

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SUSAN HOPKINS
Appellant,

vs.

CANNON COCHRAN MANAGEMENT
SERVICES, INC., D/B/A CCMSI; AND
WASHOE COUNTY,
Respondents

No. 82894

Electronically Filed
May 26 2021 08:10 a.m.

DOCKETING STATEMENT
CIVIL APPEALS
Elizabeth Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Judicial District Department 15
County Washoe County Judge David A. Hardy
District Ct. Case No. CV20-01650

2. Attorney filing this docketing statement:

Attorney Clark G. Leslie, Esq. Telephone 775-684-7555
Firm Nevada Attorney for Injured Workers
Address 1000 East William Street, Suite 208
Carson City, Nevada 89701

Client(s) Susan Hopkins

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

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Client(s) Cannon Cochran Management Services, Inc. and Washoe County

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. Nature of the action. Briefly describe the nature of the action and the result below:

Appellant denied workers' compensation benefits for an injury sustained outside of the workplace but during a paid break. The injury occurred when the Appellant tripped and fell due to a defective sidewalk that was under the control of the employer. The employer acquiesced in and knew of its employees walking near the work place during contractually mandated break times (two 20-minute breaks per work day). The employer/insurer asserted the injury arose from a 'neutral' risk and was not compensable. Appellant argued that the injury arose from an 'employment' risk and therefore within the parameters of the Nevada Industrial Insurance Act.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the injury to Appellant "arise out of" her employment where she was on a paid break when she fell due to a defect in a sidewalk maintained by her employer and where the employer did not provide a 'break' room for its employees and did not bar its employees from walking on adjacent grounds while engaged in their breaks?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Not aware of similar issues.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: No court in Nevada has ruled upon the issue presented by this appeal.

The claim is closely akin to various rules in workers' compensation law that provide for liability ('going and coming rule,' 'parking lot rule,' 'traveling employee rule,' and, the 'parking lot rule'). However, no case or statute precisely addresses the issue of an employee on a paid break being injured near the employer's premises. There are thousands of Nevada employees that enjoy compensated break times who are unsure of whether they will be covered by NIIA benefits if they are injured while engaged in contractually-mandated activities during break times.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

NRAP 17(b)(10). Appellant believes the Supreme Court should retain jurisdiction of this appeal because it presents a question of first impression that affects thousands of Nevada workers who do not know if their compensated 'break time' activities will be covered under the NIIA if they are injured while engaged in their break time away from their employer's facility or place of business.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from Apr 23, 2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served Apr 23, 2021

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed May 6, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:
NRS 233B.150 provides: "An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution. The appeal shall be taken as in other civil cases."

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Susan Hopkins, appellant

Washoe County, respondent

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Not applicable

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Hopkins - claim for NIIA benefits

Washoe County

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

NRAP 3A(b)(1): "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered."

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Susan Hopkins
Name of appellant

May 26, 2021
Date

Carson City, Nevada
State and county where signed

Clark G. Leslie, Esq.
Name of counsel of record


Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 26th day of May, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

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

Dated this 26th day of May, 2021

ALEX ANDRACA
Signature

EXHIBIT 1

EXHIBIT 1

2700
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*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.

Case No: CV20-01650

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

Dept. No: 15

Respondents.

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, 2021. 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.

1
2 **APPLICABLE FACTS**

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

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

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

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

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

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

7 An appeal hearing was held on August 6, 2020. (ROA 9-43.) Petitioner provided witness
8 testimony at the appeal hearing and Exhibits 1 and 2 were admitted into evidence. (ROA 18-29,
9 44-98.) On September 25, 2020, the Appeals Officer issued a Decision finding no causal
10 connection between Claimant's injury and the nature of her work or workplace. (ROA 3.) The
11 Appeals Officer found Claimant's "walking and tripping was not an employment related risk
12 because the Petitioner was walking for her own recreation and enjoyment. The Employer did not
13 create an employment related risk by permitting the Petitioner to walk around a public office
14 facility that was open to the public." (ROA 6.) The Appeals Officer concluded that "[t]he weight
15 of the evidence and legal authority support legal conclusion that the Petitioner failed to satisfy NRS
16 616C.150(1), and she did not suffer a compensable industrial injury on September 24, 2019."
17 (ROA 7.) On October 14, 2020, Petitioner filed the instant petition for judicial review seeking
18 review by this Court of the September 25, 2020 Appeals Officer Decision.

19 STANDARD OF REVIEW

20 A court may set aside a final decision of an agency if the decision is clearly erroneous in
21 view of the substantial evidence, arbitrary, capricious, in violation of statute, characterized by an
22 abuse of discretion or affected by error of law. NRS 233B.135(3); *Ranieri v. Catholic Community*
23 *Services*, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). In reviewing a mixed question of law
24 and fact, an appellate court gives deference to the lower court's findings of fact but independently
25 reviews whether those facts satisfy the applicable legal standard. *See Hernandez v. State*, 124 Nev.
26 639, 647, 188 P.3d 1126, 1132 (2008) (abrogated on other grounds by *State v. Eighth Jud. Dist. Ct.*,
27 134 Nev. 104, 412 P.3d 18 (2018)). An "agency's fact-based conclusions of law 'are entitled to
28 deference, and will not be disturbed if they are supported by substantial evidence.'" *Law Offices of*

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

9 DISCUSSION

10 **A. The Appeals Officer correctly concluded that Petitioner’s injury did not arise** 11 **out of and in the course of her employment.**

12 Under the Nevada Industrial Insurance Act (“NIIA”):

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

18 NRS 616C.150(1). As the Appeals Officer observed in the Decision, the NIIA does not make an
19 employer absolutely liable. (ROA 3) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d
20 1026, 1032 (2005)).

21 The Appeals Officer properly applied *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600,
22 939 P.2d 1043 (1997) to determine whether Petitioner’s injury “arose out of” and “in the course of”
23 her employment. The Nevada Supreme Court has held that an injury arises out of one’s
24 employment when there is a causal connection between the employee’s injury and the nature of the
25 work or workplace. *Gorsky*, 113 Nev. at 605, 939 P.2d at 1046. In contrast, whether an injury
26 occurs within the course of the employment refers merely to the time and place of employment, *i.e.*,
27 whether the injury occurs at work, during working hours, and while the employee is reasonably
28 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

1 subjected to a greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at
2 353, 240 P.3d at 7 (adopting the increased-risk test).

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

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

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

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

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

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

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

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

21 In *Buma*, the Nevada Supreme Court adopted the personal comfort rule, which extends
22 coverage under workers’ compensation law, for a traveling employee “because of the risks
23 associated with travel away from home.” *Buma*, 135 Nev. Adv. Op. 60, 453 P.3d at 909 (citing
24 *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wash.2d 133, 177 P.3d 692, 701 (Wash.
25 2008)). “Under the personal comfort rule, an employee remains in the course of employment
26 during personal comfort activities unless the departure from the employee’s work-related duties ‘is
27 so substantial that an intent to abandon the job temporarily may be inferred’” *Id.* at 909
28

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

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

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

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

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

1 the intangible value of employee health and morale common to all kinds of recreation and social
2 life.”). Rather, the Nevada Supreme Court has applied this exception to cases of “distinct” benefit,
3 such as an on-call employee driving his employer’s vehicle home for purposes of furthering the
4 employer’s business. *See Tighe v. Las Vegas Metro. Police Dep’t*, 110 Nev. 632, 635, 877 P.2d
5 1032 (Nev. 1994) (citing *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992),
6 *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 n.6 (2001)).

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

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

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

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

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

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

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1 DECISION

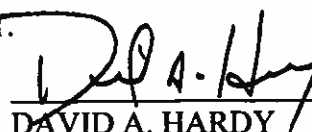
2 As articulated above, the Appeals Officer's Decision was supported by substantial
3 evidence and was not clearly erroneous. Furthermore, the Appeals Officer's Decision was not
4 an abuse of discretion nor was it based on an error of law.

5 Accordingly, and good cause appearing:

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

8 IT IS SO ORDERED.

9 DATED this 22nd day of April, 2021.

10 
11 DAVID A. HARDY
12 District Judge

13 This Court noted the objections to the
14 proposed order and concludes they are
15 unnecessary because the arguments are
16 preserved for further review.
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18 D.A.H.
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EXHIBIT 2

EXHIBIT 2

1 **CODE: 2540**

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8 *Management Services, Inc.*

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 * * *

12 SUSAN HOPKINS,

13 Petitioner,

14 vs.

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

19 Respondents,

Case No.: CV20-01650

Dept. No.: 15

20 **NOTICE OF ENTRY OF ORDER**

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

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28 //

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
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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
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/s/ Carole Davis
An Employee of McDonald Carano LLP