IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No.82894

SUSAN HOPKINS
Appellant,

v.

CANNON COCHRAN MANAGEMENT SERVICES, INC. dba CCMSI; and
WASHOE COUNTY,
Respondents.

Appeal from a District Court Order
of Affirmance Denying Petition for Judicial Review
Second Judicial District Court, Washoe County
Dept. No. 15
Case No. CV20-01650

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Appellant's parent corporations: Not Applicable.

Firms having appeared: Nevada Attorney for Injured Workers

Appellant's pseudonyms: None

Submitted this 1st day of September, 2021.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

I.

JURISDICTIONAL STATEMENT

A.

Basis for Jurisdiction

This appeal is brought before this court pursuant to NRAP 3A(a) because the Appellant, Susan Hopkins, is aggrieved by a final order issued by the district court that denied review of a Department of Administration appeals officer's Decision and Order.

B.

Relevant Filing Dates

A final decision issued by the appeals office in the matter now being appealed was filed September 25, 2020. Ms. Hopkins filed a Petition for Judicial Review on October 16, 2020. A Notice of Appeal was filed by Ms. Hopkins on May 6, 2021.

C.

Final Order

The district court issued its Decision and Order on April 22, 2021. This Decision and Order was a final judgment and this

Decision disposed of all issues brought before the district court in the underlying workers' compensation claim.

II.

ROUTING STATEMENT

This appeal is not presumptively retained by the Nevada Supreme Court in accordance with NRAP 17. However, the issue raised by this appeal is a question of first impression and raises as a principal issue a question of statewide public importance. NRAP 17(d). Specifically, there is a need for the court to decide the extent to which a worker can expect to be within the ambit of the Nevada Industrial Insurance Act (NIIA)(workers' compensation) where:

(1) The employee was paid for the time her employer was contractually obligated to provide two 20-minute break times;

(2) A defective sidewalk outside of the workplace that was under the control of the employer was being used by Appellant during one such break time that caused a serious injury;

(3) Had an injury occurred to Appellant when she was on her break time and had happened on her employer's premises during her

break time (taking a quiet break or "power nap" at her desk, her defective chair collapses and she injures her spine) she would have had a compensable claim (*see* e.g. *Dixon v. SIIS*, 111 Nev. 994, 899 P.2d 571 (1995))'[1] and

(4) This claim has aspects akin to the 'going and coming rule,' the 'parking lot rule,' 'personal comfort rule,' and, the 'traveling employee rule' where, if the facts exist, there is liability under the Nevada Industrial Insurance Act (NIIA). However, this appeal is not precisely within any of these 'rules'; as such, an entire category of Nevada workers seek clarity as to whether they will or will not be covered for an injury if they engage in activities off-premises, on a sidewalk under the control of the employer, where the activity (walking) is known and encouraged by the employer, while on a paid break.

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[1] The court in *Dixon* affirmed granting workers' compensation benefits for a worker injured on a lunch break while exercising on a bicycle. In *Dixon* the injury was argued to be an "athletic event" that was not compensable pursuant to former NRS 616.110(1). Here, the walk engaged in by Ms. Hopkins was denoted to be a "recreational" activity by the appeals officer. AA 85. Both denominations are incorrect. In *Dixon*, the appeals officer concluded, with the agreement of the Supreme Court, that riding the bicycle was a regular incident of employment as it was an "expected custom and practice at this remote location and was even encouraged by the laboratory." The parallels to Ms. Hopkins' injury while on her break and *Dixon* are patent. *See infra*.

Multiple concepts of Nevada's workers' compensation law favors liability for Ms. Hopkins' injury but, without a judicial determination, the question will remain an open one that fosters great uncertainty among Nevada citizens, employers, insurers and the courts.

III.

STATEMENT OF THE ISSUES

The issue in this claim is whether an employee who is injured while engaged in her contractually-guaranteed and compensated "break time" during working hours can receive workers' compensation benefits if the injury occurs off the premises of the employer but at a place that the employer had control over, and, a place the employer encouraged its employees to utilize during their break time walk?

This issue can be re-framed to ask the question: was the Appellant's injury that occurred during a wage-compensated break time one that 'arose in the course of employment' where the injury occurred off the physical premises of the employer but on a defective sidewalk within the control of the employer, while

the employee was engaged in an activity known to the employer, and, where the employer affirmatively acted to influence its employees, including Ms. Hopkins, as to where and how to engage in their break time?

IV.

STATEMENT OF THE CASE

A final Decision and Order was filed by the appeals officer on September 25, 2020. AA 85. Appellant sought district court review of the decision pursuant to NRS 233B.130 on October 20, 2020. AA 93. The district court issued its opinion affirming the appeals officer on April 6, 2021. AA 280 and 301 (dated April 22, 2021). Petitioner sought appellate review from the decision of the district court May 6, 2021. AA 335. Following an assessment for settlement, the parties were directed to proceed with this appeal.

V.

STATEMENT OF THE FACTS

Appellant Susan Hopkins, a state employee, was contractually granted two fifteen-minute breaks each work day. AA. 131. She was

injured while engaged in her morning break on September 23, 2019. AA 38. The sidewalk upon which Ms. Hopkins walked upon during her break was under the control of the employer. AA 41.[2] Ms. Hopkins' employer was not only aware that its employees engaged in walks during these break times but even issued warnings to its employees as to places to be avoided due to construction. AA 81.

More specifically, Ms. Hopkins was employed by Washoe County Health District (Washoe). Ms. Hopkins was injured when she tripped and fell on the sidewalk approximately 75 feet from the entrance to the building where Ms. Hopkins worked. The fall resulted in a serious fracture to Ms. Hopkins' right great toe and left hip strain. AA 135. The injury required surgery and a period of convalescence. AA 137. Following the injury, Washoe requested a work order to repair the sidewalk where Ms. Hopkins was injured. AA 41.

Washoe knew about, but did not prevent, its employees from leaving the work premises to engage in a break time activity. AA

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[2] AA 41 indicates that the employer filed a "Supervisor's Report of Injury" on or about September 24, 2019 wherein the employer's Risk Management department noted that it needed to "Place[] a work order to repair sidewalk."

81. Ms. Hopkins' union secured the break time for her and her co-workers. AA 131. This accommodation was not limited to any particular type of activity utilizing the break time twice each work day. AA 131-132.

Washoe became affirmatively involved with its employees' break time when it expressly warned its employees to avoid the Reno-Sparks Livestock Events Center (RSLEC) that was undergoing construction. The RSLEC was an area that Ms. Hopkins' and her co-workers used for walking during their break time. The RSLEC was near Ms. Hopkins' work site and was known to the employer to be used by its employees. AA 81-82.

Washoe was directly involved with its employees' break time. Washoe sent an e-mail to its employees, including Ms. Hopkins, the day before Ms. Hopkins was injured. AA 81. This e-mail was a warning as to where its employees should walk and avoid walking. *Id.*

The e-mail expressly warned about dangers posed by on-going construction at RSLEC. This e-mail outlined, in red ink, the areas to be avoided by employees who were walkers engaged in

their break time. This e-mail also mapped an area in green ink that Washoe deemed safe for walking. AA 82.[3]

Washoe argued below that it had no requirement for its employees to engage in walks during their break time. Conversely, Washoe did not discourage walking during these breaks nor did it forbid employees from leaving the work premises during these paid rest periods. Ms. Hopkins testified that the diagram does not indicate the spot where she fell. AA 133.

VI.

SUMMARY OF THE ARGUMENT

Workers who enjoy break times that are part of their compensation have no assurance that if they are injured during their work-related break time that they fall under the penumbra of the NIIA. If Ms. Hopkins had remained on Washoe's premises during her break and had been injured when a defective chair

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[3] The copy of the exhibit that is part of the record does not show the red or green colors that were mapped by Ms. Hopkins' employer. However, the colors were not an issue at the hearing as all parties and the appeals officer had copies that showed the colors of red and green to indicate areas that should be avoided and those that should be used for walking during a work break. The district court also did not state that any problem arose from the black-and-white nature of the exhibits.

collapsed or she slipped or tripped on a defective floor then there would be no question that her injury was work related.

In the case presented to the appeals officer, the outside of the building where she worked and fell on a defective sidewalk under the control of the employer. The appeals officer has determined in his Decision and Order that such an injury did not 'arise out of' Ms. Hopkins' employment. This ruling is contrary to statutory and case law favoring employer liability.

The anomalous result of the appeals officer's analysis could be used to deny benefits to other injured workers similarly situated to Ms. Hopkins. The denial of liability under the facts giving rise to Ms. Hopkins' workers' compensation claim requires an appellate ruling to remove the uncertainty faced by many Nevada employees daily.

The rights to workers' compensation benefits are unclear for an entire class of Nevada employees. Granting employees break time is common, but it is uncertain whether taking a break from work beyond the premises of their employer is an activity that

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will preclude workers' compensation coverage for resulting injuries.

The 'going and coming' rule[4] consists of many exceptions to the general rule that workers' compensation benefits are not awarded to employees coming to or going from their place of employment. Exceptions abound and serve to further define the rule much like the hearsay rule that is defined by its exceptions nearly as much as the rule itself.

Under the going and coming rule, for example, when an employee is engaged in a 'special errand' for an employer either before or after work is completed, and an injury arises, the injury is compensable under Nevada law unless the employee materially deviates from the course taken to accomplish the 'special errand.' *See e.g. Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126 (2008).

Another exception to the going and coming rule is the 'parking lot' rule where, although the employee is not on the

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[4] The 'going and coming rule' provides no NIIA coverage for injuries sustained by employees that occur during travel to or from work. *Cannon Cochran Mgmt. Servs. v. Figueroa*, 136 Nev. Adv. Rep. 51, 468 P.3d 827, 829 (2020). The rule is somewhat defined by its exceptions. *See infra*.

physical premises of the employer, he or she is injured in the employer's parking lot while in the course of coming to or leaving work then the injury is deemed to have arisen out of the employment although not within the structural premises of the employer. *See MGM Mirage v. Cotton,* 121 Nev. 396, 400, 116 P.3d 56 (2005).

Another departure from the going and coming rule arises with traveling employees who are injured while traveling away from the employer's primary place of business. These traveling employee claims arise and are analyzed under a doctrine known as the 'personal comfort' rule.

In *Buma v. Providence Corp. Dev.,* 135 Nev. Adv. Rep. 60, 453 P.3d 904 (2019) the court recently remanded the appeal with instructions for the appeals officer to take evidence on whether the personal errand exception to the traveling employee rule should apply where a traveling employee was killed.

The decision in *Buma* also discussed the personal comfort rule and how, under certain circumstances, an injury can 'arise out of' the employment while an employee is seeing to his or her

personal comfort (drinking water, getting fresh air, etc.) while traveling away from the employer's place of business. *Buma*, 453 P.3d, at 909.

The point is this: work activities can 'arise out of' the employment relationship whether on the work premises or outside of the work place. Like the 'parking lot' and 'traveling employee' exception, the injury to Ms. Hopkins did not occur on the work premises. And, akin to 'traveling employees' and 'parking lot' injuries, the injury can be compensable even if away from the work site and while engaged in a personal comfort activity when receiving compensation during the off-worksite activity.

And just as in 'personal comfort' cases, Ms. Hopkins was engaged in an activity that fostered her physical comfort in a manner where the activity was an integral part of her employment agreement with her employer. The act of walking during Ms. Hopkins' break from work was not "recreational" (*see* Decision and Order, AA 90) as it was part of her work contract and employment

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environment. What was Ms. Hopkins to do during her break if not, from time to time, take a walk in the area of her work place?

This appeal asks this court to offer guidance and some modicum of certainty for the thousands of Nevada employees who enjoy compensated break times and who are injured on break. Not all break times are mandated by contract. For example, all state classified employees are required to take two breaks each day without a contract.

It is Ms. Hopkins's position that her conduct at the time she was injured 'arose out of' her employment because she was engaged in a sanctioned work activity at the time of her injury and was injured due to a defective sidewalk under the control of her employer.

As matters now stand, a Nevada employee who is injured under similar circumstances will be unsure as to whether the injury will be compensated. This uncertainty is unsettling for every employee who receive break time.

This lack of certainty means that employees do not know to what extent should they curb, curtail or avoid activities during

a paid break time outside the work premises. These employees who are provided paid break times do not know what will happen to a workers' compensation claim if they sustain an injury beyond the parameter of their actual work place. In deciding this appeal the court can answer these questions and provide a quantum of certainty to these employees.

VII.

ARGUMENT

A.

Standard of Review

On issues of law it is appropriate for the reviewing court to make an independent judgment, rather than a more deferential standard of review. *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 849 P.2d 267 (1993). A "pure legal question" is a question that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the court. An example of a pure legal question might be a challenge to the facial validity of a statute. *Beavers v. Department of Motor*

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Vehicles and Pub. Safety, 109 Nev. 435, 438 n.1, 851 P.2d 432 (1993).

The appeals officer's decision on the facts may be reversed if it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Ranieri v. Catholic Community Servs.*, 111 Nev. 1057, 901 P.2d 158 (1995).

A reviewing court may undertake an independent review of the administrative construction of a statute. *State Indus. Ins. Sys. v. Campbell*, 109 Nev. 997, 999, 862 P.2d 1184 (1993). In this instance, the question of whether NRS 616C.150 was misinterpreted by the appeals officer is reviewable on appeal when it was determined in the Decision and Order that the activity engaged in by Ms. Hopkins when she was injured was "recreational" and, therefore, the injury was not one that "arose out of" her employment. AA 90.

Within the context of this appeal, the issue of NIIA liability arising from the injury suffered by Ms. Hopkins is a mixed question of fact and law that this court may consider and

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offer guidance for future injured workers. *See* NRS 233B.135(a),(d),(e) and (f).

This statute and its sub-parts allow for appellate review where the substantial rights of the claimant have been prejudiced because the final decision is in violation of statutory provisions (NRS 233B.135(a)), affected by other error of law (NRS 233B.135(d)), clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record (NRS 233B.135(e)), or arbitrary, capricious or characterized by abuse of discretion (NRS 233B.135(f). *See e.g. Langman v. Nevada Adm'rs*, 114 Nev. 203, 955 P.2d 188 (1998).[5]

The court has consistently held that when the court reviews an administrative agency's decision, the purpose of the appellate review is to determine whether in light of the evidence presented the agency acted arbitrarily and capriciously, thereby abusing its discretion. *Rio All Suite Hotel & Casino v. Phillips*, 126

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[5] In *Langman* the court held that the Supreme Court's role in reviewing an administrative decision is to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion; however, where the construction of a statute is at issue, independent review is necessary.

Nev. 346, 349, 240 P.3d 2, 4 (2010).

In this appeal, the determination of Ms. Hopkins' activity at the time she was injured as being "recreational" was prejudicial error. This determination was not supported by substantial, or any, evidence. The activity undertaken by Ms. Hopkins - to walk near to her place of employment during her paid break - could not be deemed "recreational" because it arose out of the employment contract and was a necessary part of Ms. Hopkins' work day.

The employer did not forbid its employees from leaving its premises when engaged in their work breaks; the employer did not offer a place within its premises where employees could exercise or walk during break times; the employer expressly advised its employees to avoid the RSLEC area when walking during a break; it failed to maintain a sidewalk within its control, and, it encouraged or funneled employees to the area where Ms. Hopkins was injured. AA 41, AA 81, and AA 82.

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B.

Various "rules" have found liability for work injuries away from the workplace because the conduct leading to an injury nonetheless 'arises from' the employment

(1).

The 'going and coming rule' serves an exception to the general principle that an injury experienced while going to or coming from work is not compensable

This appeal's starting point is the requirement that an injury arise out of and in the course of the employment. "An injury arises out of the employment 'when there is a causal connection between the employee's injury and the nature of the work or workplace.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005); *see also Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 599, 426 P.3d 586, 590 (2018).

The going and coming rule is discussed in *MGM Mirage v. Cotton*, 121 Nev. 396, 399, 116 P.3d 56, 58 (2005) wherein the Court explained that the going and coming rule provides that: "injuries sustained by employees while going to or returning from their regular place of work are not deemed to arise out of and in

the course of their employment, unless the injuries fall under an exception to the rule."

The court has stated that, "[t]his rule frees employers from liability for the dangers employees encounter in daily life" when they are beyond the reach of their employers' control. *Cotton,* 121 Nev. 396, 399-400, 116 P.3d 56, 58 (2005).[6]

The exceptions to the going and coming rule abound. In *Bob Allyn Masonry v. Murphy,* 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) the matter involved facts closely aligned to Ms. Hopkins' appeal. In *Murphy* the court held: "[w]hen an employee is required to use the streets and highways to carry out his employment obligations, the risks of those streets and highways are thereby converted to risks of employment." 124 Nev. at 286, 183 P.3d at 130.

In *Murphy* the employee was injured on his day off but, at his employer's request, he was delivering equipment from his

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[6] In *Buma, supra,* 453 P.3d at 907-908, the court stated that "This general rule [going and coming rule that normally precludes liability], however, does not apply to 'traveling' employees—those 'whose work entails travel away from the' workplace by definition." *See infra* for 'traveling employee' analysis.

employer's construction yard to the employer's job site. When Mr. Murphy departed from the job site he was injured in an automobile accident.

To answer the question of whether the injury arose out of the employment the court adopted the "street-risk rule." *Id.* at 280. The street-risk rule that became Nevada law was expressed as follows: "when an employee is required to drive as a component of employment, the risks and hazards associated with the roadways are incident to that employment, and thus injuries sustained due to risks associated with those roadways arise out of the employment." *Murphy*, 124 Nev. at 280-281.[7]

Here, Ms. Hopkins had a break time that required her to go somewhere to engage in her 15-minute break from work. The street upon which she walked during her break had risks, *i.e.*, a defective sidewalk that Washoe issued a "work order" to have repaired after Ms. Hopkins' injury. The employer was contractually obligated to allow Ms. Hopkins to engage in her

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[7] The court in *Murphy* noted that several other jurisdictions have adopted the street-risk exception to the going and coming rule. The court cited authorities from Connecticut, Georgia and Indiana. *See Murphy*, n. 14.

work break and it acquiesced in its employees choosing to walk as part of their break.

Because Ms. Hopkins was not forbidden from leaving the work premises when engaged in her break nor did the employer provide a 'break room' or other designated place to rest during the break, in a sense, the employee was required to exit the work premises from time to time so that the break time could have meaning and a positive effect.

The court in *Murphy* expressed the 'actual street-risk rule' as one that would be adopted by Nevada and would be guided by the following principles:

> Having considered the types of street-risk rules outlined above, as well as Nevada's prior jurisprudence concerning the meaning of "arise out of" employment and the legislative mandate requiring neutral construction of workers' compensation statutes, we now adopt the actual street-risk rule. The actual street-risk rule accords with the concept reaffirmed in *Mitchell* that an employee must show a causal connection between his injury and employment risks to establish that his injury arose out of the employment. When an employee is required to use the streets and highways to carry out his employment obligations, the risks of those streets and highways are thereby converted to risks of employment. If the employee can demonstrate that his injury was occasioned by those risks, his injury will be deemed to have arisen out of the employment.

Murphy, 124 Nev. at 285-286 (citations omitted).

To engage her break time, Ms. Hopkins was required to use the public sidewalks if she chose to walk during her break. While not "required" to use the sidewalks, Ms. Hopkins had little choice over where to engage in her break other than beyond the premises of her employment. And when the employer had knowledge of this activity and actively encouraged walking as a break activity (warning of where to walk and where to avoid walking) then the 'street-risk' rule should apply to Ms. Hopkins' choice of how she spent her break time.

In an early case involving the going and coming rule, the court in *Crank v. Nevada Indus. Comm'n*, 100 Nev. 80, 675 P.2d 413 (1984), acknowledged the general rule of non-liability for injuries arising from going to or coming from work. But, it also enunciated one of many exceptions when it stated: "an exception to that rule applies where the employee is paid an identifiable amount as compensation for his expense of travel." *Id.* (citing 1 Arthur Larson, *The Law of Workmen's Compensation,* §§ 16.20, 15.30 (1982))(internal punctuation marks omitted for clarity).

. . .

Ms. Hopkins was being paid by her employer at the time of her injury. Although not engaged in "travel" in the truest sense, Ms. Hopkins was "traveling" in accordance with her contractually-mandated break time.

Other exceptions are recognized under the going and coming rule. In *Tighe v. Las Vegas Metro. Police Dep't.*, 110 Nev. 632, 877 P.2d 1032 (1994) an undercover police officer was injured in an automobile accident caused by the negligence of another driver. An argument was made that the claimant was "on call" when he was injured as he carried a police beeper and drove an unmarked undercover Metro vehicle equipped with a police radio.

The *Tighe* court concluded that the officer was in the course of his employment because the travel at issue to and from work "confers a distinct benefit upon the employer." *Id.* at 635. The court cited to *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992), where a service technician who was on call and driving home in his employer's van was still within the course of his employment because he was subject to his employer's control

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and was furthering his employer's business in taking the van home. *Id.* at 1006, 842 P.2d at 721-22.

Washoe benefitted by Ms. Hopkins engaging in known walks during her break time because by acquiescing and not prohibiting Ms. Hopkins from walking during her break time it complied with contractual obligations that required Washoe to provide break times to its employees. Also, the record reveals that Ms. Hopkins was subject to the control of the employer that went so far as to advise where its employees should walk versus places they should avoid. And, after the injury, Washoe initiated a work order to have the defect in the sidewalk near its building repaired.

(2).

The 'parking lot rule' allows for off-site liability if an injury occurs in the employer's parking lot

In *MGM Mirage v. Cotton*, 121 Nev. 396, 116 P.3d 56 (2005), the court affirmed that "[m]any jurisdictions recognize that one exception to the 'going and coming' rule is the 'parking lot' rule: An injury sustained on an employer's premises while an

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employee is proceeding to or from work is considered to have occurred 'in the course of employment.'" *Cotton*, 121 Nev. at 400.

The exception was stated as follows: "Under a parking lot or premises-related exception to the going and coming rule, injuries sustained on the employer's premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred 'in the course of employment.' (Citations omitted)." *Id.*

When Ms. Hopkins was injured she was on her employer's premises if not in the building where she worked. AA 134-135. She engaged in walks that brought her back to the workplace within a reasonable and contractually defined period of time - 15 minutes. The doctrine behind this exception to the parking lot rule should apply to adjacent sidewalks that abut or connect one state-owned building to another, such as the defective sidewalk that Washoe stated it would "place an order" to have repaired. AA 41.

(3).

Traveling salespeople injuries are compensable unless the injury arose after a substantial departure from the purpose of the travel.

Larson's seminal treatise on Workers' Compensation, cited many times by this court, discusses the 'personal comfort rule' within the context of a 'traveling employee' by first noting an important distinction: "Many jurisdictions (although this is seldom expressly mentioned in the opinions) seem to divide employment-related activities into two groups: actual performance of the direct duties of the job, and incidental activities such as seeking personal comfort, going and coming, engaging in recreation, and the like." 2 Larson, *Larson's Workers' Compensation Law*, §21.08 (citation omitted).

Thus, the 'going and coming rule,' that would normally preclude an injury to an employee away from the job "does not apply to 'traveling' employees – those 'whose work entails travel away from the workplace' by definition.'" *Buma*, 453 P.3d at 907.

These "incidental activities" will be deemed as arising out of the employment unless the activities are unreasonable or extraordinary deviations from the employment. *Id.* In using "reasonableness" as a "rubbery yardstick," Larson convincingly writes that as to,

> personal comfort..., going and coming, recreation, acts outside regular duties, and other categories in which active performance of work is not involved [t]he rule for present purposes would then be that a personal comfort activity, *although normally covered*, is outside the course of employment *if the method is impliedly prohibited* (citation omitted)(emphasis added).

Larson's, *supra* at §21.08[d].

In this appeal, the employer did not expressly or impliedly prohibit walking during break times. In fact, the employer affirmatively inserted itself into the break time by funneling employees away from one area outside the work place and to another area presumed to be safe for walking. *See* AA 81.

The *Buma* court, previously referenced, has solidified the personal comfort rule in Nevada. In *Buma,* a traveling employee journeyed from his office in Reno (he was vice president of a Reno sales company) to Houston for a business conference. On a Sunday, while visiting a customer at his ranch in Houston, Mr. Buma engaged in an ATV ride sometime after 5:00 p.m. While riding to the end of a trail, the ATV driven by Mr. Buma rolled over and he was killed.

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In finding liability, the court held:

> For instance, 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 or the method chosen to minister to one's personal comfort is so unusual and unreasonable that the act cannot be considered incidental to the course of employment. (Citation omitted). Generally, [t]he personal comfort doctrine applies to such acts as eating, resting, drinking, going to the bathroom, smoking, and seeking fresh air, coolness, or warmth. *Id.* The class of activities covered by the personal comfort doctrine depends on the particular circumstances of employment.

Buma, *supra* at 909-910 (internal quotation marks omitted for clarity).

Ms. Hopkins closely mirrors the situation faced by a traveling employee whose work entailed, in part, a compensated break time that foreseeably and knowingly took her outside of the physical premises of the work place. *See infra*. Ms. Hopkins "traveled" away from her work place to engage in her work-related break time and, during this absence from the work place, she was injured.

To date, employers and insurers consistently argue that this rule of personal comfort for employees is limited to traveling salespeople. Ms. Hopkins was within the ambit of 'personal

comfort' when she was taking her break on September 19, 2019 and, in one sense, she was "traveling" while on the job. All other aspects of her injury are comparable to the deceased employee in *Buma*.

C.

The facts support the conclusion that this injury was an employment risk

When deciding if a causal link exists to ascertain if an injury arose out of the employment, the court must determine "the type of risk faced by the employee [as] an important first step in analyzing whether the employee's injury arose out of her employment." *Phillips*, 126 Nev. at 350.

Nevada divides such risks into three categories: personal, neutral, and employment-related. *Id.* Generally speaking, an "'employment-related risk' represents a risk created entirely by the workplace and that the worker would not have faced had he not been employed at the particular job where the injury. occurred." *Id.* at 353.

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As noted above, the court's ruling in *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 240 P.3d 2 (2010), set forth categories of "risk" that form the conceptual analysis necessary to determine if an injury 'arose out of' the work: employment risk, personal risk and neutral risk.

An employment risk is one that arises out of employment if there is "a causal connection between the injury and the employee's work, in which the origin of the injury is related to some risk involved *within the scope of employment* (internal quotes omitted for clarity)(emphasis added)." *Phillips* 126 Nev. at 350-351 citing, *Mitchell v. Clark County School District*, 121 Nev. at 182, 111 P.3d at 1106 (quoting *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 604, 939 P.2d 1043, 1045-46 (1997)).

Washoe consistently argues that the injury arose from a 'neutral risk' arising from the employment. Ms. Hopkins adamantly disputes this characterization as it was an 'employment risk' that led to her work injury.

As for neutral risks, "neutral risks are those that are 'of neither distinctly employment nor distinctly personal

character.'" 1 Larson & Larson, supra, § 4.03, at 4-2. *See also Mitchell*, 121 Nev. at 181 n.7, 111 P.3d at 1106 n.7 ("An unexplained fall, originating neither from employment conditions nor from conditions personal to the [employee], is considered to be caused by a neutral risk.").

A neutral risk entails the application of an "increased risk" test to determine causation,

> if the court finds that the risk was neutral but that the workplace or its conditions 'increased the risk' of an injury that might have happened anyway had the worker not been employed but whose danger or severity was elevated by workplace conditions, then a causal link is established and the injury is deemed to have "arisen" from the workplace.

Id. at 353.

A personal risk is one, such as an underlying disease that is "so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." *Phillips*, 126 Nev. at 351; 1 Larson & Larson, *supra*, § 4.02, at 4-2. This type of risk is not an issue in this appeal.

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The decision in *Gorsky, supra* was the first to interpret the phrase "arose out of" in the context of NRS 616C.150(1) that requires a claimant to "establish by a preponderance of the evidence that [her] injury arose out of and in the course of [her] employment." *See Gorsky*, 113 Nev. at 604.

The claimant in *Gorsky* did not prevail because he could not fulfill the requirements of NRS 616C.150(1), *i.e.*, the court concluded that the 'arose out of' component was not established by Mr. Gorsky because he did not provide evidence that "his work environment caused him to fall."[8]

In *Phillips, supra*, the injured employee, a casino dealer, was required to take six breaks during her 8-hour shift. The sole manner in which Ms. Phillips' employer allowed Phillips to take her break was to require her and other card dealers to use the casino's employee break room that could only be accessed by two flights of stairs that led to the room.

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[8] The determination of why Mr. Gorsky fell was because he suffered from multiple sclerosis, not because of any work risk or defect. *See Gorsky,* 113 Nev. at 604-605.

Ms. Phillips tripped and fell on the staircase and was injured. The court found that the injury 'arose out of' the employment because she faced an 'increased risk' of injury when compared to the public because of her employment that mandated Ms. Phillips use the stairs to take her mandatory break notwithstanding the absence of a defect in the stairs at the casino.[9]

The injury to Ms. Hopkins did not arise from a neutral risk. Her fall is not one of unknown causes as it is undisputed that Ms. Hopkins fell due to a defective sidewalk (*see* AA 83, a photograph depicting a ruler showing a defect in the sidewalk where Ms. Hopkins fell that was higher than 1" in height). Further, the fall and injury occurred because of employment conditions (employment contract) that required a break time for Washoe employees. Thus, the fall that led to Ms. Hopkins' injury did originate from employment conditions, *viz.*, the employment required paid break times.

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[9] The court concluded that in the course of her employment with the casino, Ms. Phillips had accessed the stairs over 25,000 times in her tenure with her employer which constituted the 'increased risk' upon the theory that she was injured due to a 'neutral' risk.

No evidence was offered to show that Washoe offered its employees an alternate method or means of utilizing their break time. Washoe did not offer an on-the-premises walking track, there was no in-house gym offered by Ms. Hopkins' employer, nor were there any other in-house accommodations provided for Washoe employees to use and enjoy during their break.

VIII.

CONCLUSION

The injured employee, Susan Hopkins, sustained an injury arising from an employment risk. The injury occurred on a sidewalk under the control of the employer but not within the four corners of the building where Ms. Hopkins worked. These facts are not distinguishing or dispositive evidence that works against the claim for NIIA benefits brought by Ms. Hopkins.

This is an issue of first impression because it involves paid break periods off the premises of the employer thus a distinguishing factor from *Phillips, et al.* This ruling will affect thousands of Nevada employees who enjoy paid, mandatory break times off-premises but have no certainty as to whether

their activities while engaged in a paid break time of 15 minutes will fall within the NIIA if they are injured while engaged in their break.

This is not a neutral risk situation because the cause of the fall is known. This is an injury that is closely akin to the going and coming rule, and its exceptions, the parking lot rule (within the going and coming rule), and, the personal comfort rule that is contained in the traveling employee rule.

The appeals officer erred by deeming the activities of Ms. Hopkins during her walk as "recreational." This was in violation of statutes, was a decision affected by other errors of law, was clearly erroneous in view of the evidence in the record and was arbitrary, capricious and characterized by abuse of discretion.

Ms. Hopkins was exercising her rights pursuant to her contract of employment that required her employer to provide two 20-minute breaks that were compensated. The employer was aware of its employees using their break time to take walks near the workplace. Washoe even warned its employees to avoid certain

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places to walk and encouraged its employees to walk other places, including the area where the injury occurred.

Had Ms. Hopkins not been employed by Washoe she would not have sustained her injury on September 24, 2019. Had she fallen in her office and injured herself during her break she would be entitled to full NIIA benefits if a defect led to the injury. A defective sidewalk did cause the injury at issue and the sidewalk, and the defect, was within the penumbra of responsibility and control of the employer.

DATED this 7th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

(NRAP 28.2)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6)because:

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DATED this 7th day of day of September, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b) and NRAP 30(f), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on September **, 2021, the foregoing APPELLANT'S OPENING BRIEF was electronically filed with the Clerk of Court for the Nevada Supreme Court by using the Nevada Supreme Court's e-filing system (Eflex). Participants in this case who are registered with Eflex as users will be served by the E-flex system as follows:

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