**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| PROVIDENCE CORP. DEVELOPMENT DBA: MILLER HEIMAN, INC.; GALLAGHER BASSETT SERVICES, INC.; and CNA CLAIMSPLUS,<br><br>Appellants,<br><br>v.<br><br>KAYCEAN BUMA, as the surviving spouse, and DELANEY BUMA, as the surviving child of JASON BUMA (Deceased),<br><br>Respondent. | Case No.: 84111 |



# APPELLANTS' OPENING BRIEF

JOHN P. LAVERY, ESQ.
Nevada Bar No. 004665
L. MICHAEL FRIEND, ESQ.
Nevada Bar No. 011131
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Avenue, Suite 900, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Appellants PROVIDENCE CORP. DEVELOPMENT DBA: MILLER HEIMAN, INC.; GALLAGHER BASSETT SERVICES, INC.; and CNA CLAIMSPLUS,

CHARLES C. DIAZ, ESQ.
Nevada Bar No. 003349
DIAZ & GALT
443 Marsh Ave.
Reno, NV 89509
Attorney for Respondents KAYCEAN BUMA, as the surviving spouse, and DELANEY BUMA, as the surviving child of JASON BUMA (Deceased),

## I.

## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellants Providence Corp. Development dba Miller Heiman, Inc., and Gallagher Bassett Services Inc., are publicly traded holding companies; Gallagher Bassett Services Inc., is the operating subsidiary which performs the third-party claims administrations services, and is wholly owned (100%) by the parent company, Gallagher Bassett Services Inc.

2. The undersigned counsel states that the following attorneys have appeared or are expected to appear in this court, and the underlying proceedings with the district court and administrative agency, on behalf of Appellants: JOHN P. LAVERY, ESQ., DANIEL L. SCHWARTZ, ESQ., LEE E. DAVIS, ESQ., JOEL P. REEVES, ESQ., and L. MICHAEL FRIEND, ESQ. of LEWIS BRISBOIS BISGAARD & SMITH LLP.

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These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

DATED this 25 day of August, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ L. Michael Friend
JOHN P. LAVERY, ESQ.
Nevada Bar No. 004665
L. MICHAEL FRIEND, ESQ.
Nevada Bar No. 011131
2300 West Sahara Drive, Suite 900, Box 28
Las Vegas, Nevada 89102
Attorneys for Appellants

## II.

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## IV.

## JURISDICTIONAL STATEMENT

On December 23, 2021, the district court filed its decision and order granting petition for judicial review, and the notice of entry of order was filed on December 24, 2021. Appellants were aggrieved by the final order and filed the instant appeal on January 12, 2022, with this honorable court per NRS 233B.150. See also NRAP Rule 3 and 4. Accordingly, this court has jurisdiction.

## V.

## ROUTING STATEMENT

Under NRAP 17(b)(9), this case would be presumptively assigned to the court of appeals as it concerns a petition for judicial review of an administrative agency's final decision.

## VI.

## STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the appeals officer's decision and order was proper, supported by substantial evidence, and founded on a proper application of the law per NRS 233B.135.

2. Whether the appeals officer properly concluded that decedent's ATV outing was a distinct personal departure on a personal errand depriving him of coverage under the Nevada Industrial Insurance Act (NIIA).

## VII.

## STATEMENT OF THE CASE

This is a workers' compensation case involving claimant Jason Buma's death as the result of an ATV accident occurring on March 29, 2015, while Mr. Buma was on a business trip for his employer. Mr. Buma's surviving widow and daughter ("Respondents") requested death benefits on May 11, 2015. (APP I at 104-120.) The employer's third-party administrator denied Respondents' request for death benefits on June 25, 2015. (APP I at 124-125.)

Following a hearing on the matter, a hearing officer issued a decision and order on October 23, 2015, affirming denial of benefits. (APP I at 150-152.) Respondents appealed that decision to an appeals officer.

The matter came before appeals officer Lorna Ward on April 13, 2016. (APP I at 167.) On February 7, 2017, the appeals officer issued a decision and order affirming denial of benefits. (APP I at 227-241) Respondents petitioned the district court for review, which was denied on July 24, 2017. (APP II at 396-401.) Respondents appealed to this court.

On December 12, 2019, this court issued its opinion in Buma v. Providence Corp. Dev., 135 Nev. Adv. Rep. 60, 453 P.3d 904 (2019). The court remanded the issue to the appeals officer for additional analysis of the traveling employee rule and its exception for distinct personal errands. (APP II at 357-371.)

Upon remand to the appeals officer, the parties agreed no further evidence was necessary and they presented written briefs to the appeals officer. (APP II at 378-379, 402-428.)

On December 2, 2020, the appeals officer issued the subject decision and order. The appeals officer affirmed denial of benefits as Respondents failed to establish a compensable claim. (APP II at 429-435.) Respondents filed a petition for judicial review.

On December 23, 2021, the district court rendered an order granting petition for judicial review, finding the appeals officer applied the wrong legal standard and that based on the evidence Respondents had established a compensable industrial insurance claim entitling them to survivor benefits. (APP III at 518-530.)

Appellants filed an appeal of the district court's order to this court on January 12, 2022. (APP III at 531-536.)

## VIII.

## STATEMENT OF FACTS

Claimant Jason Buma died on March 29, 2015, as the result of an ATV accident. On that date, Mr. Buma had travelled to Houston, Texas for a business conference scheduled to begin the next day as part of his employment. (APP I at 130.) On this trip, Mr. Buma stayed with Michael O'Callaghan, a local friend and independent affiliate of Mr. Buma's employer, who lived on a ranch approximately

two hours from Houston. (Id. at 129, 184.) Mr. Buma made his own travel arrangements and chose to stay with Mr. O'Callaghan. (APP I at 179.) Mr. Buma and Mr. O'Callaghan were scheduled to give a presentation at the conference the next morning. (Id. at 181.) The two had worked together for about three years. (Id. at 129.) Mr. Buma had stayed with Mr. O'Callaghan on at least two prior occasions and had driven the ATV on visits prior to this occasion. (Id. 130.)

Mr. Buma arrived at Mr. O'Callaghan's ranch at approximately 3:30 p.m. (Id.) The two had a glass of wine and visited on Mr. O'Callaghan's porch. (Id.) They then decided to ride ATVs before going to dinner. (Id.) Mr. O'Callaghan verified that Mr. Buma was riding the ATV at Mr. Buma's request for recreational purposes, with no related work purpose. (Id.) At approximately 5:00 p.m., Mr. O'Callaghan came upon Mr. Buma lying in a pool of blood on the road next to his ATV. (Id.) Mr. Buma died shortly thereafter on the scene. (Id.)

Mr. Buma's surviving widow and daughter ("Respondents") requested death benefits on May 11, 2015. (APP I at 104-120.) The employer's third-party administrator denied Respondents' request for death benefits on June 25, 2015. (APP I at 124-125.) The letter enclosed a copy of Claimant's Death Certificate, Claimant and Mrs. Buma's Marriage Certificate, and a Texas Peace Officer's Crash Report, as well as emergency service reports. (APP I at 104-120.)

On June 8, 2015, in response to questions from the adjuster, the employer noted that: (1) there were no company events on March 29, 2015, at the location where the accident occurred; (2) Mr. Buma was not required to ride the ATV for work purposes; and (3) Mr. Buma was not required to meet with clients until March 30, 2015, at 8:30 a.m. (APP I at 121-123.)

On June 25, 2015, the employer's third-party administrator issued a determination denying industrial insurance benefits. (APP I at 124-125.)

An investigative report was completed on July 6, 2015, regarding the accident. (APP I at 127-148.) On June 30, 2015, the investigator obtained a recorded statement of Michael O'Callaghan, the owner of the property where the accident occurred, which the investigator summarized in the report. (APP I at 129.) Mr. O'Callaghan stated he was self-employed with Axiom International, Inc., and had been an independent representative for Miller Heiman for 15 years. (Id.) Mr. O'Callaghan further stated he was assigned by Miller Heiman to a territory managed by Claimant and that he and Claimant had worked together for about 3 years. (Id.)

On August 13, 2015, Respondents timely filed an appeal of the administrator's June 25, 2015, determination denying benefits. (APP I at 149.)

The matter ultimately came before appeals officer Lorna Ward on April 13, 2016. (APP I at 167.) Mrs. Buma testified at the hearing.

On February 7, 2017, the appeals officer issued a decision and order affirming denial of benefits as Respondents had not established a compensable claim. (APP I at 227-241) Ms. Buma petitioned the district court for review, which was denied on July 24, 2017. (APP II at 396-401.) Ms. Buma appealed to this court.

On December 12, 2019, this court issued its opinion in Buma v. Providence Corp. Dev., 135 Nev. Adv. Rep. 60, 453 P.3d 904(2019). The court remanded the issue to the appeals officer for additional analysis of the traveling employee rule and its exception for distinct personal errands. (APP II at 357-371.)

On February 20, 2020, the appeals officer filed an order stating that the parties agreed no further proceedings or additional evidence was necessary. The appeals officer accordingly set a briefing schedule for the parties to present their arguments. (APP II at 378-379.) Both parties submitted briefs. (APP II at 402-428.)

On December 2, 2020, the appeals officer issued the subject decision and order. The appeals officer affirmed claim denial, concluding that Mr. Buma's ATV accident did not occur within the course and scope of employment because it was a distinct departure on a personal errand. (APP II at 441-446.) Respondents timely filed a petition for judicial review contesting the decision.

On December 24, 2021, the court rendered an order granting petition for judicial review, finding the appeals officer applied the wrong legal standard and that based on the evidence Respondents had established a compensable industrial insurance claim. Appellants timely appealed the order to this court.

## IX.

## SUMMARY OF THE ARGUMENT

The appeals officer concluded that Respondents did not meet their burden of establishing a compensable industrial insurance claim from which to derive death benefits. The appeals officer found that Mr. Buma's accident occurred while he was traveling for work, and, therefore, fell under the traveling employee rule codified at NRS 616B.612(3).

The appeals officer then considered whether the subject ATV accident was a personal errand amounting to a distinct departure from his employment. To that end, the appeals officer focused on whether the ATV excursion was reasonable and foreseeable. She concluded that although Mr. Buma was tending reasonably to the needs of personal comfort by riding an ATV on his business trip, the activity was not one that Mr. Buma's employer could have anticipated or foreseen. Therefore, she concluded the accident was due to a personal risk to Mr. Buma and was not compensable. Accordingly, the claim was properly denied under Nevada law.

Respondents argued that the appeals officer's reliance on whether the activity is foreseeable is an error of law. Appellants disagree. The appeals officer properly analyzed the facts based on Nevada law as outlined in this court's decision in Buma. There was no legal error or other basis under NRS 233B.135 to disturb the appeals officer's decision.

## X.

## ARGUMENT

### A.

### Standard of review

The standard of review for judicial review of administrative agency decisions is codified at NRS 233B.135. When reviewing a district court's decision on a petition for judicial review of an administrative agency decision, the court uses the same analysis as the district court. Elizondo v. Hood Mach., Inc., 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). The court defers to an agency's findings of fact as long as they are supported by substantial evidence. Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

Substantial evidence exists if a reasonable person could find the evidence before the agency adequate to support the agency's conclusion. Id. at 362, at 384. Factual findings are clearly erroneous when there is no evidence or testimony in the record for their support. Hermann v. Varco-Pruden Buildings, 106 Nev. 564, 566-

67, 796 P.2d 590, 592 (1990). Agency rulings also lack substantial evidentiary support whenever they are based on implicit findings not found in the record. State Indus. Ins. Sys. v. Christensen, 106 Nev. 85, 87, 787 P.2d 408, 409 (1990). An agency ruling without substantial evidentiary support is arbitrary and capricious and, therefore, unsustainable. Id. at 88, 787 P.2d at 410. Although administrative proceedings need not strictly follow the rules of evidence, the fact-finder is charged with making a decision based on evidence of a type and amount that will ensure a fair and impartial hearing. Nassiri v. Chiropractic Physician's Br. of Nev., 130 Nev. 245, 249, 327 P.3d 487, 490 (2014).

A reviewing court may set aside an agency decision if the decision was based upon an incorrect conclusion of law or otherwise affected by an error of law. State Indus. Ins. Sys. v. Giles, 110 Nev. 216, 871 P.2d 920 (1994); Jessop v. State Indus. Ins. Sys., 107 Nev. 888, 822 P.2d 116 (1991); see, also, NRS 233B.135(3)(d). Further, appellate review on questions of law is de novo, and the reviewing court is free to address purely legal questions without deference to the agency's decision. Giles, supra; American Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983).

NRS 616A.010 is clear that Nevada no longer has liberal construction under the NIIA. Issues must be decided on their merits, and not according to the common law principle requiring that statutes governing workers' compensation be liberally construed. That means workers' compensation statutes must not be interpreted or construed broadly or liberally in favor of any party.

**B.**

**The appeals officer properly concluded the subject accident was not compensable under the NIIA because it was a distinct departure from employment on a personal errand**

When this case came before the court the first time, the court remanded the matter for the appeals officer to reconsider compensability of the claim "guided by the traveling employee rule and its exception for distinct personal errands" as set forth in the opinion. Buma, 453 P.3d at 911. It is undisputed that Mr. Buma was a traveling employee covered under NRS 616B.612(3). However, the parties diverge on whether riding an ATV is a distinct departure from employment on personal errand based on the facts.

Nevada adopted the majority rule that traveling employees are continuously in the course and scope of employment during their travel except during distinct departures on personal errands. Id. at 906. Respondents argue that because Mr. Buma was engaged in a reasonable activity, his accident occurred within the course and scope of his employment. However, this court made it clear that simply proving

injury while performing a reasonable activity is alone insufficient to prove a compensable claim. Id. at 908-909. "A general reasonableness standard without a finding of a connection to the employee's work," however, "would go too far in covering the social and recreational activities of traveling employees." Id. (quoting Ball-Foster Glass Container Co. v. Giovanelli, 163 Wn.2d 133, 177 P.3d 692, 698 (Wash. 2008). This court has consistently held that an employee must "establish more than merely being at work and suffering an injury in order to recover" workers' compensation under the NIIA. Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005) (quoting Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997)). The court extended this reasoning to the rule for traveling employees under NRS 616B.612(3). Buma, 453 P.3d at 908-909.

In order to determine whether a traveling employee has left the course of employment by distinctly departing on a personal errand, the nature of the activity must be considered in the context of the trip. Id. at 909. Traveling employees may attend to their reasonable recreational needs during downtime without leaving the course and scope of employment. Id. at 910. Recreational activities that are unreasonable in view of the totality of the circumstances may constitute a distinct departure on personal errand. Id.

Further, the category of risk must be considered. While at work, employees may encounter three types of risk: employment, personal or neutral. Rio All Suite Hotel & Casino v. Phillips, 126 Nev. 346, 351, 240 P.3d 2, 5 (2010). For traveling employees, employment-related risks extend to include risks necessitated by travel, such as reasonably attending to personal comforts during the trip. Buma, 453 P.3d at 910.

Upon remand, the appeals officer found that although riding an ATV was a reasonable activity for personal comfort, it was not a foreseeable activity by the employer based on the facts. The appeals officer looked to the Bagcraft case cited by the court in Buma for consideration of whether riding an ATV was a reasonable and foreseeable activity. Buma, 453 P.3d at 908; Bagcraft Corp. v. Indus. Comm'n, 302 Ill. App. 3d 334, 338, 705 N.E.2d 919, 921, 235 Ill. Dec. 736 (Ill. App. Ct. 1998).

In Bagcraft, Mr. Bolda died from an ATV accident occurring while he was on a business trip. Id., at 336-337, 705 at 920-921. Under Illinois law, whether a traveling employee's activity arose out of and in the course and scope of employment depended on whether the activity was reasonable and foreseeable. Id., at 338, 705 at 921. Based on the facts of the case, the Bagcraft court held that Mr. Bolda's ATV excursion was reasonable and foreseeable and therefore compensable. In reaching that decision the court determined that riding an ATV was not an unreasonable

activity per se. The court further concluded that the activity was foreseeable to Mr. Bolda's employer because the employer was aware that employees had ridden ATVs on prior trips and because the company hosting the event distributed information regarding activities available at the lodge (including ATV riding). Id. at 341, 235 at 740.

In the instant case, the appeals officer concluded that riding an ATV was a reasonable activity for personal comfort because no evidence was presented showing otherwise. (APP II at 445.) The appeals officer, however, went on to distinguish the facts of this case with those in Bagcraft. (Id.) In reaching her decision, the appeals officer specifically found that no evidence was presented that the employer should have known or anticipated that Mr. Buma would ride an ATV at Mr. O'Callaghan's ranch. (Id.) Further, the appeals officer noted that Mr. Buma made his own travel arrangements and there was no evidence the employer was even aware that he was staying at the ranch. (Id.) These facts supported that Mr. Buma was on a distinct departure for personal errand at the time of the accident. Accordingly, the accident was a personal risk because it was not a risk necessitated by travel based on the evidence on the record.

The appeals officer did not commit legal error by applying foreseeability to her compensability analysis. The question asked of the appeals officer was whether the ATV outing was a distinct personal departure on a personal errand. In answering

that question, the trier of fact (the appeals officer) is tasked with weighing the totality of the circumstances. "The focus is on the nature of the activity and the activity's purpose, considered in the context of the work and the trip, rather than the travel status of the employee." Buma, 453 P.3d at 909. There is no set rubric for what amounts to a totality of the circumstances, which makes sense given the wide span of activities that people can engage in and the almost infinite circumstances under which they can undertake those activities. When giving traveling employees such a justifiably wide berth for personal comfort, the analysis simply does not lend itself to bright line rules and requirements that must or must not be ticked off for a claim to be deemed compensable.

The facts of this case are truly unfortunate. However, the appeals officer properly concluded that Appellants are not liable for Mr. Buma's ATV accident because his actions did not arise out of or within the course and scope of his employment. It is conceded that traveling employees are indeed afforded an expanded entitlement to workers' compensation benefits by virtue of the fact that they are required to be away from home and the comforts of home while they are traveling for their employment. However, that entitlement is not unending and must indeed be analyzed under the totality of the circumstances.

The appeals officer decision was based on her application of Nevada law to the facts of the case. The factual determinations used to support her conclusion are not within the purview of the court to reweigh per NRS 233B.135(3). The question in this case is whether there was any error of law. The record shows that the appeals officer followed the direction of this court and concluded that Mr. Buma's ATV riding was a personal errand and a distinct departure from his employment. There was nothing arbitrary or capricious about the decision. Accordingly, there was no legal error and the appeals officer's decision should not be disturbed.

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## XI.

## CONCLUSION

The appeals officer properly applied Nevada law regarding traveling employees and exceptions for personal errands to the facts before her. Respondents failed to meet their burden to establish a compensable claim under the NIIA and are therefore not entitled to survivor benefits.

WHEREFORE, Appellants respectfully request that this court affirm the appeals officer's December 2, 2020, decision affirming the administrator's June 25, 2015, claim denial determination.

DATED this 25 day of August, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ L. Michael Friend

JOHN P. LAVERY, ESQ.
Nevada Bar No. 004665
L. MICHAEL FRIEND, ESQ.
Nevada Bar No. 011131
2300 West Sahara Avenue, Suite 900, Box 28
Las Vegas, NV 89102
Phone: (702) 893-3383
Facsimile: (702) 366-9563
Attorneys for Appellants

## CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) 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 3,104 words.

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.

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4. 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 23 day of May, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ L. Michael Friend

JOHN P. LAVERY, ESQ.
Nevada Bar No. 004665
L. MICHAEL FRIEND, ESQ.
Nevada Bar No. 011131
2300 West Sahara Avenue, Suite 900, Box 28
Las Vegas, NV 89102
Phone: (702) 893-3383
Facsimile: (702) 366-9563
Attorneys for Appellants

## CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 25 day of August, 2022, service of the attached APPELLANTS' OPENING BRIEF was made through the court's electronic filing system to:

Charles C. Diaz, Esq.
cdiaz@diazgaltlaw.com
DIAZ & GALT
443 Marsh Ave.
Reno, NV 89509
*Attorneys for Respondents*

/s/ L. Michael Friend
An employee of LEWIS, BRISBOIS, BISGAARD & SMITH, LLC