation and issued a

new determination letter on December 5, 2019, denying the claim under NRS 616C.150 for failure to establish that the injury arose out of and in the course of employment. (ROA 92-93.)

Petitioner appealed CCMSI's December 5, 2019 determination letter, and a hearing was conducted before a Hearings Officer on January 13, 2020. (ROA 95.) The Hearing Officer issued a Decision and Order affirming the determinations and finding "the evidence fails to support that the injury arose out of the Claimant's employment and the conditions thereof." (ROA 95.)

An appeal hearing was held on August 6, 2020. (ROA 9-43.) Petitioner provided witness testimony at the appeal hearing and Exhibits 1 and 2 were admitted into evidence. (ROA 18-29, 44-98.) On September 25, 2020, the Appeals Officer issued a Decision finding no causal connection between Claimant's injury and the nature of her work or workplace. (ROA 3.) The Appeals Officer found Claimant's "walking and tripping was not an employment related risk because the Petitioner was walking for her own recreation and enjoyment. The Employer did not create an employment related risk by permitting the Petitioner to walk around a public office facility that was open to the public." (ROA 6.) The Appeals Officer concluded that "[t]he weight of the evidence and legal authority support legal conclusion that the Petitioner failed to satisfy NRS 616C.150(1), and she did not suffer a compensable industrial injury on September 24, 2019." (ROA 7.) On October 14, 2020, Petitioner filed the instant petition for judicial review seeking review by this Court of the September 25, 2020 Appeals Officer Decision.

STANDARD OF REVIEW

A court may set aside a final decision of an agency if the decision is clearly erroneous in view of the substantial evidence, arbitrary, capricious, in violation of statute, characterized by an abuse of discretion or affected by error of law. NRS 233B.135(3); *Ranieri v. Catholic Community Services*, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). In reviewing a mixed question of law and fact, an appellate court gives deference to the lower court's findings of fact but independently reviews whether those facts satisfy the applicable legal standard. *See Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1132 (2008) (abrogated on other grounds by *State v. Eighth Jud. Dist. Ct.*, 134 Nev. 104, 412 P.3d 18 (2018)). An "agency's fact-based conclusions of law 'are entitled to deference, and will not be disturbed if they are supported by substantial evidence.'" *Law Offices of*

Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 78, 383-84 (2008) (internal citation omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion, and [the court] may not reweigh the evidence or revisit an appeals officer's credibility determination." *Id.* at 362, 184 P.3d at 384. While a "district court is free to decide purely legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986) (internal citation omitted).

DISCUSSION

A. The Appeals Officer correctly concluded that Petitioner's injury did not arise out of and in the course of her employment.

Under the Nevada Industrial Insurance Act ("NIIA"):

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

NRS 616C.150(1). As the Appeals Officer observed in the Decision, the NIIA does not make an employer absolutely liable. (ROA 3) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005)).

The Appeals Officer properly applied *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d 1043 (1997) to determine whether Petitioner's injury "arose out of" and "in the course of" her employment. The Nevada Supreme Court has held that an injury arises out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace. *Gorsky*, 113 Nev. at 605, 939 P.2d at 1046. In contrast, whether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties. *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. Both of these factors must be satisfied in order for an injury to be compensable under the NIIA. *See MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) (explaining "that the inquiry is two-fold").

i. The Appeals Officer properly applied the facts to the law in finding that Petitioner's injury did not "Arise Out of" her employment.

In order for an injury to "arise out of" employment under NRS 616C.150(1), "the employee must show that the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d. 2, 5 (2010) (quoting *Mitchell v. Clark Cty. Sch. Dist.*,121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). To "arise out of the claimant's employment" the injury must be "fairly traceable to the nature of the employment or workplace environment." *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. The Appeals Officer properly applied these holdings to consider whether Petitioner's injury "arose of out" her employment. (ROA 5.)

The Appeals Officer considered the four types of workplace risk relevant to workers' compensation under Nevada law: (1) employment risk, (2) personal risk, (3) neutral risk, and (4) mixed risk. *See Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. Adv. Rep. 71, 426 P.3d 586, 588 (2018). Employment risks arise out of the employment. *Id.* at 590. They are solely related to the employment and include obvious industrial injuries. *See Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017) (classic employment risks include "machinery breaking, objects falling, explosives exploding tractor tipping, fingers getting caught in gears, excavations caving in, and so on" as well as "occupational diseases"). Personal risks do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Personal risks include injuries caused by personal conditions and illnesses, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis." *Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* Larson supra § 4.02, 4-2 (examples of personal risks include dying a natural death the effects of disease or internal weakness and death by "mortal personal enemy").

A neutral risk is a risk that is neither an employment risk nor a personal one, such as a fall that is not attributable to premise defects or a personal condition. *Phillips*, 126 Nev. at 351, 240 P.3d at 5; see also Larson, supra § 4.03, at 4-2 (examples of neutral risks include hit by a stray bullet out of nowhere, bit by a mad dog stabbed by a lunatic running amuck," acts of God and unknown causes). A neutral risk arises out of the employment if the employee was

subjected to a greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at 353, 240 P.3d at 7 (adopting the increased-risk test).

In *Phillips*, the claimant fell and broke her ankle on the stairs to the employee break room. *Id.* The claimant was required to use that staircase by her employer and the staircase was not accessible to the general public. *Id.* at 354. Thus, the Nevada Supreme Court applied the neutral risk analysis to the claimant's injury and found that it arose out of her employment and was therefore compensable because "the frequency with which she was required to use the stairs subjected her to a significantly greater risk of injury than the risk faced by the general public." *Id.*

Here, Petitioner contends that, like the claimant in *Phillips*, she was "essentially 'funneled' or 'conveyed'" to the sidewalk where she tripped and fell. (Opening Br. at 20.) This comparison is not apt. The sidewalk where Petitioner was injured was accessible to the public, and the Employer did not require Petitioner to walk on that sidewalk for her mandatory break period. Thus, *Phillips* is distinguishable, and the Appeals Officer did not err by finding that Petitioner was not exposed to a neutral risk that subjected her to an increased risk of injury as compared with the general public.

Rather, the Appeals Officer properly found that the Employer did not create an employment risk by permitting Petitioner to walk around an office complex in an area that was open to the public. (ROA 6.) At the time of her injury, Petitioner was walking for her own recreation and enjoyment outside of her workplace. (ROA 21-22.) While the Employer was aware that its employees walked during break periods and warned of unsafe locations for walking, it neither required Petitioner to walk during her break, nor did it require her to walk in the area where she was injured. (ROA 22, 45.) Thus, the Appeals Officer's conclusion that Petitioner failed to prove by preponderance of evidence that her injury "arose out of" her employment is supported by the substantial evidence.

ii. The Appeals Officer properly applied the facts to the law in finding that Petitioner was not "In the Course of Employment" when she was injured.

While Petitioner contends she was in the course of her employment when walking during her mandatory break time, in an area deemed safe by the Employer who was aware that employees walked during breaks, the Appeals Officer concluded that "when the Petitioner was walking during

her break, she was walking for her own personal enjoyment and health." (ROA 3.). The Appeals Officer found that, under *Gorsky*, Petitioner was not reasonably performing her work duties and therefore she was not in the course of her employment when the injury occurred. *Id.* This is supported by the substantial evidence which shows that Petitioner chose to walk during her breaks and the Employer did not require her to walk during breaks. (ROA 24, 45.) Contrary to Petitioner's assertion, the Appeals Officer did consider the fact that Petitioner was on a mandatory break when she was injured, and also the fact that the Employer had sent an email showing that it was aware some employees chose to walk during their breaks and warning them that some areas near the workplace were unsafe for walking due to construction and the presence of heavy equipment. These facts are not inconsistent with the Appeals Officer's finding that Petitioner was not reasonably performing her work duties when she was injured. Thus, a reasonable person could conclude that, under Nevada law, Petitioner was not in the course of her employment when the injury occurred.

iii. The Appeals Officer properly concluded that the personal comfort doctrine does not apply here.

Petitioner argues that the personal comfort doctrine for traveling employees recognized in *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Rep. 60 (Dec. 12, 2019), applies to this case because walking while on a mandatory break is a form of being away from the physical workplace but still under the control of the Employer. (Opening Br. at 14.) This reading of *Buma* was properly rejected by the Appeals Officer.

In *Buma*, the Nevada Supreme Court adopted the personal comfort rule, which extends coverage under workers' compensation law, for a traveling employee "because of the risks associated with travel away from home." *Buma*, 135 Nev. Adv. Op. 60, 453 P.3d at 909 (citing *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wash.2d 133, 177 P.3d 692, 701 (Wash. 2008)). "Under the personal comfort rule, an employee remains in the course of employment during personal comfort activities unless the departure from the employee's work-related duties 'is so substantial that an intent to abandon the job temporarily may be inferred . . . .'" *Id.* at 909

(quoting *Ball-Foster*, 177 P.3d at 700). Thus, *Buma* permits a traveling employee to tend to reasonable recreation needs during downtime without leaving the course of employment.

The Appeals Officer properly concluded that *Buma* does not apply to the instant case. Petitioner was not traveling on behalf of the Employer at the time of her trip and fall injury. Petitioner cannot be deemed under the employer's control for purposes of qualifying for the personal comfort doctrine because she was not traveling. Therefore, the Appeals Officer correctly found the Petitioner cannot rely upon *Buma* to satisfy the course of employment requirement in NRS 616C.150.

iv. The employer benefit exception to the "Going and Coming" Rule does not apply here.

Petitioner contends that her injury falls under an exception to the "'going and coming' rule" which "precludes compensation for most employee injuries that occur during travel to or from work," because walking during her break conferred a benefit on the Employer. *MGM Mirage*, 121 Nev. at 399, 116 P.3d at 58. In support of her position, Petitioner cites a document provided to County employees which advised employers to provide a map of walking routes around the office and prompted employees to seek information from the Centers for Disease Control and Prevention's Healthier Worksite Initiative programs designed to benefit the employer by reducing time lost from work due to illness or disease. (*See* Opening Br. at 17, *citing* ROA 124.) This document, however, is from Washoe County's public website and is a resource from the Washoe County Health District to provide information to the general public. (ROA at 92.) While County employees are encouraged to participate in voluntary activities such as walking during their break times, they are not required by the County to do so. *Id.*

Perhaps more importantly, the going and coming case law Petitioner cites does not support the use of the doctrine on the facts presented. The employer benefit exception described in *MGM Mirage v. Cotton* does not extend to a benefit as far removed as reducing time lost from work due to disease. *Nevada Indus. Commission v. Holt*, 83 Nev. 497, 500, 434 P.2d 423 (1967) ("[R]ecreational activity should not be deemed within the course of employment unless a regular incident of employment, or required by the employer, or of direct benefit to the employer beyond

the intangible value of employee health and morale common to all kinds of recreation and social life."). Rather, the Nevada Supreme Court has applied this exception to cases of "distinct" benefit, such as an on-call employee driving his employer's vehicle home for purposes of furthering the employer's business. *See Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 635, 877 P.2d 1032 (Nev. 1994) (citing *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 n.6 (2001)).

In *Tighe*, the employee was an on-call undercover police offer who suffered injuries in an automobile accident while driving home in his employer's vehicle. *Id.* The court found that the employer benefitted from having one of its undercover officers driving an undercover vehicle and therefore the employee was subject to his employer's control at the time of his accident. *Id.* at 636. Similarly, the Petitioner in *Evans* was an on-call service technician driving home in his employer's van and was found to be within the course of his employment because he was furthering his employer's business in taking the van home. *See Evans*, 108 Nev. at 1006, 842 P.2d at 721-22. Here, while there may have been an incidental benefit to the Employer in Petitioner maintaining her health by walking on her break, there was no "distinct" benefit. She was not on call. The Employer did not require her to go for a walk. Therefore, she was not "in the course of" her employment under the employer benefit exception to the "going and coming" rule. Even if the Petitioner was "in the course of" her employment at the time of her injury, the injury did not "arise out of" her employment, as set forth here. Both factors of the two-part inquiry must be satisfied for an injury to be compensable under NRS 616C.150(1). The Appeals Officer's decision in this regard is therefore supported by substantial evidence and was not the product of legal error.

B. The Appeals Officer's conclusion that Petitioner did not show by a preponderance of the evidence that her injury arose out of and in the course of her employment under NRS 616C.150(1) is supported by substantial evidence.

The Appeals Officer Decision is supported by substantial evidence and may not be disturbed on appeal. *See Law Offices of Barry Levinson, P.C.* 124 Nev. at 362, 184 P.3d at 384. "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* The Appeals Officer Decision applies the relevant legal authority and

carefully weighs all the evidence in concluding that Petitioner failed to satisfy NRS 616C.150(1).

The Appeals Officer did not ignore the facts that suggest the Employer had control over the Petitioner at the time of her injury, as argued by Petitioner. Instead, the Appeals Officer considered those facts in arriving at the conclusion that the injury did not "arise out of" and "in the course of" her employment. The Appeals Officer weighed the fact that Petitioner was on a contractually mandated break at the time of her injury, that the Employer was aware of employees walking during break periods, and that the Employer had sent an email to Petitioner warning of unsafe areas for walking. (ROA 2, 4-6.) These facts do not undermine the substantial evidence tending to show that Petitioner was not required to walk during her break, was not performing work duties, was walking for her own recreation and enjoyment, and was walking in an area of her choice not mandated by the Employer at the time of her injury.

A reasonable person could find this evidence sufficient to support the Appeals Officer's conclusion that that Petitioner has not met her burden under NRS616C.150(1) to establish that her injury occurred as a direct result of the duties that arose out of and in the course of her employment and therefore did not suffer a compensable industrial injury. Accordingly, the Appeals Officer Decision is not "[a]ffected by other error of law," is not "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," and is not "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3). Thus, no grounds exist for granting Claimant's Petition for Judicial Review.

///

///

///

///

///

///

///

///

DECISION

As articulated above, the Appeals Officer's Decision was supported by substantial evidence and was not clearly erroneous. Furthermore, the Appeals Officer's Decision was not an abuse of discretion nor was it based on an error of law.

Accordingly, and good cause appearing:

IT IS HEREBY ORDERED that Petitioner's Petition for Judicial Review is DENIED. The Appeals Officer's findings of facts and conclusions of law are hereby affirmed.

IT IS SO ORDERED.

DATED this 22nd day of April, 2021.

DAVID A. HARDY
District Judge

This Court noted the objections to the proposed order and concludes they are unnecessary because the arguments are preserved for further review.

DAH

FILED
Electronically
CV20-01650
2021-04-23 11:56:17 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8409966

CODE: 2540

Lucas M. Foletta, Esq. (#12154)
Lisa Wiltshire Alstead, Esq. (#10470)
MCDONALD CARANO LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501
(775) 788-2000
lfoletta@mcdonaldcarano.com
lwiltshire@mcdonaldcarano.com

Attorneys for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

SUSAN HOPKINS, Petitioner, vs. CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION; Respondents,	Case No.: CV20-01650 Dept. No.: 15

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on April 22, 2021, the above-entitled Court entered its Order of Affirmance Denying Petition for Judicial Review. A true and correct copy of the Order is attached hereto.

//

//

//

//

//

Affirmation

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding document does not contain the social security number of any person.

Dated: April 23, 2021.

MCDONALD CARANO LLP

By: */s/ Lucas M. Foletta*
Lucas M. Foletta, Esq. (NSBN 12154)
Lisa Wiltshire Alstead, Esq. (NSBN 10470)
100 West Liberty Street, 10th Floor
Reno, NV 89501

Attorneys for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

McDONALD CARANO
100 WEST LIBERTY STREET, TENTH FLOOR • RENO, NEVADA 89501
PHONE 775.788.2000 • FAX 775.788.2020

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on April 23, 2021, I certify that I electronically filed the foregoing with the Clerk of the Court which served the following parties electronically:

Clark G. Leslie, Esq.
Nevada Attorney for Injured Workers
1000 E. William St., Ste. 208
Carson City, NV 89701

/s/ Carole Davis
An Employee of McDonald Carano LLP

McDONALD CARANO
100 WEST LIBERTY STREET, TENTH FLOOR • RENO, NEVADA 89501
PHONE 775.788.2000 • FAX 775.788.2020

INDEX OF EXHIBITS

Exhibit	Description	Pages
1	Order of Affirmance Denying Petition for Judicial Review	11

McDONALD CARANO
100 WEST LIBERTY STREET, TENTH FLOOR • RENO, NEVADA 89501
PHONE 775.788.2000 • FAX 775.788.2020

EXHIBIT 1

2700
Lucas Foletta
Nevada Bar No. 12154
McDONALD CARANO LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89505
Telephone: (775) 788-2000

Attorney for Respondents
Washoe County and Cannon Cochran
Management Services, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CITY OF RENO, CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; WASHOE COUNTY; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION,

Respondents.

Case No: CV20-01650

Dept. No: 15

ORDER OF AFFIRMANCE DENYING PETITION FOR JUDICIAL REVIEW

Presently before the Court is a Petition for Judicial Review ("Petition") filed by Petitioner Susan Hopkins ("Hopkins" or "Petitioner") on October 14, 2020, seeking reversal of an Appeals Officer Decision. The Petition arises out of a contested industrial insurance claim. Petitioner filed her Opening Brief on December 21, 2020. Respondents Washoe County ("County" or "Employer") and its third-party administrator Cannon Cochran Management Services, Inc. ("CCMSI," and together with the County, "Respondents") filed their Answering Brief on January 1, 2020. Petitioner filed her Reply Brief on February 18, 2021. The Court heard oral argument on March 3, 2021.

Upon careful review of the record, written briefs, and oral argument, the Court finds good cause to deny the Petition, and affirms the Appeals Officer Decision filed on September 25, 2020 with the Nevada Department of Administration Appeals Office regarding the denial of Petitioner's workers' compensation claim.

APPLICABLE FACTS

Petitioner works as an office support specialist for the Washoe County Health District in the environmental health services division. (ROA 21.) The Health District offices are located adjacent to the Washoe County Fairgrounds and the Reno-Sparks Livestock Events Center ("RSLEC"). (ROA 46.) Petitioner often chose to walk at the RSLEC during her breaks. (ROA 21-22.) On September 23, 2019, Employer warned 9th Street employees, including Petitioner, who walked during breaks to avoid the area of the RSLEC due to construction and heavy equipment in and around the area. (ROA 45-46.) The email did not require employees to walk during their breaks and warned "[a]s always use caution and be aware of your surroundings." (ROA 45.)

On September 24, 2019, Petitioner took her morning break from work. (ROA 21, 23-24.) Petitioner's break was paid. (ROA at 21.) She chose to go for a walk during her break. (ROA 24.) She exited the back door of her workplace and, approximately 50 to 75 feet outside the door, she tripped over a raised sidewalk and fell. (ROA 24-25.) Petitioner then returned to her office and to her desk with the assistance of her co-workers. (ROA 26.)

On the day of her injury, Petitioner treated at Reno Orthopedic Clinic and completed a Form C-4 claim for workers' compensation and report of initial treatment. (ROA 57-58.) Her supervisor completed notice of injury and report of injury forms. (ROA 59-61.) On September 27, 2019, Petitioner returned for follow-up at Reno Orthopedic Clinic and was diagnosed with left hip strain and a non-displaced fracture of the right great toe. (ROA 69-72.) On October 3, 2019, CCMSI issued a determination letter denying the workers' compensation claim on the basis that Petitioner did not meet her burden to establish that the injury arose out of and in the course of her employment. (ROA 80.)

Petitioner appealed CCMSI's October 3, 2019 determination to the Hearings Division of the Department of Administration, and on November 14, 2019 the Hearing Officer entered a Decision and Order remanding the determination and instructing the insurer to review new documentation submitted by Petitioner and issue a new determination regarding claim compensability. (ROA 38-39.) Pursuant to the Hearing Officer Decision, CCMSI reviewed the documentation and issued a

new determination letter on December 5, 2019, denying the claim under NRS 616C.150 for failure to establish that the injury arose out of and in the course of employment. (ROA 92-93.)

Petitioner appealed CCMSI's December 5, 2019 determination letter, and a hearing was conducted before a Hearings Officer on January 13, 2020. (ROA 95.) The Hearing Officer issued a Decision and Order affirming the determinations and finding "the evidence fails to support that the injury arose out of the Claimant's employment and the conditions thereof." (ROA 95.)

An appeal hearing was held on August 6, 2020. (ROA 9-43.) Petitioner provided witness testimony at the appeal hearing and Exhibits 1 and 2 were admitted into evidence. (ROA 18-29, 44-98.) On September 25, 2020, the Appeals Officer issued a Decision finding no causal connection between Claimant's injury and the nature of her work or workplace. (ROA 3.) The Appeals Officer found Claimant's "walking and tripping was not an employment related risk because the Petitioner was walking for her own recreation and enjoyment. The Employer did not create an employment related risk by permitting the Petitioner to walk around a public office facility that was open to the public." (ROA 6.) The Appeals Officer concluded that "[t]he weight of the evidence and legal authority support legal conclusion that the Petitioner failed to satisfy NRS 616C.150(1), and she did not suffer a compensable industrial injury on September 24, 2019." (ROA 7.) On October 14, 2020, Petitioner filed the instant petition for judicial review seeking review by this Court of the September 25, 2020 Appeals Officer Decision.

STANDARD OF REVIEW

A court may set aside a final decision of an agency if the decision is clearly erroneous in view of the substantial evidence, arbitrary, capricious, in violation of statute, characterized by an abuse of discretion or affected by error of law. NRS 233B.135(3); *Ranieri v. Catholic Community Services*, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). In reviewing a mixed question of law and fact, an appellate court gives deference to the lower court's findings of fact but independently reviews whether those facts satisfy the applicable legal standard. *See Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1132 (2008) (abrogated on other grounds by *State v. Eighth Jud. Dist. Ct.*, 134 Nev. 104, 412 P.3d 18 (2018)). An "agency's fact-based conclusions of law 'are entitled to deference, and will not be disturbed if they are supported by substantial evidence.'" *Law Offices of*

Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 78, 383-84 (2008) (internal citation omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion, and [the court] may not reweigh the evidence or revisit an appeals officer's credibility determination." *Id.* at 362, 184 P.3d at 384. While a "district court is free to decide purely legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986) (internal citation omitted).

DISCUSSION

A. The Appeals Officer correctly concluded that Petitioner's injury did not arise out of and in the course of her employment.

Under the Nevada Industrial Insurance Act ("NIIA"):

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

NRS 616C.150(1). As the Appeals Officer observed in the Decision, the NIIA does not make an employer absolutely liable. (ROA 3) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005)).

The Appeals Officer properly applied *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d 1043 (1997) to determine whether Petitioner's injury "arose out of" and "in the course of" her employment. The Nevada Supreme Court has held that an injury arises out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace. *Gorsky*, 113 Nev. at 605, 939 P.2d at 1046. In contrast, whether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties. *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. Both of these factors must be satisfied in order for an injury to be compensable under the NIIA. *See MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) (explaining "that the inquiry is two-fold").

i. The Appeals Officer properly applied the facts to the law in finding that Petitioner's injury did not "Arise Out of" her employment.

In order for an injury to "arise out of" employment under NRS 616C.150(1), "the employee must show that the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d. 2, 5 (2010) (quoting *Mitchell v. Clark Cty. Sch. Dist.*,121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). To "arise out of the claimant's employment" the injury must be "fairly traceable to the nature of the employment or workplace environment." *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046. The Appeals Officer properly applied these holdings to consider whether Petitioner's injury "arose of out" her employment. (ROA 5.)

The Appeals Officer considered the four types of workplace risk relevant to workers' compensation under Nevada law: (1) employment risk, (2) personal risk, (3) neutral risk, and (4) mixed risk. *See Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. Adv. Rep. 71, 426 P.3d 586, 588 (2018). Employment risks arise out of the employment. *Id.* at 590. They are solely related to the employment and include obvious industrial injuries. *See Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017) (classic employment risks include "machinery breaking, objects falling, explosives exploding tractor tipping, fingers getting caught in gears, excavations caving in, and so on" as well as "occupational diseases"). Personal risks do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Personal risks include injuries caused by personal conditions and illnesses, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis." *Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* Larson supra § 4.02, 4-2 (examples of personal risks include dying a natural death the effects of disease or internal weakness and death by "mortal personal enemy").

A neutral risk is a risk that is neither an employment risk nor a personal one, such as a fall that is not attributable to premise defects or a personal condition. *Phillips*, 126 Nev. at 351, 240 P.3d at 5; see also Larson, supra § 4.03, at 4-2 (examples of neutral risks include hit by a stray bullet out of nowhere, bit by a mad dog stabbed by a lunatic running amuck," acts of God and unknown causes). A neutral risk arises out of the employment if the employee was

subjected to a greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at 353, 240 P.3d at 7 (adopting the increased-risk test).

In *Phillips*, the claimant fell and broke her ankle on the stairs to the employee break room. *Id.* The claimant was required to use that staircase by her employer and the staircase was not accessible to the general public. *Id.* at 354. Thus, the Nevada Supreme Court applied the neutral risk analysis to the claimant's injury and found that it arose out of her employment and was therefore compensable because "the frequency with which she was required to use the stairs subjected her to a significantly greater risk of injury than the risk faced by the general public." *Id.*

Here, Petitioner contends that, like the claimant in *Phillips*, she was "essentially 'funneled' or 'conveyed'" to the sidewalk where she tripped and fell. (Opening Br. at 20.) This comparison is not apt. The sidewalk where Petitioner was injured was accessible to the public, and the Employer did not require Petitioner to walk on that sidewalk for her mandatory break period. Thus, *Phillips* is distinguishable, and the Appeals Officer did not err by finding that Petitioner was not exposed to a neutral risk that subjected her to an increased risk of injury as compared with the general public.

Rather, the Appeals Officer properly found that the Employer did not create an employment risk by permitting Petitioner to walk around an office complex in an area that was open to the public. (ROA 6.) At the time of her injury, Petitioner was walking for her own recreation and enjoyment outside of her workplace. (ROA 21-22.) While the Employer was aware that its employees walked during break periods and warned of unsafe locations for walking, it neither required Petitioner to walk during her break, nor did it require her to walk in the area where she was injured. (ROA 22, 45.) Thus, the Appeals Officer's conclusion that Petitioner failed to prove by preponderance of evidence that her injury "arose out of" her employment is supported by the substantial evidence.

ii. The Appeals Officer properly applied the facts to the law in finding that Petitioner was not "In the Course of Employment" when she was injured.

While Petitioner contends she was in the course of her employment when walking during her mandatory break time, in an area deemed safe by the Employer who was aware that employees walked during breaks, the Appeals Officer concluded that "when the Petitioner was walking during

her break, she was walking for her own personal enjoyment and health." (ROA 3.). The Appeals Officer found that, under *Gorsky*, Petitioner was not reasonably performing her work duties and therefore she was not in the course of her employment when the injury occurred. *Id.* This is supported by the substantial evidence which shows that Petitioner chose to walk during her breaks and the Employer did not require her to walk during breaks. (ROA 24, 45.) Contrary to Petitioner's assertion, the Appeals Officer did consider the fact that Petitioner was on a mandatory break when she was injured, and also the fact that the Employer had sent an email showing that it was aware some employees chose to walk during their breaks and warning them that some areas near the workplace were unsafe for walking due to construction and the presence of heavy equipment. These facts are not inconsistent with the Appeals Officer's finding that Petitioner was not reasonably performing her work duties when she was injured. Thus, a reasonable person could conclude that, under Nevada law, Petitioner was not in the course of her employment when the injury occurred.

iii. The Appeals Officer properly concluded that the personal comfort doctrine does not apply here.

Petitioner argues that the personal comfort doctrine for traveling employees recognized in *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Rep. 60 (Dec. 12, 2019), applies to this case because walking while on a mandatory break is a form of being away from the physical workplace but still under the control of the Employer. (Opening Br. at 14.) This reading of *Buma* was properly rejected by the Appeals Officer.

In *Buma*, the Nevada Supreme Court adopted the personal comfort rule, which extends coverage under workers' compensation law, for a traveling employee "because of the risks associated with travel away from home." *Buma*, 135 Nev. Adv. Op. 60, 453 P.3d at 909 (citing *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wash.2d 133, 177 P.3d 692, 701 (Wash. 2008)). "Under the personal comfort rule, an employee remains in the course of employment during personal comfort activities unless the departure from the employee's work-related duties 'is so substantial that an intent to abandon the job temporarily may be inferred . . . .'" *Id.* at 909

(quoting *Ball-Foster*, 177 P.3d at 700). Thus, *Buma* permits a traveling employee to tend to reasonable recreation needs during downtime without leaving the course of employment.

The Appeals Officer properly concluded that *Buma* does not apply to the instant case. Petitioner was not traveling on behalf of the Employer at the time of her trip and fall injury. Petitioner cannot be deemed under the employer's control for purposes of qualifying for the personal comfort doctrine because she was not traveling. Therefore, the Appeals Officer correctly found the Petitioner cannot rely upon *Buma* to satisfy the course of employment requirement in NRS 616C.150.

iv. The employer benefit exception to the "Going and Coming" Rule does not apply here.

Petitioner contends that her injury falls under an exception to the "'going and coming' rule" which "precludes compensation for most employee injuries that occur during travel to or from work," because walking during her break conferred a benefit on the Employer. *MGM Mirage*, 121 Nev. at 399, 116 P.3d at 58. In support of her position, Petitioner cites a document provided to County employees which advised employers to provide a map of walking routes around the office and prompted employees to seek information from the Centers for Disease Control and Prevention's Healthier Worksite Initiative programs designed to benefit the employer by reducing time lost from work due to illness or disease. (*See* Opening Br. at 17, *citing* ROA 124.) This document, however, is from Washoe County's public website and is a resource from the Washoe County Health District to provide information to the general public. (ROA at 92.) While County employees are encouraged to participate in voluntary activities such as walking during their break times, they are not required by the County to do so. *Id.*

Perhaps more importantly, the going and coming case law Petitioner cites does not support the use of the doctrine on the facts presented. The employer benefit exception described in *MGM Mirage v. Cotton* does not extend to a benefit as far removed as reducing time lost from work due to disease. *Nevada Indus. Commission v. Holt*, 83 Nev. 497, 500, 434 P.2d 423 (1967) ("[R]ecreational activity should not be deemed within the course of employment unless a regular incident of employment, or required by the employer, or of direct benefit to the employer beyond

the intangible value of employee health and morale common to all kinds of recreation and social life."). Rather, the Nevada Supreme Court has applied this exception to cases of "distinct" benefit, such as an on-call employee driving his employer's vehicle home for purposes of furthering the employer's business. *See Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 635, 877 P.2d 1032 (Nev. 1994) (citing *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 n.6 (2001)).

In *Tighe*, the employee was an on-call undercover police offer who suffered injuries in an automobile accident while driving home in his employer's vehicle. *Id.* The court found that the employer benefitted from having one of its undercover officers driving an undercover vehicle and therefore the employee was subject to his employer's control at the time of his accident. *Id.* at 636. Similarly, the Petitioner in *Evans* was an on-call service technician driving home in his employer's van and was found to be within the course of his employment because he was furthering his employer's business in taking the van home. *See Evans*, 108 Nev. at 1006, 842 P.2d at 721-22. Here, while there may have been an incidental benefit to the Employer in Petitioner maintaining her health by walking on her break, there was no "distinct" benefit. She was not on call. The Employer did not require her to go for a walk. Therefore, she was not "in the course of" her employment under the employer benefit exception to the "going and coming" rule. Even if the Petitioner was "in the course of" her employment at the time of her injury, the injury did not "arise out of" her employment, as set forth here. Both factors of the two-part inquiry must be satisfied for an injury to be compensable under NRS 616C.150(1). The Appeals Officer's decision in this regard is therefore supported by substantial evidence and was not the product of legal error.

B. The Appeals Officer's conclusion that Petitioner did not show by a preponderance of the evidence that her injury arose out of and in the course of her employment under NRS 616C.150(1) is supported by substantial evidence.

The Appeals Officer Decision is supported by substantial evidence and may not be disturbed on appeal. *See Law Offices of Barry Levinson, P.C.* 124 Nev. at 362, 184 P.3d at 384. "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* The Appeals Officer Decision applies the relevant legal authority and

carefully weighs all the evidence in concluding that Petitioner failed to satisfy NRS 616C.150(1).

The Appeals Officer did not ignore the facts that suggest the Employer had control over the Petitioner at the time of her injury, as argued by Petitioner. Instead, the Appeals Officer considered those facts in arriving at the conclusion that the injury did not "arise out of" and "in the course of" her employment. The Appeals Officer weighed the fact that Petitioner was on a contractually mandated break at the time of her injury, that the Employer was aware of employees walking during break periods, and that the Employer had sent an email to Petitioner warning of unsafe areas for walking. (ROA 2, 4-6.) These facts do not undermine the substantial evidence tending to show that Petitioner was not required to walk during her break, was not performing work duties, was walking for her own recreation and enjoyment, and was walking in an area of her choice not mandated by the Employer at the time of her injury.

A reasonable person could find this evidence sufficient to support the Appeals Officer's conclusion that that Petitioner has not met her burden under NRS616C.150(1) to establish that her injury occurred as a direct result of the duties that arose out of and in the course of her employment and therefore did not suffer a compensable industrial injury. Accordingly, the Appeals Officer Decision is not "[a]ffected by other error of law," is not "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," and is not "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3). Thus, no grounds exist for granting Claimant's Petition for Judicial Review.

///

///

///

///

///

///

///

///

DECISION

As articulated above, the Appeals Officer's Decision was supported by substantial evidence and was not clearly erroneous. Furthermore, the Appeals Officer's Decision was not an abuse of discretion nor was it based on an error of law.

Accordingly, and good cause appearing:

IT IS HEREBY ORDERED that Petitioner's Petition for Judicial Review is DENIED. The Appeals Officer's findings of facts and conclusions of law are hereby affirmed.

IT IS SO ORDERED.

DATED this 22nd day of April, 2021.

DAVID A. HARDY
District Judge

This Court noted the objections to the proposed order and concludes they are unnecessary because the arguments are preserved for further review.

DAH

F I L E D
Electronically
CV20-01650
2021-03-12 02:53:27 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8340625

CASE NO. CV20-01650 **SUSAN HOPKINS VS. CANNON COCHRAN MGMT ETAL**

DATE, JUDGE OFFICERS OF COURT PRESENT

3/3/2021
HONORABLE DAVID A. HARDY
DEPT. NO. 15
M. Merkouris (Clerk)
L. Urmston (Reporter)
Zoom Webinar

APPEARANCES-HEARING

ORAL ARGUMENTS

10:41 a.m. – Court convened via Zoom.

Clark Leslie, Esq., was present on behalf of Petitioner Susan Hopkins.

Lucas Foletta, Esq., was present on behalf of Respondents Washoe County, Cannon Cochran Management Services, Inc., and Appeals Office of the Department of Administration.

Pursuant to the national and local COVID-19 emergency response that caused temporary closure of the courthouse located at 75 Court Street in Reno, Washoe County, Nevada, this hearing was conducted remotely. This Court and all participants appeared electronically via Zoom Webinar. This Court was physically located in Washoe County, Nevada.

COURT reviewed the procedural history of the case, noting that he was inclined to vacate this hearing after reviewing the briefs and moving papers, however he decided he would like to hear from counsel on the issue.

Counsel Leslie presented argument in support of the Petition for Judicial Review, filed October 14, 2020.

Counsel Foletta responded; and he further argued in opposition of the Petition for Judicial Review.

Counsel Clark replied; and he further argued in support of the Petition for Judicial Review.

COURT thanked counsel for their excellent legal work and briefs on this issue.

COURT ORDERED: Matter taken under advisement; a transcript of this hearing shall be filed.

11:20 a.m. – Court adjourned.

F I L E D
Electronically
CV20-01650
2021-05-10 10:30:45 AM
Alicia L. Lerud
Clerk of the Court
Transaction # 8435585

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SUSAN HOPKINS,

Petitioner,

vs.

CITY OF RENO, CANNON COCHRAN MANAGEMENT SERVICES, INC. DBA CCMSI; WASHOE COUNTY; AND APPEALS OFFICE OF THE DEPARTMENT OF ADMINISTRATION,

Respondents.

_____/

Case No. CV20-01650

Dept. No. 15

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 10th day of May, 2021, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 10th day of May, 2021.

Alicia Lerud, Interim
Clerk of the Court
By /s/YViloria
YViloria
Deputy Clerk