IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANTS' REPLY 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.

TABLE OF CONTENTS

II.

TABLE OF AUTHORITIES

Cases **Page No(s).**

Statutes

III.

REPLY

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). Although she determined that Mr. Buma's activity was reasonable, she concluded that based on the totality of the circumstances Mr. Buma's activity at the time of his death *was* a distinct personal departure on a personal errand and therefore not compensable under the Nevada Industrial Insurance Act (NIIA).[1]

Respondents argue that the appeals officer erred by adding a foreseeability requirement to her analysis in rendering her decision. Her analysis, however, is

[1] As an aside, it should be noted that although the appeals officer concluded that ATV riding was not inherently dangerous as long as it is undertaken reasonably, she came to this conclusion because there was "[n]othing in the record [to] suggest that Jason was acting in an unreasonable fashion." APP II at 445. This is an erroneous shifting of the burden. It is claimant's burden to establish by a preponderance of the evidence the elements of his claim under NRS 616C.150. It was not Appellants' burden to prove that claimant was acting in an unreasonable fashion.

Further, in point of fact, there are no facts in evidence to suggest that claimant was acting reasonably at the time of the unwitnessed accident (including that he had been drinking prior to the accident (APP I at 130) and the accident itself implies something outside of the reasonable operation of an ATV occurred). Therefore, the appeals officer's conclusion that the activity was reasonable was purely speculative and based on both error of law and lack of substantial evidence.

consistent with the court's ruling in Buma rejecting the general reasonableness standard, which is what Respondents argue is the standard in the case. Buma v. Providence Corp. Dev., 135 Nev. Adv. Rep. 60, 453 P.3d 904 (2019). The Respondents ignore that there still must be a connection to the employee's work.

The court held in Buma that 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)). Accordingly, the core principle that underpins this case is the defining mainstay of Nevada workers' compensation law: "a claimant must establish more than merely being at work and suffering an injury in order to recover." Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997). Indeed, even in the context of traveling employees who are "deemed in their employers' control, as a practical matter, for the duration of their trips[…]the traveling employee doctrine does not require coverage for every injury." Buma, 453 P.3d at 908.

As succinctly stated by the Court in Buma:

> To receive workers' compensation under the NIIA, an injured employee (or his dependents) must show two things: "that the employee's injury arose out of and in the course of his or her employment." NRS 616C.150(1). If the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties,

> then the injury arises "in the course of employment" under NRS 616C.150(1). An injury arises out of the employment when there is a causal connection between the employee's injury and the nature of the work or workplace.

453 P.3d at 907(citations removed)

As noted by the appeals officer in the subject decision, the court in Buma, did indeed state that "[t]he 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." APP II at 430. The court did not instruct the appeals officer to look only for activities that were material deviations in time/space. Rather, those were only two factors that "tended" to show a deviation. The real test is whether the activity was reasonable "in light of the total circumstances of the trip." Id. at 910. Thus, the question for the appeals officer was whether Mr. Buma's fated trip on the ATV was reasonable in light of the total circumstances of the trip. Indeed, "[t]he 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." Id. at 909 (citations removed.) Here, the appeals officer concluded that there was no work connection because the Employer could not have foreseen that such an activity would have been undertaken while Mr. Buma was on his business trip.

The court in Buma cited to examples of injuries that were deemed compensable and some examples that were not compensable. Regarding the compensable cases, the Court led off with a Washington case wherein a traveling employee was injured while taking walk on his day off and was injured while crossing the street. Ball-Foster Glass Container Co. v. Giovanelli, 163 Wn.2d 133, 177 P.3d 692, (Wash. 2008). The employer in that case argued that the claim should have been denied because the claimant's actions were "inherently dangerous" as claimant was injured by crossing a multilane road without first assuring that he had the right of way. The court disagreed, holding that "[t]he relevant inquiry for purposes of workers' compensation is whether the injury is related to a risk of employment…when the worker is not actually engaging in work activity, coverage should be limited to injuries fairly attributable to the risks of travel."(emphasis added) In concluding that the claimant's injuries were related to a risk of his employment, the Court relied on such factors as where his hotel was, the purpose of the claimant's crossing of the street, and what "risks of travel" an employee might encounter. Indeed, the Court went beyond whether the claimant's actions were merely "reasonable."

The next case provided, Gravette v. Visual Aids Elecs., 216 Md. App. 686, 90 A.3d 483 (2014), involved a traveling employee who was injured while dancing. The court concluded that the claim was compensable in part because "it can be said

that the employer had at least constructive notice that their traveling employees would make use of the entire facility at the Gaylord Hotel." Further, the Court explicitly held in support of a compensable claim that "the injuries were foreseeable because the accident happened: 1) on premises (his hotel) where the employee could be expected to utilize and, 2) not far removed from his actual work site." Again, multiple factors, including foreseeability, were applied to determine whether this claim was compensable.

In another case, a CBS employee hired to assist CBS's television coverage of the 1994 Winter Olympic Games, injured his knee while skiing on his day off and was awarded benefits. CBS, Inc. v. Labor & Indus. Review Comm'n, 219 Wis. 2d 564, 579 N.W.2d 668 (Wis. 1998). However, the facts of that case are more interesting than the brief blurb provided by the court:

> In this case, Kamps' employment with CBS took him to Lillehammer, Norway. His assignment was to help cover winter sporting events, and his employer provided him with lodging on a ski hill. In addition, at somewhat short notice Kamps was advised that he and his crew did not have to cover an event that day, but could spend the day as they pleased. Kamps went skiing, at the suggestion of his supervisor, in the company of his coworkers, transported to the ski site by vehicles provided by the employer. These facts constitute credible and substantial evidence on which LIRC based its interpretation that skiing was a usual, legitimate act incidental to Kamps' daily existence while a traveling employee for CBS under Wis. Stat. § 102.03(1)(f).

Although the Court in CBS did not explicitly say the word "foreseeability," clearly the expectations of the employer were taken into account with respect to the totality of the circumstances.

Non-compensable cases cited by the Court include Fleetwood Enters., Inc. v. Workers' Comp. Appeals Bd., 134 Cal. App. 4th 1316, 37 Cal. Rptr. 3d 587 (Ct. App. 2005), wherein a traveling employee's injuries were not compensable where the claimant was injured in a car accident after extending his stay in Europe by three days for "additional sightseeing in Italy" following the completion of the business purpose of the trip. The court held that "an employee injured while participating in specific recreational or social activities is eligible for workers' compensation benefits if he or she can show that the activity was a "reasonable expectancy" of, or "impliedly required by," the employment. Id. Again, although the court does not say the word "foreseeability," California courts clearly consider the expectations of the employer when considering the work relatedness of injuries to a traveling employee.

Respondents' assertion that foreseeability has no place in this analysis is quite unfounded. As noted above, a majority of the cases cited by the court in Buma consider whether the claimant's choice of recreation was foreseeable, reasonably expected, reasonably comprehended, or outright condoned by the employer in their respective rulings.

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

In concluding that Mr. Buma's activity was a distinct personal departure on a personal errand, the appeals officer's analysis focused on whether the employer should have known or anticipated that Mr. Buma would ride an ATV at Mr. O'Callaghan's ranch. The appeals officer did not commit legal error by applying foreseeability to her compensability analysis. The question is whether there is any basis under NRS 616C.135 to disturb the appeals officer's decision. The record shows that the appeals officer followed the direction of this court and concluded that the facts supported 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.

IV.

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 23 day of November, 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 1,838 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 November, 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 23 day of November, 2022, service of the attached APPELLANTS' REPLY 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