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 REPLY 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 16th day of November, 2021.

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I.
INTRODUCTION

In this Reply Brief Appellant, Susan Hopkins, will demonstrate that:

(1) The Appeals Officer clearly erred when he concluded that the injury at issue in this appeal did not arise from an 'employment risk.' A leading decision in this state confirms that an injury due to tripping by a known cause is an employment, not neutral, risk.

The difference between these two tests is dispositive regarding the key issue in this appeal: did the injury to Ms. Hopkins 'arise out of' her employment?

This fundamental error that is preserved in the record is conclusive justification for a reversal of the decision below or a remand to correct the record as to the express and erroneous conclusion of law offered by the Appeals Officer in his Decision and Order.

(2) The District Court erroneously concluded that the court should defer to the decisions of the Appeals Officer that found the injury did not 'arise out of' Ms. Hopkins's

employment. The Appeals Officer clearly erred by employing the incorrect risk when analyzing whether the injury 'arose out of' Ms. Hopkins's employment. Deference was inappropriate and the district court exceeded the limits of NRS 233B.135 deference in its support of the Appeals Officer's findings and conclusions.

(3) The arguments presented by Ms. Hopkins were preserved and do appear in the record below such that all arguments offered by Ms. Hopkins are correctly and appropriately presented.

II.

ARGUMENT

A.

Reversible error occurred when the Appeals Officer concluded that Ms. Hopkins's injury did not 'arise out of' her employment with Washoe

(1)

The Appeals Officer prejudicially erred when concluding that the injury sustained by Ms. Hopkins was not the result of an 'employment risk'

The Appeals Officer concluded at AA 90 that the injury to Ms. Hopkins was not a result of an "employment risk." Specifically, the Appeals Officer concluded: "The Employer did not create an employment related risk by permitting the Claimant

to walk around a public office facility that was open to the public." *See* AA 90. Ms. Hopkins has consistently maintained that the risk she faced on the date and time of her injury was an "employment risk."

Many examples of this issue being raised and considered abound. For example, the Decision and Order issued by the Appeals Officer concludes by stating, "Claimant's walking and tripping was not an employment-related risk because the Claimant was walking for her own recreation and enjoyment." AA 90.

Ms. Hopkins's counsel stated at the beginning of oral argument that it was the intent of Ms. Hopkins to establish that, "number one, this is an employment risk ..." AA 368:11-12. Washoe's counsel responded to Ms. Hopkins's assertion by arguing:

> And then you ask, well, what type of risk was this, was this an employment risk, that is, a risk, you know, inherent in the nature of the employment, that's clearly not the case, because she tripped over a portion of the sidewalk that was raised or, you know, sort of out of - you know, it was broken or busted or however you want to characterize it. And so that's not a risk that's inherent in the nature of her employment.

See AA 381:11-18.

Washoe, understanding the importance of control, incorrectly argued that Ms. Hopkins's counsel mischaracterized the Appeals Officer's decision when "claiming [in the Opening Brief] that

[the] Appeals Officer ignored facts demonstrating the Employer's control over its employees during breaks." AA 237.

This statement by Washoe was inaccurate as to one element of the "employment risk" test. One component of Washoe's involvement in the injury that was not considered or analyzed by the Appeals Officer is the undisputed fact that the area where Ms. Hopkins was injured was controlled by Washoe. AA 41 (Exhibit 2, *offered into evidence by Washoe*).

This exhibit establishes that the sidewalk where Ms. Hopkins was injured was a "Washoe County grounds sidewalk" and thereafter stated: "Sidewalk should be repaired." Nowhere in the Decision and Order is this exhibit and evidence mentioned. *Id.* at AA 41. The employer was further implicated as the undisputed evidence established that Washoe did not mark the area of Ms. Hopkins's fall as "dangerous" or an area to be avoided. *See* AA 82-83.

But, a simple review of the Decision and Order (AA 85-91) indicates that the Appeals Officer never considered Washoe's control and responsibility for the defective sidewalk where the

defective sidewalk caused the fall and injury to Ms. Hopkins.

The difference pertaining to the type of risk facing the injured worker at the time of injury is crucial as the metric for determining liability for a fall at the workplace is different depending on the nature of the "risk" the injured worker faced at the time of injury.

The court in *Phillips* emphasized this fact when it held: "We take this opportunity to clarify that determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment." *Phillips*, *supra*, at 350.

The issue and argument can be framed as follows:

Liability for workers' compensation benefits will be curtailed if the injury did not 'arise out of' the employment. *See* NRS 616C.150(1).[1] The analysis then becomes a 'risk' assessment wherein a determination is made as to whether the

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[1] NRS 616C.150(1) provides: "1. 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."

injury arose from an "employment," "personal," or, "neutral risk." *Rio All Suite & Casino v. Phillips*, 126 Nev. 346, 351-352, 240 P.3d 2 (2010).[2]

In the seminal decision of *Phillips*, *supra*, the court was presented with an injury due to a fall on stairs at the workplace. Kathryn Phillips was employed as a poker dealer by Rio All Suite Hotel & Casino. Ms. Phillips worked eight-hour shifts and was allowed two 20-minute breaks from her work. As Ms. Phillips was walking down the stairs that led to the employee break room her left foot "twisted over" and, as it was later learned, had fractured her ankle.

The Rio Hotel and Casino and the insurer (collectively "Rio") denied the workers' compensation claim Ms. Phillips filed for her injury asserting the injury did not 'arise out of' her employment. Rio cited to *Mitchell v. Clark County School District*, 121 Nev. 179, 111 P.3d 1104 (2005) as support for the denial of the claim.

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[2] Another "risk" discussed in *Phillips* is a "mixed risk" that is applicable to a risk that causes injuries due to a "personal" risk and an "employment" risk. *See Phillips, supra,* at 910. This risk was not raised or argued by either party in this appeal.

The Hearing Officer affirmed the denial of the claim also relying upon *Mitchell* stating "Mitchell has changed the landscape for injuries occurring on-the-job and whether they are covered under workers[']compensation." *Phillips, supra* at 349.

The Appeals Officer reversed the Hearing Officer's ruling finding the injury to Ms. Phillips distinguishable from *Mitchell* because the injury did not arise from an "unexplained fall."[3] *Phillips, supra*, at 349. The District Court concurred with the Appeals Officer's finding that the decision did not violate NRS 233B.135(3), in relation to the standard of review of an agency's decision. Rio appealed.

The Supreme Court in *Phillips* reviewed the decision in *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 604, 939 P.2d 1043, 1045-46 (1997) wherein liability was denied because Mr. Gorsky fell at the workplace and injured himself while walking down a hallway that was clear of "any foreign substance." It was

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[3] In this appeal it is undisputed that Ms. Hopkins tripped and fell because of a defective sidewalk not an "unexplained fall."

determined that Mr. Gorsky was afflicted with multiple sclerosis and had previously mentioned being unsteady when walking. Also, Mr. Gorsky failed to offer evidence that demonstrated his work environment caused the fall. *Gorsky*, *id.*, at 604-05, 939 P.2d at 1046.

The Court then reexamined *Mitchell v. Clark County School District*, 121 Nev. 179, 111 P.3d 1104 (2005) with the principles of *Gorsky* as a guide. In *Mitchell* an employee fell on a flat surface while walking towards a stairway causing her to roll down the stairs and sustain a serious injury. Ms. Mitchell could not explain the reason for the fall. Ms. Mitchell's claim was deemed appropriately denied.

The *Phillips* court then began the analysis by stating, "an injury 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.'" *Phillips*, *supra*, at 350, *citing Mitchell*, 121 Nev. at 182, 111 P.3d at 1106 (quoting *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046).

After this statement of the applicable law, the Court in *Phillips* then denominated three relevant risks that pertained to Ms. Phillips's work injury and if it 'arose out of' the job: employment, personal, and, neutral risks.

The reversible error that warrants reversal or remand for Ms. Hopkins's injury is found in the *Phillips* decision, at page 351. The decision in *Phillips* favorably cites to the appellate ruling in *Ill. Consol. Tel. Co. v. Industrial Com'n*, 314 Ill. App. 3d 347, 732 N.E.2d 49, 53, 247 Ill. Dec. 333 (Ill. App. Ct. 2000) (Rakowski, J., specially concurring).

Of significance, *Phillips* adopts the Illinois decision wherein it was held that "Slips and falls *that are due to employment risks include tripping on a defect at employer's premises or falling on uneven or slippery ground* at the work site. (Emphasis added)." *Phillips, supra*, at 351.

The *Phillips* decision then concludes the analysis of 'employment risks' by stating, "Generally, injuries caused by employment-related risks are deemed to arise out of employment

and are compensable. (Citations omitted)." *Phillips, supra,* at 351.

In contrast, the *Phillips* court also described 'neutral risks' as, for example, "An *unexplained fall,* originating neither from employment conditions nor from conditions personal to the [employee], is considered to be caused by a neutral risk. (Emphasis added.)" *citing* 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 4.01-4.03, at 4-2 to 4-3 (2010)and *Mitchell. See Phillips, supra,* at 351.

The cause of Ms. Hopkins's fall is known and uncontested: an uneven surface on a defective sidewalk under the control of the employer. *See* AA 38 (C-4 Form), 86 (Decision and Order), 39 (Employer's C-3 Form), 41 (Washoe's Exhibit 2 admitted into evidence; work order to repair).

The fact that the uncontested cause of Ms. Hopkins's fall was a defective sidewalk under the control of Washoe established the "employment risk" nature of the mechanism of injury to be reviewed by the court. A "Conclusion of Law" that states Ms. Hopkins's fall was not an employment risk, is, by itself,

sufficient error to mandate reversal or a remand pursuant to NRS 233B.135(d) and (e).

(2)

Phillips and _Cotton_ illustrate the Appeals Officer's reversible error when concluding the injury did not 'arise out of' Ms. Hopkins's employment

Washoe compounded the error in its Respondent's Answering Brief when it repeated the Conclusions of Law authored by the Appeals Officer, specifically: "The Employer did not create an employment related risk by permitting the Claimant to walk around a public office facility that was open to the public." AA 237:15-17.

The Appeals Officer is alleged to have applied the relevant statutes and case law to conclude that the Employer did not create an employment related risk. *See generally,* Respondent's Answering Brief at 7-9, and 11. But, the record establishes that not all the *facts* in evidence were applied to this appeal, to wit, the repair order evincing the undisputed fact that Ms. Hopkins fell due to a defect on Washoe's property under its control.

As *Phillips* instructs, falls that occur at the workplace due to a defect are *employment* risks. The Appeals Officer expressly stated in the Decision and Order that "The raised sidewalk was in a public area of the Washoe County Health District complex". *See* AA 86.

NRS 233B.135 provides that an appeal may be taken from an "error of law" (NRS 233B.135(d)) and if the decision appealed from is "clearly erroneous in view of the ...substantial evidence on the whole record." *See* NRS 233B.135(e).

The error of incorrectly identifying the correct risk analysis to utilize in assessing the appeal of Ms. Hopkins does not invite "deference" to the appeals officer nor is the determination that clear error occurred below a matter of "substituting its judgment for that of the agency" (NRS 233B.135(3).

By starting down the wrong path of analysis that led to the ultimate rejection of an "employment risk," the Appeals Officer made at least three reversible errors: (1) incorrectly assessing the facts involving the fall causing Ms. Hopkins's injury; (2)

applying the incorrect law pertaining to the type of risk she faced at the moment of her injury; and, (3) the incorrect conclusion of denying liability because the risk faced by Ms. Hopkins when she was injured was not an employment risk.

The injury was not properly reviewed by the Appeals Officer and the error is reversible as it led to an erroneous conclusion about liability and how liability was to be judicially discerned.[4]

(3)

Ms. Hopkins's appeal raises issues akin to the 'going and coming' rule and 'parking lot' exception that was misapplied by the Appeals Officer

The 'going and coming' rule was articulated by Washoe in its Respondent's Brief at AA 245. A component of the 'going and coming' rule is the 'parking lot' exception that was set forth in Ms. Hopkins's Opening Brief before the District Court beginning at AA 220. Further, Ms. Hopkins cited to *MGM Mirage v. Cotton*, 121 Nev. 396, 116 P.3d 56 (2005) at AA 221.

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[4] *See* AA 90 (Decision and Order) wherein the Appeals Officer incorrectly states that "Claimant has not provided evidence of an employment related risk or neutral risk that subjected her to a greater risk than the general public due to her employment..."

In *Cotton* the court found the employer liable for an injury that occurred when the employee was traversing the parking lot on her way to start her shift *prior to being on the clock*. *Cotton, supra*, at 398. In the course of entering the physical building where she worked, Ms. Cotton was injured when she tripped over a curb while "stepping from the parking lot onto the sidewalk leading to the entrance of an MGM building." *Cotton, supra*, at 398.

Cotton is uniquely similar to the present dispute. The Hearing Officer, as herein, denied liability because the injury was deemed to not 'arise out of' her employment. *Id.* The court began its analysis by noting that "we have sustained a workers' compensation award when an employer's truck struck an employee as he waited on the employer's premises, after his shift, for his ride home." *Id.* at 399 *citing Provenzano v. Long*, 64 Nev. 412, 428, 183 P.2d 639, 646-47 (1947).

Next the Nevada Supreme Court in *Cotton* acknowledged the facts of Ms. Cotton's claim as giving rise to "a premises-related exception to the going and coming rule, other states have." *Id.*

at 400. The *Cotton* court noted that many jurisdictions recognize "one exception to the 'going and coming' rule is the 'parking lot' rule: An injury sustained on an employer's premises while an employee is proceeding to or from work is considered to have occurred 'in the course of employment.'" *Id.*

The court then held, "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." *Id.*

In concluding that Ms. Cotton was entitled to workers' compensation benefits the decision stated:

> If an employee establishes that an injury occurred in the course of employment, she also must show that the injury "arose out of" the employment. In this case, Cotton was on the employer's premises as she walked from the employer's parking lot to the employer's sidewalk entrance about ten minutes before she was scheduled to work. *She tripped over the curb, part of the workplace environment*, and injured her ankle. Thus, Cotton first showed that her injury occurred in the course of employment because she was injured within a reasonable time before starting work. Second, she demonstrated that her injury arose out of her employment because she established the causal link between the injury and workplace conditions or workplace environment. Accordingly, the appeals officer

> did not abuse her discretion by awarding Cotton benefits.

Cotton, 121 Nev. at 400-401 (emphasis added).

The only significant difference between *Cotton* and Ms. Hopkins's injury is that she was on an employer-maintained sidewalk rather than a parking lot when injured.

Ms. Hopkins was on a defective sidewalk that Washoe ordered repaired on the same day as the injury to Ms. Hopkins. AA 41. Ms. Hopkins was injured only because she was engaged in her *compensated* break time outside the office building but on Washoe's property. Ms. Hopkins was 'going to and coming from' her employer during her break times when she walked in an area not part of her employer's warning of places to avoid.

The Court took note of MGM's arguments when it stated:

> MGM argues that Cotton was not injured in the course of employment when she arrived in her employer's parking lot about ten minutes before she was scheduled to work because '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. MGM contends that the inquiry in Nevada is whether the employee was performing a service for the employer *or acting within the employer's control at the time of the injury.* (Emphasis added).

Cotton, supra, at 399.

The *Cotton* court then held:

> MGM correctly states that *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 outside of the actual period of employment or off the employer's premises. (Emphasis added)

Cotton, supra at 399.

At this juncture the *Cotton* court then declared that: "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.'*" (Emphasis added).

Cotton, supra, at 400.

The injury, when correctly viewed, is an employment risk that arose from Ms. Hopkins's employment with Washoe. Further, an exception to the 'going and coming' rule - the 'parking lot' rule - provides support for Ms. Hopkins's injury because it entails very similar facts.

Cotton is a "premises-related" decision that allows for NIIA coverage when "an employee injured on the employer's premises while proceeding to or from work within a reasonable interval before or after work may be entitled to workers' compensation." *Id.* at 401. Employer control over the area where the injury

occurred is a key element demanding analysis prior to determining liability. The element of control was not properly reviewed by the appeals court or the district court.

The rule of law espoused in *Cotton* is that whether an injury 'arises out of' an injured employee's job can be determined by the level of control an employer has over an employee when the injury occurs off premises. The 'going and coming' rule, 'traveling employee' rule, the 'street use' rule and others all stem from analyzing the degree of control exercised by the employer when the employee is injured. *Cotton* makes this analysis an essential part of determining liability.

Washoe cannot have it both ways: if Ms. Hopkins was "on the clock" and was doing an activity acquiesced and required by the employment contract then Washoe is incorrect when stating Ms. Hopkins' injury did not arise out of her employment simply because she was 50 feet beyond the front door of her employer; if, on the other hand, Washoe argues that Ms. Hopkins was not doing an activity related to work then it must explain why Ms. Hopkins' injury is not akin to that suffered by Ms. Cotton in her claim.

If the activity that led to the injury is because the employer requires or is forced by contract to allow the activity (*e.g.* walking), then, the activity 'arises out of' the employment relationship. If the injury occurs on premises under the control

of the employer then, once more, liability is demonstrated. And if an employee is walking in a place that her employer deemed safe and injures herself by a defect at an area contiguous to the workplace, then, an 'employment risk' exists and, again, liability is present.

B.

Deference to the Appeals Officer by the District Court was improper and not supported by NRS 233B.135, *et al*.

In any administrative law appeal it can be expected for the prevailing party to argue "deference" to the Appeals Officer. NRS 233B.135(3) is cited for the proposition, as at page 10 of Washoe's Respondent's Brief, that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact."

But, the court will review an Appeals Officer's conclusions where they establish "clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Id. citing Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

Deference to the Appeals Officer's judgment and findings is expressed in terms of a decision or conclusion being supported by "substantial evidence." *See* NRS 233B.135; *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An appellate

court will review a district court's findings and legal conclusions for "substantial evidence" *de novo*. "Substantial evidence" is that which a reasonable mind might accept as adequate to support a conclusion. *See, e.g. Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008).

The question of whether a "clear error" occurred with the decision formulated by the Appeals Officer is articulated above: the court clearly erred in concluding that the injury at issue did not arise from an employment risk. The error led the Appeals Officer to ignore the importance of the defect and the connection of the cause of the injury to the employer.

Deference has limits. Many major decisions in workers' compensation law have been a result of not deferring to rulings below. *See, e.g. Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008)(remand for 'street risk' rule); *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008)('arising out of' employment where "injury" and "accident" were questioned); *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 426 P.3d 586 (2018)(appeal from adverse ruling by the court of appeals regarding 'arising out of' issue where the employee had not yet clocked in but was "on Harrah's premises at his regularly scheduled time to work"). Many other examples abound.

Here, deference is not warranted. In *Sierra Packaging & Converting, LLC v. Chief Administrative Officer of the OSHA of the Div. of Indus. Rels. of the Dep't of Bus. & Indus.*, 133 Nev. 663, 406 P.3d 522 (2017) the court commented on the role of the appellate court reviewing administrative law decisions when it wrote: "If the agency's decision rests on an error of law and the petitioner's substantial rights have been prejudiced, this court may set aside the decision." *Sierra Packaging*, 406 P.3d at 525.

Also, "deference" does not preclude a remand for further factual considerations: "A reviewing court has the inherent authority to remand administrative agency cases for factual determinations." *General Motors v. Jackson*, 111 Nev. 1026, 1030, 900 P.2d 345, 348 (1995).

Thus, Washoe's insistence upon deferring to the Appeals Officer and District Court is misplaced in this appeal. Deference is not appropriate where a clear error of law appears in the record below. The Appeals Officer's review must be based upon "substantial evidence *of the whole record* (emphasis added)" (*e.g. see Dubray v. Coeur Rochester, Inc.*, 112 Nev. 332, 337, 913 P.2d 1289, 1292 (1996) before deference is conferred.

The record discloses a clear error when the Appeals Officer denoted the injury as not arising from an 'employment risk.' The record, when reviewed in its entirety, established that the injury arose from a defect on property controlled by Ms.

Hopkins's employer. Deference, under these circumstances, is not warranted.

C.

All of Ms. Hopkins's arguments were raised by the parties in the District Court appeal

The suggestion that arguments were argued before this court for the first time is without merit and is inaccurate. Washoe's Respondent's Brief offers this argument at footnote 1 at page 1. Washoe posits that the issue of control was not raised below.

This argument is belied by the fact that the evidence of control was in an exhibit accepted into evidence and was *offered by Washoe*. *See* AA 41. The record establishes Washoe had control over the area where the fall occurred.

In its Appellant's Brief before the district court, Ms. Hopkins's arguments included the reference to Washoe's possession of the land where the injury occurred: "Ms. Hopkins *was on a city sidewalk* immediately adjacent to her workplace when she injured herself." Washoe owns and is responsible for city sidewalks as is affirmed by the work order at AA 41.

Other examples of arguments before the district court and elsewhere abound:

- AA 226: "*The employer's control*, the mandatory nature of the break time and the *influence of the employer*

over the events that led to the injury were improperly ignored." (Emphasis added);

- AA 237: The Appeals Officer's conclusion in the Decision and Order was expressly cited in Respondent's Answering Brief for the holding that stated, "The Employer did not create an employment related risk by permitting the Claimant to *walk around a public office facility* that was open to the public."
- AA 241: Washoe argued in its Answering Brief that "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." Washoe made this argument despite putting into evidence the work order to repair the defect that is the issue in this appeal. Washoe made this representation knowing its responsibility and intent to repair the defect *on its property*.
- AA 246: Washoe itself raised the "control" issue in its Brief when it stated: "Rather than ignoring, as Claimant would have it, the facts suggest the Employer *had control over the Claimant at the time of her injury*, the Appeals Officer *considered those facts* in arriving at the conclusion that the injury did not "arise out of" and "in the course of" her employment.

Washoe then asserts that the Appeals Officer did review "those facts" pertaining to control by Washoe.

- AA 306: The "Order of Affirmance" sets forth the following finding: "The sidewalk where Petitioner was injured *was accessible to the public...*" Public sidewalks are maintained by the municipality, Washoe, and are subject to the public entity's control. *See generally*, NRS 405.250 ("Construction and maintenance of sidewalks").
- AA 124: No objections were raised as Exhibit 2, Washoe's evidence packet, that was admitted into evidence - an exhibit that included the work order at AA 41 *for the defective sidewalk* where Ms. Hopkins fell.
- AA 209: In Petitioner's Opening Brief before the district court, Ms. Hopkins argued at the onset of her "Summary of Argument" that "It was reversible error to *ignore the control and influence* Washoe had on the events leading up to Ms. Hopkins' injury."
- AA 211: Ms. Hopkins argued in her Opening Brief before the district court that "It was clear error to not rule upon or even consider the control element of Washoe's involvement in Ms. Hopkins' break time."

- AA 295: In the "Order of Affirmance" drafted by Washoe's counsel, Washoe included the following language: "While Petitioner contends she was in the course of her employment when walking during her mandatory break time, *in an area deemed safe by the Employer* who was aware that employees walked during breaks..." (Emphasis added)

All parties are now aware that the area where the fall occurred was not "safe." To now argue that Washoe's control was not raised below is plainly contradicted by the record.

Other assertions of matters not being raised below are quickly dispensed with. The 'going and coming' rule was expressly argued before the district court together with an explanation that the rule is defined by its exceptions. At oral argument before the district court, Ms. Hopkins's counsel stated:

- AA 368-369: "We have a 'going and coming' rule, for example (*see also* AA 378). You can't receive benefits from the NIIA if you're going to work or coming home, *but there are exceptions to that. And the rule is defined by the exceptions.* (Emphasis added). *See also,* AA 369 ('discussion of the 'parking lot' exception); AA 370 ('traveling employee').
- AA 378: Opposing counsel raised 'going and coming' when he responded to the court's comment by stating "I

understand the 'going and coming rule,' but when you're away from work you're not on the clock."

This issue is put to rest when the record before the district court is examined. The leading decision pertaining to "new" arguments raised for the first time on appeal is found at *Old Aztec Mine, Inc. v. Brown*, 97 Nev 49, 623 P.2d 981 (1981). The concern voiced by the court was that when a new issue is raised for the first time on appeal the district court did not have the opportunity to consider and rule upon the new argument. *Id.* at 52.

Here, the evidence pertaining to "control" was in the record and the issue of "control" was argued throughout the litigation with references to "public area," "defective sidewalk," the need for Washoe to repair the defect, the "employer's control" over the break time, and, the exhibit at AA 41. Likewise, the 'going and coming' rule, and its exceptions, was argued before the district court.

Of equal importance, however, is the record that discloses the lack of interest by the district court in the law regarding 'arising out of,' on the one hand, and, recurring arguments offered by Washoe that the court give "deference" to the Appeals Officer's Decision and Order. *See, e.g.* AA 239 (Respondent's Opening Brief urging that an Appeals Officer's conclusions of law are "entitled to deference...")

Deference was the key element of the district court's initial conclusions after hearing and reviewing the evidence, including the work order at AA 41. It was deference that was the initial interest of the district court.

At the oral argument the district court judge began the proceedings by the court stating to counsel, "I'm actually intrigued by respondents' very strong assertion about my limited deferential role." AA 365.

Later, when issuing its preliminary ruling, the district court indicted it was focused on deference: "The analytical framework of existing industrial insurance law compels affirmance of the Appeals Officers [sic] Decision." *See* AA 280-281. It was only later, when Washoe's counsel prepared the proposed Order of Affirmance that a more detailed statement of other grounds for the ruling were offered.

The point is that if the concern for "new arguments" is that the court below did not have an opportunity to consider a contention, the record establishes that the overriding concern of the district court was deference, not 'arising out of' employment issues. The concern voiced by *Old Aztec Mine* is not present in this appeal as the court focused on "deference" to the Appeals Officer rather than the substantive nature of the dispute.

This position taken by the district court was not necessarily wrong but it does pointedly illustrate the district

court's narrow approach to the appeal and a distinct disinterest in the finer points of 'arising out of' as a key issue to be determined. Thus, the concern stated in *Old Aztec Mine* that the lower court did not have the opportunity to consider an issue is not present in this appeal as its attention was primarily upon deference as the issue to be determined in this appeal.

III.

CONCLUSION

Reversible error is apparent on the face of the record. The Appeals Officer erroneously concluded that the injury suffered by Ms. Hopkins did not arise from an "employment risk," but, instead, a "neutral risk."

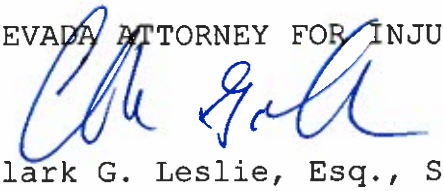
This error escapes any "deference" that is to be given to the Appeals Officer's conclusions of law. As illustrated herein, there are many decisions that reversed conclusions of law made by an Appeals Officer.

The assertion of Ms. Hopkins raising an issue for the first time on appeal is simply incorrect. The record is replete with examples of where the issue of control and the 'going and coming' rule, with its exceptions, appear in the record below. And, the district court chose to focus on deference, not the issue of 'arising out of' and, therefore, the concerns voiced in *Old Aztec Mine* are not present in this appeal.

At the very least, the matter should be remanded to the Appeals Officer for a ruling that entails use of the correct standard - "employment risk." The finding that the injury arose from a neutral risk was patently wrong as this test does not apply where the cause of the trip and fall is known and on property controlled by the employer, as herein.

DATED this 16th day of November, 2021

NEVADA ATTORNEY FOR INJURED WORKER



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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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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of day of November, 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 November 16th, 2021, the foregoing **APPELLANT'S REPLY 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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DATED: NOVEMBER 16, 2021

SIGNED: ALEX ANORACA