IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 82894

SUSAN HOPKINS,

Appellant,

v.

CANNON COCHRAN MANAGEMENT SERVICES, INC., d/b/a CCMSI; AND WASHOE COUNTY,

Respondents.

Appeal From Order Denying Petition For Judicial Review
Second Judicial District Court
District Court Case No.: CV20-01650

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, 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 the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Respondent Washoe County is a political subdivision of the State of Nevada and therefore a governmental entity that is exempt from the disclosures required by NRAP 26.1(a). Respondent Cannon Cochran Management Services, Inc., has no parent companies and no party owns ten percent (10%) or more in stock in the company.

In the course of the proceedings leading up to this appeal, Respondents have been represented by the law firm of McDonald Carano LLP.

Dated: October 7, 2021.

McDONALD CARANO LLP

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ROUTING STATEMENT

This administrative agency appeal is presumptively and appropriately assigned to the Court of Appeals under NRAP 17(b)(9). As set forth more fully in Respondents' Response to Docketing Statement on file herein, contrary to Appellant Susan Hopkins' ("Hopkins") assertion, this appeal does not raise as a principal issue a question of first impression or statewide public importance that would warrant retention by the Nevada Supreme Court under NRAP 17(a)(11) or (12).

First, Hopkins argues that a matter of first impression exists as to the extent to which a worker can expect workers' compensation for an injury incurred during a paid break in a location that was under the control of her employer.[1] While Hopkins acknowledges this Court has addressed numerous similar claims involving employees injured during break periods, she impermissibly asks this Court to expand existing case law to address her precise situation. Her position is misplaced because existing case law interpreting the scope of the Nevada Industrial Insurance Act ("NIIA") is sufficient to dispose of the issue on appeal.

Hopkins cites *Dixon v. SIIS*, 111 Nev. 994, 899 P.2d 571 (1995), in support

[1] As a preliminary matter, the administrative decision on appeal does not address, and the parties did not litigate, the issue of whether Respondent Washoe County had control over or maintained the sidewalk. (I AA 1-3.) That issue is therefore not appealable under NRS 233B.150, and thus cannot be used to justify retention by the Nevada Supreme Court. *See* Respondents' Response to Docketing Statement, filed herein on June 1, 2021.

of the proposition that, had she been injured on the employer's premises during her break time, she would have had a compensable claim. (Opening Br. at 2-3, n.1.) This is a mischaracterization of the Court's holding in *Dixon*, which involved an employee injured in a bicycle accident during an uncompensated lunch hour while on special assignment at a remote laboratory in Los Alamos, New Mexico. 111 Nev. at 997, 899 P.2d at 573. In *Dixon*, the laboratory provided and encouraged use of a bicycle during employee breaks. The Court held that "a recreational activity could only be characterized as within the course of employment if it is a regular incident of employment, or required by the employer, or of benefit to the employer 'beyond the intangible value of employee health and morale common to all kinds of recreation and social life.'" *Id.* (quoting *Nevada Indus. Comm'n v. Holt*, 83 Nev. 497, 500, 434 P.2d 423, 424 (1967)). Under the unique circumstances in *Dixon* – the remoteness of the laboratory, and the laboratory providing, encouraging, and acquiescing in use of the bicycle – the Court found that riding the bicycle during an uncompensated lunch hour was a regular incident of employment and therefore the employee was entitled to workers' compensation. *Id.*

Here, Hopkins was neither on special assignment away from her regular place of employment, nor did her employer provide her with any special equipment to engage in a recreational activity during her break time. The Court's ruling in *Dixon* does not amount to blanket coverage for employee injuries that occur on an

employer's premises. Whether a recreational activity is within the course of employment and therefore compensable under NRS 616C.150(1) depends on the factors set forth in *Dixon* and *Holt*. 111 Nev. at 997, 899 P.2d at 573; 83 Nev. at 500, 434 P.2d at 424. The appeals officer properly applied those factors to conclude Hopkins' injury was not compensable. Moreover, even if the injury was in the course of employment, the appeals officer properly found that Hopkins did not meet her burden to show that the injury "arose out of" her employment as required under NRS 616C.150(1). This Court need not develop its case law to address the circumstances of this case.

Secondly, there is no issue of statewide importance here because, contrary to Hopkins' assertion, Nevada workers do not lack clarity as to when an injury that occurs during a paid break is covered under the NIIA. (*See* Opening Br. at 3.) Rather, the robust statutory scheme and decades of case law already provide ample guidance in this area. Accordingly, Respondents respectfully contend this appeal should be retained by the Court of Appeals pursuant to NRAP 17(b)(9).

STATEMENT OF THE ISSUE

The sole issue on appeal is whether applicable law and substantial evidence supports the Appeals Officer Decision, as affirmed by the district court, that Hopkins did not meet her burden to establish that her injury arose out of and in the course of her employment under NRS 616C.150, and therefore Respondents properly denied

her workers' compensation claim.

STATEMENT OF THE CASE

This appeal arises out of a contested workers' compensation claim. The specific dispute involves claim denial. (*See* I Appellant's Appendix ("AA") 1-3.) Respondent/self-insured employer Washoe County (the "County") and its third-party administrator, Respondent Cannon Cochran Management Services, Inc. ("CCMSI"), denied Hopkins' claim for an injury that occurred on September 24, 2019, while walking during a break from her employment with the Washoe County Health District. (I AA 38-48.) Hopkins filed an administrative appeal and then a petition for judicial review after an appeals officer ultimately affirmed the denial of her claim. (I AA 1-3, 85-92; II AA 301-311.)

In the administrative proceedings, the appeals officer concluded that Hopkins had not met her burden to establish pursuant to NRS 616C.150 that her injury arose out of and in the course of her employment and, therefore, claim denial was proper. (I AA 85-92.) The district court reached the same conclusion, affirmed the administrative decision, and denied Hopkins' petition for judicial review. (II AA 301-311.) Respondents served notice of entry of the district court's order on April 23, 2021, and Hopkins filed this appeal on May 6, 2021. (II AA 312-313; 335-339.)

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STATEMENT OF FACTS

I. Hopkins' Injury and Workers' Compensation Claim

Hopkins works as an office support specialist for the Washoe County Health District in the Environmental Health Services Division. (I AA 39; 131:9-11.) The Health District offices are located adjacent to the Reno-Sparks Livestock Events Center ("RSLEC"). (I AA 82-83.) Hopkins often chose to walk at the RSLEC during her breaks. (I AA 131:23-132:3.) On September 23, 2019, the County warned 9th Street employees, including Hopkins, who walked during breaks to avoid the area of the RSLEC due to construction and heavy equipment in and around the area. (I AA 81.) The email did not require employees to walk during their breaks and warned "[a]s always use caution and be aware of your surroundings." (*Id.*)

On September 24, 2019, Hopkins took her morning break from work. (I AA 133:20-134:1.) She chose to go for a walk during her break. (I AA 134:12-17.) 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. (I AA 135:4-9.) Hopkins then returned to her office and to her desk with the assistance of her co-workers. (I AA 136:14-16.)

On the day of her injury, Hopkins treated at Reno Orthopedic Clinic and completed a Form C-4 claim for workers' compensation and report of initial treatment. (I AA 38-39.) Her supervisor completed notice of injury and report of

injury forms. (I AA 40.) On September 27, 2019, Hopkins 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. (I AA 50-53.) On October 3, 2019, CCMSI issued a determination letter denying the workers' compensation claim on the basis that Hopkins did not meet her burden to establish that the injury arose out of and in the course of her employment. (I AA 61-62.)

II. Procedural History

Hopkins 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 Hopkins and issue a new determination regarding claim compensability. (I AA 67, 70-72.) 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. (I AA 73-74.)

Hopkins appealed CCMSI's December 5, 2019 determination letter, and a hearing officer conducted a hearing on January 13, 2020. (I AA 76.) On January 16, 2020, the hearing officer issued a Decision and Order affirming the determinations and finding "the evidence fails to support that the injury arose out of

[Hopkins'] employment and the conditions thereof." (I AA 76-77.) Hopkins appealed the January 16, 2020 Decision and Order. (I AA 14.)

On August 6, 2020, an appeals officer conducted a hearing. (I AA 119.) Hopkins provided witness testimony at the appeal hearing and Exhibits 1 and 2 were admitted into evidence. (I AA 123-124, 129-140.) On September 25, 2020, the appeals officer issued an Appeals Officer Decision (the "Decision") finding no causal connection between Hopkins' injury and the nature of her work or workplace. (I AA 85-92.) The appeals officer found Hopkins' "walking and tripping was not an employment related risk because [Hopkins] was walking for her own recreation and enjoyment. The Employer did not create an employment related risk by permitting [Hopkins] to walk around a public office facility that was open to the public." (I AA 90.) The appeals officer concluded that "[t]he weight of the evidence and legal authority support [the] legal conclusion that [Hopkins] failed to satisfy NRS 616C.150(1), and she did not suffer a compensable industrial injury on September 24, 2019." (I AA 90-91.)

On October 14, 2020, Hopkins petitioned the district court for judicial review of the Decision. (I AA 114.) The district court denied Hopkins' petition in an Order entered on April 23, 2021, concluding that the Decision was supported by substantial evidence and was not an abuse of discretion, nor was it based on an error of law. (II AA 301-311.) This appeal followed. (II AA 335-354.)

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order denying Hopkins' petition for judicial review because substantial evidence and the applicable law support the appeals officer's conclusion that the County and CCMSI properly denied Hopkins' workers' compensation claim.

First, the appeals officer did not err in concluding Hopkins was injured while she was walking for recreation and enjoyment, and therefore her injury was not compensable. Contrary to Hopkins' contention, the appeals officer's analysis followed established statutory and case law to determine whether Hopkins' injury "arose out of" and "in the course of" her employment under NRS 616C.150(1). The appeals officer thoroughly considered the fact that the County warned employees of unsafe locations for walking during breaks, which Hopkins now mischaracterizes as the County's control over its employees during break time. Substantial evidence supports the appeals officer's conclusion that Hopkins did not show by a preponderance of the evidence that her injury arose out of and in the course of her employment. Hopkins requests that this Court substitute its own opinion for that of the appeals officer as to the application of the evidence to the law, which is clearly impermissible. Instead, deference must be given to the appeals officer's findings of fact.

Further, the appeals officer properly analyzed Hopkins' injury under *Phillips*

and concluded that she was not engaged in a work activity and did not face an employment risk when walking during her break time. While Hopkins makes much of the fact that she was "on the clock" when she was injured and that her break period was mandated by her employment contract, this does not change the analysis. Hopkins asks the Court to adopt a new exception to the "going and coming" rule, which generally shields employers from liability for injuries that occur when an employee is going to or coming from work, arguing that there is a lack of clarity under the NIIA as to the compensability of injuries that occur during a paid break. That argument is a red herring. Existing case law interpreting the statute is dispositive in determining when such an injury "arises out of" and "in the course of" employment.

Finally, the appeals officer correctly analyzed and declined to apply the exceptions to the general rule that an employer is not liable for employee injuries that occur during travel to or from work. The "going and coming" case law Hopkins cites does not support the application of any exception to the doctrine on the facts presented. Similarly, the appeals officer's finding that the "personal comfort" doctrine for traveling employees does not apply here is also supported by the facts and the law. Because the applicable law and substantial evidence support the Appeals Officer Decision, the district court's order should be affirmed.

ARGUMENT

I. Standard of Review

This is an appeal from a district court order denying a petition for judicial review of an administrative decision in a workers' compensation action. Hopkins asks this Court to review the agency's factual findings and conclusions of law. Based on the record before the agency, under NRS 233B.135, "this court reviews an administrative decision to determine if the 'agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion,' or if it was otherwise affected by prejudicial legal error." *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011) (quoting *Campbell v. State, Dep't of Tax'n*, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993)).

NRS 233B.135 also provides that "[t]he court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135(3). Rather, this Court reviews an agency's factual findings "for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation marks omitted). Further, "an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." *Campbell*, 109 Nev. at 515, 853 P.2d at 719. Substantial

evidence is that which "a reasonable mind might accept as adequate to support the appeals officer's conclusion." *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009).

Here, the agency correctly applied the law and the substantial evidence supports its decision, thereby warranting affirmance under the deferential standard of review.

II. The Appeals Officer Did Not Err in Concluding that Hopkins' Injury Did Not Arise Out of and in the Course of Her Employment.

Hopkins maintains that the appeals officer misinterpreted NRS 616C.150(1) by finding that her injury did not "arise out of" her employment. (Appellant's Opening Brief ("AOB") at 15; I AA 90.) Under that section of the 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) (emphasis added).

As the appeals officer correctly observed in the Decision, the NIIA does not make an employer absolutely liable. (I AA 87 (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 Hopkins' injury "arose out of" and "in the course of" her

employment under NRS 616C.150. (I AA 87.) In *Gorsky*, this Court 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. *See* 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. *Id.* at 604, 939 P.2d at 1046. Both factors must be satisfied 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").

A. The Appeals Officer Properly Interpreted NRS 616C.150(1) in Finding Hopkins' Injury Did Not "Arise Out of" Her Employment.

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 Hopkins' injury "arose of out" her employment. (I AA 87-90.)

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. (I AA 89-90 (citing *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600-01, 426 P.3d 586, 588 (2018)).) As the appeals officer explained, employment risks arise out of the employment. (I AA 89 (citing *Baiguen*, 134 Nev. at 600, 426 P.3d at 590).) Employment risks are solely related to the employment and include what can be characterized as "classic" industrial injuries, like machinery breaking or objects falling. (I AA 89-90 (citing *Phillips*, 126 Nev. at 351, 240 P.3d at 5; 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017)).) Personal risks include injuries caused by underlying personal disabilities or illnesses and do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Hopkins correctly states that this type of risk is not an issue in this appeal. (AOB at 31.)

A neutral risk is neither an employment risk nor a personal one, but rather is a risk "such as a fall that is not attributable to premise defects or a personal condition." (I AA 90 (citing *Phillips*, 126 Nev. at 351, 240 P.3d at 5; Larson, § 4.03, at 4-2).) A neutral risk arises out of the employment (and is therefore compensable) only 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. Hopkins argues that

the appeals officer erred by analyzing the risk that gave rise to her injury as a neutral risk instead of an employment risk. (*See* AOB at 30.)

Hopkins maintains that because she was injured during an employment-required paid break she was therefore subject to an employment risk at the time of her injury. (*Id.* at 33.) This position is contrary to Nevada case law governing workplace risk. In *Phillips*, the claimant fell and broke her ankle on the stairs to the employee break room. 126 Nev. at 347, 240 P.3d at 3. The claimant was required to use that staircase by her employer and therefore she used the staircase far more frequently than did the general public. *Id.* at 354, 240 P.3d at 7. The *Phillips* Court therefore applied the neutral-risk analysis to the claimant's injury and found that it arose out of her employment. *Id.*

Here, the substantial evidence demonstrates that the sidewalk where Hopkins was injured was accessible to the public, and the County did not require Hopkins to walk on that sidewalk for her mandatory break period. The district court correctly concluded that warning employees of an unsafe area to walk does not amount to "funneling" them to another area presumed to be safe for walking. (II AA 349.) In fact, Hopkins' injury occurred in an area that the County had not specifically identified in its email message and diagrams warning walkers of unsafe areas for walking. (I AA 132:7-133:19.) Thus, *Phillips* is distinguishable, and the appeals officer did not err by finding that Hopkins 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 County did not create an employment risk by permitting Hopkins to walk around an office complex in an area that was open to the public. (II AA at 303.) At the time of her injury, the appeals officer concluded Hopkins was walking for her own recreation and enjoyment outside of her workplace. (*Id.*)

Hopkins argues it was "prejudicial error" for the appeals officer to classify this activity as "recreational" because her break period was mandated by her employment contract and was a necessary part of her workday. (*See* AOB at 17.) This argument is plainly a stretch in light of the substantial evidence supporting the appeals officer's conclusion that Hopkins was subject to a neutral risk when walking on a public sidewalk during her paid break because this activity was not a regular incident of employment or required by the County. (I AA 88-90.) Hopkins' own testimony shows that she was injured while walking during her break for her own personal enjoyment and recreation. (I AA 131:18-132:3.) The appeals officer therefore correctly concluded that Hopkins failed to prove that her injury arose out of her employment, a necessary requirement under the NIIA. *See Cotton*, 121 Nev. at 400, 116 P.3d at 58 (requiring a claimant to prove that injury arose out of employment ***and*** in the course of employment).

While the County was *aware* that its employees walked during break periods, it neither required Hopkins to walk during her break, nor did it require her to walk in the area where she was injured. (I AA 7-9, 132:12-133:19.) Hopkins' contention that the County did not offer its employees an alternative method or means of utilizing their break time such as a walking track or in-house gym is inapposite. (*See* AOB at 34.) There is no evidence to suggest that walking was the only activity available or permissible for County employees to engage in during paid breaks. Common sense dictates that an employee was free to do as they wished during a paid break from employment, whether that be walking, smoking a cigarette, reading a book, or making a personal telephone call. If, as Hopkins urges, these activities are deemed employment risks when engaged in during a paid break, it would lead to absurd results. An employee's lung cancer could "arise out of" employment if he smoked during paid breaks. An employee burned by spilling hot coffee on herself during a paid break could be compensated for her injuries. Not only would this impose an excessive burden on Nevada's employers, but it is also contrary to the purpose of the NIIA which is designed to "ensure the quick and efficient payment of compensation to injured and disabled employees at a reasonable cost to the employers." NRS 616A.010(1).

B. The Appeals Officer Properly Interpreted NRS 616C.150(1) in Finding Hopkins' Injury Was Not "In the Course of Employment."

To analyze NRS 616C.150(1)'s requirement that the injury must occur in the course of employment, "Nevada looks to whether the employee is in the employer's control in order to determine whether an employee is acting within the scope of employment when an accident occurs . . . off the employer's premises." *Cotton*, 121 Nev. at 399, 116 P.3d at 58. Here, the appeals officer found that "when the Claimant was walking during her break, she was walking for her own personal enjoyment and health." (I AA 87.) This factual finding should not be disturbed on appeal. Based on this finding, the appeals officer properly concluded that, under *Gorsky*, Hopkins was not reasonably performing her work duties during her walk and therefore her injury was not in the course of her employment. (I AA 87 (citing *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046)); *see also Holt*, 83 Nev. at 500, 434 P.2d at 423 (explaining that "recreational 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" (emphasis added)).

The appeals officer's conclusion is supported by substantial evidence that shows that Hopkins chose to walk during her breaks and the County did not require her to do so. (I AA 81-83; I AA 131:15-132:3.) The appeals officer considered the

fact that Hopkins' was on a contractually-mandated break when she was injured. (I AA 86.) It also considered the fact that the County 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. (I AA 86.) These facts do not undermine the appeals officer's conclusion that Hopkins was not reasonably performing her work duties when she was injured, and that the County did not create an employment-related risk by permitting Hopkins to walk around a public office facility that was open to the public. (I AA 90.) Thus, as the district court found, "a reasonable person could conclude that, under NRS 616C.150(1), [Hopkins] was not in the course of her employment when the injury occurred." (II AA 350.) Applying the same deferential standard of review, this Court should affirm the agency's factual findings and conclusions of law. *See Campbell,* 109 Nev. at 515, 853 P.2d at 719 (requiring deference where an agency's conclusions of law are closely related to the agency's view of the facts and are supported by substantial evidence).

C. The Appeals Officer's Conclusion That the Exceptions to the "Going and Coming" Rule Do Not Apply Here is Supported by the Applicable Law.

Hopkins further argues the appeals officer erred by finding the activity she engaged in at the time she was injured was "recreational" and therefore did not arise out of and in the course of her employment. (*See* AOB at 17.) As Hopkins observes

in her Opening Brief, this Court has held 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." *Cotton*, 121 Nev. at 399, 116 P.3d at 58; (AOB at 18-19.) The overarching purpose of this "going and coming" rule is to "free[] employers from liability for the dangers employees encounter in daily life" when they are beyond the reach of their employer's control. *Id.* at 399-400, 11 P.3d at 58. Hopkins contends that an exception to this "going and coming" rule should apply in her case because her injury occurred during a contractually mandated work break and the County did not prohibit employees from walking during their breaks. (AOB at 20-21.)

Hopkins, however, failed to raise several of these exceptions before the appeals officer or district court below. These arguments must not now be raised on appeal. *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that the Court need not consider a non-jurisdictional issue raised for the first time on appeal). The Opening Brief also fails to provide citations to the record with respect to these arguments, in violation of the Nevada Rules of Civil Procedure. *See* NRAP 28(a)(8) (requiring appropriate reference to the record in appellant's statement of facts); NRAP 28(e)(1) (requiring

that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found").

1. The "Street Risk" Exception.

In support of her position, Hopkins cites this Court's application of the "actual street-risk rule." (AOB at 21-22.) The street-risk exception to the general "going and coming" rule provides

> 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.

Bob Allyn Masonry v. Murphy, 124 Nev. 279, 285-86, 183 P.3d 126, 128 (2008) (emphasis added). Hopkins did not raise this argument before the appeals officer or the district court, so it may not be raised now on appeal. Out of an abundance of caution, however, Respondents will address the street-risk exception and why it cannot apply here.

The *Murphy* Court emphasized that "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." *Id.* (citing *Mitchell v. Clark Cnty. Sch. Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). Hopkins argues the "street-risk rule" somehow applies by analogy to her claim because the County did not

provide a break room or other designated places to rest during the break, and therefore she was "required to use the public sidewalks if she chose to walk during her break." (AOB at 22.) Hopkins also cites a document provided to County employees which advised employers to provide a map of walking routes around the office and seek information from the Centers for Disease Control and Prevention's Healthier Worksite Initiative on programs designed to benefit the employer by reducing time lost from work due to illness or disease. (I AA 12.) 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. (*Id.*) 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. Thus, it strains credulity to argue that the principles expressed by the "street-risk rule" should apply in Hopkins' case.

2. The "Employer-Benefit" Exception.

Hopkins further argues her injury falls under the "employer-benefit" exception to the "going and coming" rule because walking during her break conferred a benefit on the County. (AOB at 24.) The employer-benefit exception provides that "recreational 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." *Holt*, 83 Nev. at 500, 434 P.2d at 423. Hopkins

raises this exception notwithstanding the fact that she was not on a specified errand or special work mission that would trigger the benefits of the exception.

As the district court affirmed, "[t]he employer benefit exception to the rule described in *MGM Mirage v. Cotton* does not extend to a benefit as far removed as reducing time lost from work due to disease." (II AA 351 (citing *Holt*, 83 Nev. at 500, 434 P.2d at 423.) Rather, this Court has applied the employer-benefit exception to the "going and coming" rule to, for example, 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 (1994) (citing *Evans v. Sw. 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)). The district court explained that, "[i]n *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." (II AA 352 (citing *Tighe*, 110 Nev. at 635, 877 P.2d at 1035)). The *Tighe* 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. *Tighe*, 110 Nev. at 635, 877 P.2d at 1035.

Similarly, the district court noted that the employer-benefit exception applied in *Evans* because the claimant "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." (II AA 352 (citing *Evans*, 108 Nev. at 1006, 842 P.2d at 721-22).) Here, Hopkins was not on call or performing any work duties when she was injured. While there may have been an incidental benefit to the County in Hopkins maintaining her health by walking on her break, there was no "distinct" benefit within the meaning of the employer-benefit exception to the "going and coming" rule.

Hopkins also raises the argument that the County benefited from not prohibiting Hopkins to walk during her break time because this complied with its contractual obligation to provide break time to employees. (AOB at 24.) Leaving aside the mental gymnastics required to make sense of this contention, Hopkins cannot get around the lack of evidence in the record suggesting that the County required her to go for a walk or even to leave the premises during paid break periods. (*See, e.g.*, II AA 372:15-17 (Hopkins' counsel admitting that it is "certainly true" that the County did not require Hopkins to walk on her breaks).) Therefore, the district court properly found Hopkins was not "in the course of" her employment under the employer-benefit exception to the "going and coming" rule. (II AA 324-325.) This fact-based conclusion of law is entitled to deference on appeal. *Campbell*, 109 Nev. at 515, 853 P.2d at 719.

3. The "Paid Travel" Exception

Hopkins also attempts to shoehorn her injury into another exception to the "going and coming" rule for employees injured while being paid for travel expenses. (*See* AOB at 22-23.) Again, Hopkins did not raise this exception below, and this Court need not consider it now on appeal. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. In any event, the "paid travel" exception does not apply here.

In *Crank v. Nevada Industrial Commission*, the claimant was injured in an automobile accident while traveling from his home to a test site where he worked as a rotary drill operator. 100 Nev. 80, 81, 675 P.2d 413, 414 (1984). The Court recognized the exception to the "going and coming" rule "where the employee is paid an identifiable amount as compensation for expense of travel." *Id.* at 82, 675 P.2d at 414. However, the *Crank* Court distinguished *Dixon* and found that the claimant's contract was ambiguous as to whether the subsistence pay was intended to cover travel expenses under the terms of his contract. *Id.* at 84, 675 P.2d at 415. Accordingly, the Court reversed and remanded the case to the district court to remand the matter to the appeals officer for further proceedings related to the meaning of the subsistence pay provision. *Id.* at 84, 675 P.2d at 416.

Here, Hopkins argues that while she was not engaged in "travel," she was being paid by the county while "'traveling' in accordance with her contractually mandated break time." (AOB at 23.) However, there is no evidence in the record to

suggest that her pay during that break period was "compensation for the expense of travel" as defined by *Crank*. Thus, this exception to the "going and coming" rule cannot apply.

4. The "Parking Lot" Exception

Hopkins also contends that the "parking lot" exception to the general "going and coming" rule applies and thus her injury is "in the course of" her employment. She cites *Cotton*, wherein the Court held that "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.'" (AOB at 24-25 (citing *Cotton*, 121 Nev. at 400, 116 P.3d at 58.) Here, it is undisputed that Hopkins' injury occurred on a public sidewalk outside the workplace. (AOB at 6; I AA 134:18-135:9.) Yet Hopkins now argues, for the first time on appeal, that parking-lot exception should apply because the County controlled the sidewalks on which Hopkins fell. (AOB at 24.) As discussed in footnote 1, *supra*, neither the appeals officer nor the district court addressed, and the parties did not litigate, the issue of whether the County had control over or maintained the sidewalk where Hopkins injured herself. Hopkins therefore waived this argument, and this Court should not consider it for the first time on appeal. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Finally, even if this Court concludes that Hopkins was "in the course of" her

employment at the time of her injury, despite the substantial evidence and case law supporting otherwise, the injury did not "arise out of" her employment, as set forth *supra* Section II.A. Both factors of the two-part inquiry must be satisfied for an injury to be compensable under NRS 616C.150(1). NRS 616C.150(1); see also *Cotton*, 121 Nev. at 400, 116 P.3d at 58 (requiring a claimant to prove that injury arose out of employment ***and*** in the course of employment). Because Hopkins cannot satisfy both factors, she has failed to demonstrate that the appeals officer's conclusions of law were in error, arbitrary and capricious, or unsupported by the substantial evidence. Because the recognized exceptions to the "going and coming" rule do not apply, Hopkins is essentially asking the Court to adopt a new exception to support the precise facts of her claim. Respondents urge the Court to decline this improper invitation to create new law, which would erode the "going and coming" rule to the point where it has no meaning.

D. The Appeals Officer Appropriately Distinguished *Buma v. Providence Corp.*, in Concluding That the Personal Comfort Doctrine Does Not Apply Here.

Hopkins further argues that the personal-comfort doctrine for traveling employees recognized by this Court in *Buma v. Providence Corp. Dev.*, 135 Nev. 448, 453 P.3d 904 (2019), applies to this case because walking while on a mandatory break is a form of traveling away from the physical workplace but still under the control of the employer. (AOB at 28-29.) Both the appeals officer and the district

court correctly declined to extend *Buma* to the facts of this case.

The *Buma* Court adopted the personal-comfort rule, extending coverage under the NIIA for a ***traveling employee*** "because of the risks associated with travel away from home." *Buma*, 135 Nev. at 452, 453 P.3d at 909 (citing *Ball-Foster Glass Container Co. v. Giovanelli*, 177 P.3d 692, 701 (Wash. 2008)). "[U]nder 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 453, 453 P.3d at 909 (quoting *Ball-Foster*, 177 P.3d at 700). Under *Buma* a ***traveling employee*** is permitted to tend to reasonable recreation needs during a break from work without leaving the course of employment. *See id.* at 910.

As the appeals officer and the district court concluded, *Buma* does not apply to Hopkins' claim. (I AA 87-88; II AA 323-324.) The appeals officer found that, unlike the ***traveling employee*** in *Buma*, Hopkins was not traveling on behalf of the County at the time of her trip-and-fall injury. (I AA 87; II AA 324.) This factual finding is consistent with *Buma* and supported by substantial evidence, and therefore should not be disturbed on appeal. *See Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Therefore, the appeals officer and the district court correctly concluded that Hopkins cannot be deemed under the County's control for purposes of qualifying for the personal comfort doctrine, and she therefore cannot rely upon *Buma* to satisfy the

course-of-employment requirement under NRS 616C.150(1). (I AA 88; II AA 324.)

Hopkins offers no case law—indeed there is none—to support her position that the same personal-comfort doctrine under *Buma* applies to employer control of a ***non-traveling employee***. Rather, Hopkins again requests that this Court make new law and extend the personal-comfort doctrine to a non-traveling employee. But extending *Buma* to employees injured outside the workplace while walking on a paid break would be a breathtaking expansion of the NIIA's coverage. This Court has recognized that "the legislators did not intend the [NIIA] to make employers absolutely liable for any injury that might happen while an employee was working." *Cotton*, 121 Nev. at 398, 116 P.3d at 57. The expansion of liability sought by Hopkins is thus contrary to legislative intent. It would also disincentivize employers to permit employees go for walks or leave the premises during paid breaks. Any benefit to Nevada's workers under such an expansion would be offset by the detriment to workers' wellness and personal freedoms.

In sum, the facts and the law do not support deviating from precedent on this issue, and the Court should again reject Hopkin's request that it do so.

CONCLUSION

Respondents respectfully request that this Court affirm the district court's order denying Hopkins' petition for judicial review.

AFFIRMATION

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

Respectfully submitted this 7th day of October, 2021.

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ATTORNEY'S CERTIFICATE

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 6,981 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 7, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano LLP; that on October 7, 2021, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system. Participants in the case who are registered as users will be served by the E-Filing system. A copy will also be mailed to:

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Dated: October 7, 2021.

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