IN THE SUPREME COURT OF THE STATE OF NEVADA

PROVIDENCE CORP. DEVELOPMENT, D/B/A MILLER HEIMAN, INC., and GALLAGHER BASSETT SERVICES, INC, and CAN CLAIMSPLUS,

Appellants,

vs.

KAYCEAN BUMA, AS SURVIVING SPOUSE, AND DELANEY BUMA, AS SURVIVING CHILD OF JASON BUMA, (Deceased),

Respondents.

Supreme Court No. 84111

RESPONDENTS' ANSWERING BRIEF

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N.R.A.P.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 the judges of this court may evaluate possible disqualification or recusal.

Kacean Buma and Delaney Buma are individuals. No corporation exists that can be identified as a parent corporation or that owns 10% or more of any of the parties stock.

Charles C. Diaz, Esq., is a partner in the law firm of Diaz & Galt, LLC, and represents Kacean Buma and Delaney Buma, the appellants in this matter. Charles C. Diaz has appeared as attorney of record for appellants in all proceedings in this matter including at administrative hearings at the Department of Administration at the Hearing Office, Appeals Office, at the Second Judicial District Court and the Nevada Supreme Court.

DATED this _24th_ day of October, 2022.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal from the district court's December 23, 2021 decision, granting the Petition for Judicial Review pursuant to NRAP 3A(b)(1) and NRS 233B.150.

ROUTING STATEMENT

This case is a continuation of a workers compensation case previously decided in a published opinion of the Nevada Supreme Court, *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019) which recognized the traveling employee doctrine. This case is a continuation of that matter and requires the Nevada Supreme Court's further clarification of its previous decision. Accordingly, although appeals involving decisions of an administrative agency would generally be assigned to the Court of Appeals, pursuant to NRAP 17(b)(9), in this instance, for consistency, and because the Nevada Supreme Court is familiar with the matter, it is appropriate for it to remain with the Nevada Supreme Court. Moreover, the case involves a primary issue which is a question of statewide importance, pursuant to NRAP 17(a)(12).

STATEMENT OF ISSUES

Whether the District Court properly reversed the appeals officer's decision to deny the respondents' death benefits because, the appeals officer improperly added an element of foreseeability to the legal test set forth in *Buma*.

STATEMENT OF THE CASE

This case originated with the insurer's denial of death benefits to the heirs of Jason Buma (Mr. Buma), who died while engaged in a recreational activity while on a business trip for his employer. At the time of his death, Buma was employed as a vice president of sales by Miller Heiman. Mr. Buma's statutory heirs are Kaycean Buma, Mr. Buma's wife, and Delaney Buma, the couple's 15-year-old daughter. They seek death benefits pursuant to NRS 616C.505 as a result of Mr. Buma's untimely death while on a business trip.

Gallagher Bassett is the third-party administrator (TPA). On June 25, 2015, the TPA denied Mr. Buma's widow's application for workers compensation death benefits. The TPA's denial of benefits cited to NRS 616B.612 and NRS 616C.150, generally stating, that Mr. Buma's accident and death were "outside the course and scope of his employment." Appellant's Appendix I (hereinafter AA) I at 42. The TPA also cited to NRS 617.440 and claimed that no "disease" condition existed that could be considered for coverage. AA I at 42. The respondents appealed this denial of benefits to the appeals officer, who issued a Decision and Order, dated February 07, 2017, denying their claim for death benefits. AA I at 227-238.

On February 28, 2017, respondents filed a Petition for Judicial Review in the Second Judicial District Court which was denied on July 24, 2017. Respondents appealed that decision to the Nevada Supreme Court. AA II at 396-

401.

On December 12, 2019, the Nevada Supreme Court issued its decision in *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019). The Court vacated the district court's decision and remanded the case to the appeals officer with instructions to,"…conduct a hearing for additional fact-finding, to be guided by the traveling employee rule and its exception for distinct personal errands as set out in this opinion." AA II at 357-370.

The unanimous Court accepted Professor Larsens' *Traveling Employee Doctrine* and clearly defined how NRS 616B.612(3) applies to traveling employees, and more specifically to the petitioners claim for death benefits as a result of Mr. Buma's accidental death. AA II at 357-371. On remand to the appeals officer, the parties offered no new evidence and relied only on the evidence presented in the prior appeals officer hearing. The parties submitted written closing arguments

In its December 2, 2020, decision and order denying benefits, the appeals officer specifically found that Mr. Buma's ATV ride did not constitute a material deviation and was therefore not a distinct departure on a personal errand, and that ATV riding is not inherently dangerous if undertaken reasonably. The appeals officer then ruled that compensability turns on whether the employer knew or should have known that Mr. Buma would ride an ATV while on his business trip.

The appeals officer again affirmed the denial of the claim based upon her finding that Mr. Buma failed to meet his burden of proving by a preponderance of the evidence that the employer knew or should have known that Mr. Buma would undertake the recreational activity of riding an ATV while on his business trip. The appeals officer reasoned that although it may have been reasonable for Mr. Buma to take an ATV ride, it was not foreseeable to his employer. AA II 429-435.

The respondents filed a Petition for Judicial review with the Second Judicial District Court on December 23, 2020. AA II at 436-447. On December 23, 2021, the Second Judicial District Court Granted the Petition for Judicial Review finding that the Appeals Officer erred as a matter of law, in inserting foreseeability as a required element. AA III at 516-530. The TPA appealed that decision to this Court.

STATEMENT OF FACTS AS RECOGNIZED BY THE NEVADA SUPREME COURT

The Nevada Supreme Court went to great lengths in their decision to set forth those facts relevant to their final decision. It is this set of facts that will be relied upon and referred to by the Respondents in the case at bar. Those facts are as follows.[1]

"Respondent Miller Heiman employed Jason Buma full-time as a vice

[1] Mr. Buma is referred to as "Jason" throughout the Nevada Supreme Courts' decision but in this Answering Brief he will be referred to as Mr. Buma.

president of sales. In that capacity, Jason split his time working from home in Reno, Nevada and traveling out-of-state on business. He had no local clients or contacts, and he did not work out of Miller Heiman's Reno office. Jason enjoyed considerable discretion in carrying out his duties. He worked irregular hours, starting his day as early as 6 a.m. and sometime working as late as 10 p.m. He was constantly on call, taking business calls at any hour on weekends, on vacations, and even "while hiking." He made his own travel arrangements." AA II at 359.

Annually, Miller Heiman required Mr. Buma to travel specifically to Houston, Texas in order to attend an oil and gas conference. While in Texas for the conference, he stayed with an "independent affiliate of Miller Heiman, Michael O'Callaghan who owned a ranch outside Houston". Every year Jason attended the oil and gas conference he would stay at Mr. O'Callaghans' ranch so, they could work together and prepare the presentations on Miller Heiman's behalf. "The two would travel to and from Houston to attend the conference, meet with clients, and give presentations on Miller Heiman's services." AA II at 359.

Mr. Buma arrived at Mr. O'Callaghan's ranch the day before they were scheduled to attend the conference. "He and Michael had several joint presentations at the oil and gas conference to prepare for, with the first presentation scheduled for Monday morning at 8:30 a.m." AA II at 359.

The Supreme Court noted that, "Sometime after 5 p.m. on Sunday, Jason

and Michael went on an ATV ride around the property, as they had on Jason's prior trips. While riding toward the end of a trail that led off the property, Jason rolled his ATV. He died at the scene." AA II at 359.

KAYCEAN BUMA'S TESTIMONY

Kaycean Buma, Mr. Buma's wife, was the sole witness who testified at the appeals hearing on April 13, 2016. She testified that she and Mr. Buma had been married for 18 years and that their daughter Delaney was 15 years old. AA I at 174:16-25. Mr. Buma had worked for Miller Heiman in 1998 and then again beginning in 2012. AA I at 175:12-24; AA I at 155.

Mrs. Buma explained that Miller Heiman "sells sales training to different companies to help them improve their productivity." She explained that Miller Heiman's clientele includes Fortune 500 companies, both national and international, such as, Dresser-Rand, Halliburton, Disney, Foster Farms, etc. AA I at 176:2-8. Mr. Buma was a Vice-President of sales and was responsible for overseeing and managing the activities of independent representatives who worked for Miller Heiman around the world. Mrs. Buma testified that 40%-50% of Mr. Buma's working time involved traveling. He had no clients in Nevada. AA I at 178:4,13.

Mr. Buma's job duties and responsibilities required him to travel all over the country. He would meet with potential clients and perform sales presentations and

oversee the training teams that were sent to the individual companies that had purchased sales programs from Miller Heiman. AA I at 178:5-10.

Because Mr. Buma worked primarily at home, Mrs. Buma testified that she observed him replying to emails at 6:00 am and would take calls at 5:00 pm and sometimes up till 9:00 or 10:00 at night. She explained that Mr. Buma worked constantly and was always on-call. That he would take "weekend calls…vacation calls…calls while hiking." AA I at 180, 181.

Mrs. Buma stated that Mr. Buma always stayed in hotels when he traveled except, when he attended the Oil and Gas Industry Conference in Houston, when he would stay with his co-worker, Michael O'Callaghan at his ranch in Carmine, Texas. AA I at 178:15-24. The company reimbursed all of Mr. Buma's travel expenses. AA I at 179:9-14.

On March 29, 2015, Mr. Buma travelled to Houston the day before the Oil and Gas Industry Conference began. Mrs. Buma testified, "That he was flying in the day before to work with Mickey, Michael, on a presentation that they were giving the next morning early." AA 181:13-15. Mrs. Buma dropped him off at the Reno airport "a little before 5:00 am in the morning." AA I at 182:1

Mrs. Buma described what she knew of Mr. O'Callaghan's ranch.

> It's fairly big. You know, he's got a couple of houses on it, one where people can--like a guesthouse, which is where Jason was staying. ..
>
> You know, it's got some fishing and some hunting on it, that kind of thing.

> I think it's got a big pond that's always stocked with fish, and they can hunt on the property.

AA I at 183:11-20.

Mrs. Buma stated that Mr. O'Callaghan and Mr. Buma "…..worked together a lot. I mean every other week." AA 185:17-22. She specifically remembered that her husband had stayed at Mr. O'Callaghan's the year before for the Oil and Gas Conference. AA 187:1-4. Mrs. Buma concluded her testimony by stating that Mr. Buma had never stayed at Mr. O'Callaghan's ranch for pleasure. AA I at 187:8-10.

MICHAEL O'CALLAGHAN'S STATEMENT

A transcript of a recorded statement of Michael O'Callaghan and a written investigative report, taken by a private investigator hired by the employer, was admitted into evidence with no objections. Mr. O'Callaghan was Mr. Buma's co-worker, host, and owner of the ranch where Mr. Buma was staying at the time of his death.

Mr. O'Callaghan in his recorded statement verified the fact that he had worked with Mr. Buma for "approximately three years." AA I at 75:11.

> ..It was quite common for him to come and stay here at the ranch, and then we would drive in and out for our meetings. It gave us more time to strategize and plan, things like that." and stated that in fact he had stayed at the ranch several times in the prior years in order to work with Mr. O'Callaghan before and during the Oil and Gas Industry Conference.

AA I at 76:8-17.

Mr. O'Callaghan explained his professional relationship with Mr. Buma as business partners. "We would partner up and chase opportunities, manage accounts, close deals…" AA I at 75:4-8.

Mr. O'Callaghan described his ranch as being 74-75 acres with a few other buildings that were bedrooms and storage along with a few acre pond. AA I at 76:20, 24, 77:1-6.

Mr. O'Callaghan described the events of the late afternoon leading up to Mr. Buma's death. Mr. Buma arrived at the ranch about 3:30 pm and they "visited for a little while, and then we were going to dinner. He was going to take my wife and I out to dinner like he normally did when he came in. And he wanted to take a ride on the ATV's which we had also done previously, and so we decided to take a quick ride on the ATV's before going to dinner." O'Callaghan transcript, AA I at 77:15-21.

Mr. O'Callaghan states they had been riding about 20 minutes and he did not witness the accident.

> We rode around the ranch there's some trails out here…and then he wanted to ride to the end of Hercules Road and back, and we were going to dinner. Hercules road is a dead end road that goes about a mile. Accident happened as he was going around the curve.

AA I at 84.

This road is described as a "caliche road...It's a rock or aggregate that they put down." AA 79:7-13. It's a dead-end county road and nobody else lives on this road. "Traffic's pretty rare." AA I at 85:2-4. Mr. O'Callaghan stated that although he was riding his ATV behind Mr. Buma, he did not actually see the accident as Mr. Buma had ridden around a curve in the road. Mr. O'Callaghan found Mr. Buma lying in the middle of the gravel road where he died. AA I at 78:13-20.

STANDARD OF REVIEW

On appeal, the court reviews an administrative agency's decision to determine whether it was affected by an error of law, or was arbitrary or capricious, and thus, an abuse of discretion. NRS 233B.135(3)(d), (f); *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011). The court reviews the agency's factual findings for clear error or an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4); *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

The court reviews questions of law *de novo*. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010).

/ / /

SUMMARY OF ARGUMENT

The singular issue before this Court is whether the appeals officer erred as a matter of law by adding an element of foreseeability to the legal test established by this Court in *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019).

On petition for judicial review from the appeals officer's decision, the District Court properly found that Jason Buma was in the course and scope of his employment when injured on a brief ATV ride on the property where he was staying with a co-worker, solely for work-related purposes. Additionally, the District Court concurred with the appeals officer and, properly found that the activity was not a material deviation in time or space from carrying out the trip's employment-related objectives, nor a personal errand amounting to a distinct departure from his employer's business.

The District Court properly reversed the appeals officer's decision denying Buma's claim for benefits, finding that the appeals officer committed reversible error by misapplying the law. Specifically, the court found that the appeals officer improperly added an element of *foreseeability* to the test of whether the activity in question was reasonable, as Nevada law does not require a foreseeability test in this context. The District Court further properly found that as a matter of law, any activity in this context that is reasonable is also inherently and necessarily

foreseeable.

In coming to its conclusion, the District Court considered that the ranch where the injury occurred was not a recreational facility. It was the home of a colleague who was involved in the same type of business, was involved with the presentations Buma was in Houston to deliver and was going to be a co-presenter the following day. In short, the two were at the ranch solely for business purposes. Further, this was not the first time Mr. Buma had visited the ranch before a business presentation with Mr. O'Callaghan. The two planned to travel together to the location of their presentations the following morning.

The District Court recognized that the appeals officer found nothing inherently wrong with riding an ATV, and that the ATV ride in question was reasonable. Based upon the record and the Nevada Supreme Court's prior decision in this case, *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019), the District Court concluded that the proper legal analysis should have ended when the appeals officer found that the activity of riding an ATV under these circumstances was reasonable. The District Court therefore reversed the appeals officer's decision.

Appellants' argument that the appeals officer based its decision upon Nevada law is unsupported by the record and contrary to relevant and controlling legal authorities, including this Court's previous decision in *Buma*. Appellants' claims

on appeal are without merit and must be denied.

ARGUMENT

In *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904, 909 (2019), the Nevada Supreme Court recognized that, "traveling employees may generally tend to their *reasonable* recreational needs during downtime without leaving the course of employment under this standard." (Emphasis added). In its decision and order vacating the prior decision and remanding to the appeals officer with instructions, the Court also framed the totality of the circumstances of the case, answering all the necessary questions except one, which it distilled and set forth for the appeals officer to answer: "whether Jason's ATV outing with his business associate/co-presenter while on a business trip amounted to a 'distinct personal departure on a personal errand." AA II at 369.

The Court instructed the appeals officer that, "The cases of distinct departures on personal errands tend to involve a personally motivated activity that takes the traveling employee on a material deviation in time or space from carrying out the trip's employment-related objectives." AA II at 365.

The appeals officer found that Jason Buma did not embark on any such material deviation in time or space from his trip's employment-related objectives. AA II at 432. Further, the appeals officer found that Buma's activity of riding an ATV on the ranch where he was staying while engaged as a traveling employee

was *reasonable*. Inexplicably, the appeals officer then added a foreseeability test, beyond the finding of reasonableness, requiring that the employer knew or should have known of the specific activity of ATV riding for the injury to be compensable. AA II at 433. This was a reversible error of law.

In the "Statement of the Issues for Review" section of their opening brief, Appellants warn that they intend to again argue facts that have already been decided by the trier of fact. Appellants ignore and misstate the plain language of the appeals officer's decision when they argue that Mr. Buma was on a distinct departure or personal errand at the time of the accident. Appellants' Opening Brief at pp. vii, 12. The bottom line is, if Mr. Buma was tending to his "*reasonable* recreational needs during downtime" while riding the ATV, then, as a traveling employee, there was necessarily a work connection to the activity. The appeals officer's decision that the activity was reasonable in light of her other findings of fact, is the end of the analysis. There is no requirement that the employer know of the specific activity of ATV riding in order for the injury to be compensable.

In the *Buma* decision, this Court repeatedly referred only to the test of *reasonableness*. Most jurisdictions only apply the reasonableness test. Foreseeability is not an applicable legal consideration in this context. The appeals officer's insertion of the element of foreseeability as part of the legal test was reversible error as decided by the District Court.

A. The Totality of the Circumstances of Buma's Work Trip, as Framed by the Nevada Supreme Court in its Previous Decision in This Case.

In Buma, the Court addressed the totality of the circumstances of Mr. Buma's business trip and made numerous specific findings regarding the same. Those findings are provided again here for the Court's convenience:

(1) This case concerns a traveling employee, Jason Buma. AA II at 358.

(2) Jason died in an all-terrain-vehicle (ATV) accident while on a required business trip for his employer, respondent Miller Heiman. AA II at 358.

(3) Respondent Miller Heiman employed Jason Buma full-time as a vice president of sales. AA II at 359.

(4) Jason split his time working from home in Reno, Nevada, and traveling out-of-state on business. AA II at 359.

(5) Jason had no local clients or contacts, and he did not work out of Miller Heiman's Reno office. AA II at 359.

(6) Jason enjoyed considerable discretion in carrying out his duties. AA II at 359.

(7) Jason worked irregular hours, starting his day as early as 6 a.m. and sometimes working as late as 10 p.m. AA II at 359.

(8) Jason was constantly on call, taking business calls at any hour on weekends, on vacations, and even "while hiking." AA II at 359.

(9) Jason made his own travel arrangements. AA II at 359.

(10) Miller Heiman required Jason to travel on business, including annual trips to Houston, Texas, to attend an oil and gas conference. AA II at 359.

(11) On these trips to Houston, Jason stayed with a co-worker, an independent affiliate of Miller Heiman, Michael O'Callaghan, who owned a ranch about a two-hour drive from Houston. Each year Jason and Michael attended the conference, Jason would stay at Michael's ranch, where he and Michael would prepare their joint presentations on Miller Heiman's behalf for the conference. The two would travel to and from Houston to attend the conference, meet with clients, and give presentations on Miller Heiman's services. AA II at 359.

(12) On his most recent trip, Jason flew from Reno to Houston on a Sunday and drove from the airport to Michael's ranch in the late afternoon. He and Michael had several joint presentations at the oil and gas conference to prepare for, with the first presentation scheduled for Monday morning at 8:30 a.m. AA II at 359.

(13) Sometime after 5 p.m. on Sunday, Jason and Michael took a short break and went on an ATV ride around the property, as they had on Jason's prior trips. While riding towards the end of a trail that led off the property, Jason rolled his ATV. He died at the scene. AA II at 359.

B. Foreseeability is Not a Required Element and Was Improperly Required by the Appeals Officer.

The Nevada Supreme Court recognized the reasonableness test – and only the reasonableness test -- numerous times in its opinion:

> There is no choice but for traveling employees to face hazards away from home in order to tend to their personal needs, "including sleeping, eating, and seeking fresh air and exercise," *and reasonably entertaining themselves*, on their work trips.

*Buma,*135 Nev. Adv. Op. 60 at 452, 453 P.3d at 908, *citing Ball-Foster*, 177 P.3d at 701; *see also* 2 Larson's, *supra*, § 25.02, at 25-4 n.12(emphasis added).

The *Buma* Court clearly set forth the test to "determine whether a traveling

employee left the course of employment by distinctly departing on a personal errand." The Court did not include a foreseeability element but states that "the inquiry focuses on whether the employee was (a) tending *reasonably* to the needs of personal comfort, or encountering hazards necessarily incidental to the travel or work; or, alternatively, (b) 'pursuing . . . strictly personal amusement ventures. *Buma,*135 Nev. Adv. Op. 60 at 453, P.3d at 909, citing *Ball-Foster*, 177 P.3d at 697 (emphasis added).

Following its articulation of the appropriate test, the Court clarified that: "traveling employees may generally tend to their *reasonable* recreational needs during downtime without leaving the course of employment under this standard." *Buma, 135* Nev. Adv. Op. 60 at 453 P.3d at 909.

Several times the Court returned to this singular test of reasonableness, including its caveat that "recreational activity that is *unreasonable* in light of the total circumstances of the trip may constitute a distinct departure on a personal errand. *Buma at* 135 Nev. Adv. Op. 60 at 454, 453 P.3d at 910. (emphasis added).

"We hold that this category-based approach applies to traveling employees, though we clarify that risks necessitated by travel—such as those associated with eating in an airport, sleeping in a hotel, *and reasonably tending to personal comforts*—are deemed employment risks for traveling employees." *Buma,*135 Nev. Adv. Op. 60 at 455, 453 P.3d 910. (emphasis added).

At the conclusion of its opinion, the Nevada Supreme Court remanded for the appeals officer to craft a new decision "guided by the traveling employee rule and its exception for distinct personal errands as set out in this opinion." *Buma,*135 Nev. Adv. Op. 60 at 456, 453 P.3d at 911..

Not once did the Nevada Supreme Court use the words "reasonable and *foreseeable*" in discussing the test to be employed. Moreover, foreseeability in this context is not mentioned nor defined in Nevada's workers compensation statutes.

Accordingly, the sole test in this case is one of reasonableness. The appeals officer erred in inserting foreseeability as a required element, making the decision unsound as a matter of law. The District Court properly reversed the appeals officers' decision.

C. The Vast Majority of Jurisdictions Use Only the *Reasonableness* Test.

In Buma v. Providence Corp. Dev., 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019), this Court adopted the majority rule regarding the traveling employee doctrine. The Court found that NRS 616B.612(3) was a codification of the majority rule. The Court recognized that, "'in the majority of jurisdictions,' and under Larson's rule, traveling employees are 'within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.'" *Buma,* 135 Nev.at 451, 453 P.3d at 908.

The one and only reference to foreseeability in the Nevada Supreme Court opinion in *Buma* is a parenthetical explanation of an Illinois decision, *Bagcraft Corp. v. Indus. Comm'n,* 302 Ill.App.3d 334, 235 Ill. Dec. 736, 705 N.E.2d 919, 921 (1998), in which this Court noted that the Illinois court, "([applied the] rule covering employees under workers' compensation throughout their work trips for all reasonable and foreseeable activities)." A survey of Illinois cases on the matter shows that this two-pronged test is regularly articulated in that state. *See Wright v. Industrial Comm'n*, 62 Ill.2d 65, 338 N.E.2d 379 (1975) and *Insulated Panel Co. v. Industrial Comm'n*, 318 Ill. App. 3d 100, 743 N.E.2d 1038, 252 Ill. Dec. 882 (2001). Illinois consistent articulation that foreseeability is a required element in its test is in the minority.

It is important, however, to examine how the test is regularly employed in that state, compared to how the appeals officer employed it. In *Wright*, the claimant – who was working on location, out-of-state -- was killed in a head-on collision in his car, six miles from his motel, on a Saturday afternoon. The court found it was not unforeseeable that the decedent, as a traveling employee, would be driving six miles from his motel, even for recreational purposes. There was no evidence the decedent's conduct was unreasonable.

In *Insulated Panel*, the claimant injured his leg while out hiking, traversing lava rocks, while in Hawaii on a business trip. The lower forum originally found

his activity to be unreasonable. The commission and the reviewing court disagreed, finding the activity was reasonable and foreseeable under the traveling employee doctrine. *Id*, 318 Ill.App.3d at102.

The case of *McCann v. Hatchett*, 19 S.W.3d 218 (Tenn. 2000) provides valuable insight into the majority rule test of reasonableness. In *McCann,* the court relied upon 2 Arthur Larson Les K. Larson, Arthur Larson's Workers' Compensation Laws, § 25.00 (1998), in citing the majority rule that, "[a]n employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand." *Id*., 19 S.W.3d at 221-222.

The *McCann* court specifically adopted the majority rule in determining the compensability of injury or death of traveling employees. The court specifically held that "a traveling employee is generally considered to be in the course of his or her employment continuously during the duration of the entire trip, except when there is a distinct departure on a personal errand. Thus, under the rule we today adopt, the injury or death of a traveling employee occurring while reasonably engaged in a reasonable recreational or social activity arises out of and in the course of employment." *Id*.

The *McCann* court specifically declined to adopt the "reasonable and

foreseeable" test, citing the inapplicability of the element of "foreseeability" to workers compensation cases:

> We decline to adopt the "reasonable and foreseeable" standard used in some jurisdictions. "Foreseeability" is typically a tort law concept; as we have previously stated, "[c]oncepts of `proximate cause' or `foreseeability' as utilized in the law of torts do not necessarily govern or define coverage under the workers' compensation statutes."

McCann, 19 S.W.3d at 222 n.2, *quoting Jordan v. United Methodist Urban Ministries, Inc*., 740 S.W.2d 411 (Tenn. 1987).

As recognized by *McCann* and *Larson's*, the majority of other jurisdictions employ the straight *reasonableness* test. *See e.g., Slaughter v. State Acc. Ins. Fund*, 60 Or. App 610, 654 P.2d 1123 (1982). The Claimant was a truck driver, out of town on work. He went to a tavern one evening during a layover and was injured in a fight he did not start. The court held that the injury was compensable because his visit to the tavern was *reasonable* and not a distinct departure on a personal errand. *Id*, 60 Or. App. at 616.

The *Slaughter* decision provides additional clarity in analyzing traveling employee cases. It explained that, in looking to whether an activity of a traveling employee is covered, what is referred to in some jurisdictions as the *reasonableness* test is same test set forth in other jurisdictions as a question of whether the employee made a "distinct departure on a personal errand." *Id*, 60 Or. App. at 615-16.

As set forth elsewhere, in the *Buma* decision, the Court expressly used the language of a "distinct departure on a personal errand" in identifying the dispositive question, as well as repeatedly referring to the question of whether the activity was *reasonable*. The Court never used the term *foreseeable* in articulating the test. According to the *Slaughter* decision, the two tests are essentially interchangeable, but they do not include an element of foreseeability.

In *Epp v. Midwestern Machinery Co*., 296 Minn. 231, 208 N.W.2d 87 (1973), the deceased employee was a truck driver who arrived at a designated city on a Friday to pick up a load. Since it was not ready, he was instructed to check into a motel and wait until the load was ready. It was not ready on Saturday, either, so he was told to stay until Monday. On Sunday morning at 2:30 am, the employee was killed while crossing a highway after leaving a nearby tavern. The commission concluded that the employee "to pass some time — during a considerably long waiting period — crossed the road to the tavern and had some drinks until closing time." The court found the employee's activity to be *reasonable* and affirmed. *Id.,* 296 Minn. At 234.

In *Matter of Robards v. N.Y. Div. Elec. Products*, 33 A.D.2d 1067 (N.Y. App. Div. 1970), in which traveling employees were killed in an automobile accident at 11:30 at night, after playing four or five games of pool and drinking four or five beers, the court also employed the *reasonableness* test in affirming the

award. The court articulated the reasonableness test, "Where an employer sends an employee away from home it has been held that the test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employee may satisfy physical needs including relaxation" *Id.*, 33 A.D.2d at 1068.

The *Robards* court clarified the test, "the rule applied is simply that the employee is not expected to wait immobile but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment." *Id.*, *citing Matter of Davis* v. *Newsweek Mag.*, 305 N.Y. 20, 28; see, also, *Matter of Meredith* v. *United States Ind. Chems. Co.*, 14 A.D.2d 955, mot. for lv. to app. den., 11 N.Y.2d 641. Note that none of the cases indicate in any way that the employer needs to be put on specific notice of the activity.

In *Thompson v. Keller Foundations, Inc.*, 883 So. 2d 356 (Fla. Dist. Ct. App. 2004), a traveling employee was injured while traveling to dinner after playing pool at a sports bar for an hour. Using the *reasonableness* test, the court reversed the lower decision, acknowledging the established rule that, "so long as a traveling employee's injury arises out of a risk which is reasonably incidental to the conditions of employment, the injury will be compensable." *Id.,* 883 So. 2d at 357. See also *Garver v. Eastern Airlines*, 553 So. 2d 263, 267 (Fla. Dist. Ct. App. 1990).

And see, *Blakeway v. Lefebure Corp*., 393 So. 2d 928 (La. Ct. App. 1981) (Swimming at motel was *reasonable* recreation for traveling employee); *CBS Inc. v. Labor & Industry Review Commission*, 213 Wis. 2d 285 (Wis. Ct. App. 1997)(Traveling employee covered, because downhill skiing not an *unreasonable* activity); *Ball-Foster v. Giovanelli*, 128 Wn. App. 846 (Wash. Ct. App. 2005)(traveling employee walking to a park to listen to music on his day off was covered, citing to *Larson's* and the "distinctly personal activity" test); and *Bowser v. N.C. Dep't. of Corr*, 147 N.C. App. 308, 310 (N.C. Ct. App. 2001) (where claimant was injured returning from personal shopping, court found she "was a traveling employee who was engaged in activities which were *reasonable* under the circumstances").

In inserting the element of foreseeability, the appeals officer imposed an additional and improper burden of proof on Buma, one that required he show that the employer knew, should have known, or was on notice that Buma would ride an ATV while on the ranch for business. This expansion of the already improper test of foreseeability was an error of law as identified by the District Court and also arbitrary, capricious, and an abuse of discretion.

The bottom line is, if Mr. Buma was tending to his "reasonable recreational needs during downtime" then, as a traveling employee, there was a work connection to the activity. The appeals officer's decision that the activity was reasonable is the

end of the analysis. Requiring anything more was an error, as a matter of law. The District Court properly reversed the appeals officer's decision.

CONCLUSION

Jason Buma's brief ATV ride, with a co-worker, on the property where he was staying solely for work-related purposes, was not in any way *a material deviation in time or space* from carrying out the trip's employment-related objectives. See *Buma v. Providence Corp. Dev.*, 135 Nev. Adv. Op. 60, 453 P.3d 904 (2019). The *Buma* Court emphasized that traveling employees may generally tend to their reasonable recreational needs during downtime without leaving the course of employment under this standard. Since the appeals officer found that Buma's ATV ride was reasonable and not a personal deviation there should be no question that Mr. Buma's claim is compensable.

In *Buma*, this Court referred only to the test of *reasonableness* in arriving at its decision. The appeals officer's insertion of foreseeability as part of the legal test was in error. Moreover, the appeals officer took this manufactured test one step further and required Buma to show some kind of actual notice to the employer, that the employer knew or should have known he would be riding an ATV on the ranch. There is no such requirement. The foreseeability/knowledge test inserted by the appeals officer was in error, and the District Court's reversal of that decision was proper as a matter of law.

If a recreational activity is reasonable pursuant to the personal comfort and traveling employee doctrines, then it is foreseeable. What is not foreseeable is an unreasonable recreational activity or an activity that involves a material deviation in time and space. In the case at bar, the appeals officer found that Buma's ATV ride was not unreasonable and did not involve a material deviation in time and space. Accordingly, under the totality of the circumstances as framed and decided by the Nevada Supreme Court, the injury must be deemed to be compensable because it was connected to his work as a traveling employee.

Jason Buma was tending to his *reasonable* recreational needs when on a brief ATV ride while staying at a co-workers' ranch as a traveling employee. The appeals officer's requirements of foreseeability and notice was an error as a matter of law. The District Court properly reversed the decision of the appeals officer.

The decision of the District Court must be affirmed.

AFFIRMATION

I affirm that this document does not contain the social security number of any person.

DATED this _24th__ day of October, 2022.

DIAZ & GALT, LLC

/S/ Charles C. Diaz_____
CHARLES C. DIAZ, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface and type style requirements of NRAP 32(a)(5) and NRAP 32(a)(6) and that this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman font.

2. I further certify that this Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more and contains 6,214 words.

3. Finally, I 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)(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 this brief is not in conformity with the requirements of NRAP.

DATED this 24th day of October, 2022.

/S/ Charles C. Diaz
Charles C. Diaz, Esq.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I HEREBY CERTIFY I am an employee of Diaz & Galt, LLC and that on this date, I served a true and correct copy of the within **RESPONDENT'S ANSWERING BRIEF** via U.S. Mail to the following:

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DATED this _24th day of October, 2022.

/S/Lila Salinas_____
LILA SALINAS