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

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| FITZGERALDS CASINO/HOTEL; and CANNON COCHRAN MANAGEMENT SERVICES, INC., Appellants, vs. GARY MOGG, Respondent. | Case No.: 55818 |

# APPELLANTS' REPLY BRIEF

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## I.

## ARGUMENT

### The Decision of the Appeals Officer To Reverse the Denial of This Industrial Insurance Claim Is Not Supported by Substantial Evidence

The decision of an Appeals Officer must be supported by substantial evidence. Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. State Indus. Ins. Sys., 113 Nev. 532, 537, 936 P.2d 839 (1997).

In attempting to prove his case, Respondent had the burden of going beyond speculation and conjecture. That means that Respondent had to establish the work connection of his injuries, the causal relationship between the work related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all the evidence. To prevail, Respondent had to present more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

The issue before this Court arose from Appellants' appeal of the Appeals Officer's reversal of claim denial. In the present case, Respondent alleged that he injured his lower back, neck and left arm when he went to prop his legs up on a desk causing his chair to flip over. Respondent was employed as a surveillance agent by Appellant Employer. His job required him to monitor televisions with surveillance feeds from around the casino property. The description of the January 27, 2008 incident does not establish a causal connection between his alleged injury and his employment as required by NRS 616C.150. Respondent has not carried his NRS 616C.150 burden as there is no medical evidence that connects his injury to the duties arising from the course and scope of his employment. His treating physician, Dr. Parekh, detailed a very significant history of pre-existing injuries and the fact that Respondent was already treating with Dr. Smith for his spine before this incident at work.

**NRS 616C.150 Compensation prohibited unless preponderance of evidence establishes that injury arose out of and in course of employment;**

1. An injured employee or his dependents are not entitled to receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS unless the employee or his dependents establish by a preponderance of the evidence that the employee's injury arose out of and in the course of his employment.

An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, Respondent must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. However, if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of a claimant's employment. Finally, resolving whether an injury arose out of employment is examined by a totality of the circumstances. See, also, Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005).

Respondent argues that his use of the provided workplace chair, and his personal decision to put his feet up on the desk constitute workplace conditions that caused his injury. Respondent improperly introduced new evidence to this Court, attached to his Answering Brief, that he establishes that the chair provided by Appellant Employer constitutes an actual employment risk. This new information, which Respondent asks the Court to take judicial notice of, does not meet the requirements of NRS 47.150 and NRS 52.135, and should not be given any credence by this Court.

**NRS 47.150 Discretionary and mandatory notice.**

1. A judge or court may take judicial notice, whether requested or not.
2. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

**NRS 52.135 Official publications.** Books, pamphlets or other publications purporting to be issued by public authority are presumed to be authentic.

Respondent has merely printed several pages from the Occupational Safety & Health Administration (hereinafter referred to as "OSHA") website regarding computer workstations. It is unclear from the information provided if these pages are from an OSHA publication or how long ago this information was compiled and generated. The information and recommendations contained within

those pages may not have been compiled until well after Respondent was injured. Respondent printed this information on March 10, 2011 from the OSHA link regarding Ergonomic Solutions. The present issue on appeal does not concern the ergonomics of Respondent's workplace. Appellants would ask that this Court not take judicial notice of the submitted documents as Respondent has not met the requirements of NRS 47.150 and NRS 52.135.

The issue of the safety of the chair involved in Respondent's fall at work was considered by the Appeals Officer, and she did not make any finding that the chair was unsafe, inappropriate for the workplace, or defective in any way. Brian Swartwood, Employees Relation Manager/Risk Management provided a memorandum dated January 27, 2009, explaining that he did not recall the date of purchase for the chair involved in the incident. After the incident, the chair was inspected and no defects were found. The chair has continued to be used in the Surveillance Room. To the best of his knowledge, it is not common practice for the Surveillance staff to put their feet on the desk while sitting at work. The chairs are wheeled on a hard surface, and to put your feet up would not be a safe work place activity. (Appendix p. 181.) As the very chair that Respondent fell from is still in use by Appellant Employer, and Respondent has provided no evidence that any other employee has ever tipped over in this chair, the documents offered by Respondent are insufficient to establish some known risk inherent in his employment.

The statements from Respondent's coworkers confirm that propping one's feet upon the desk was not a common practice for a surveillance agent. Therefore, any injury stemming from that action should not be considered to arise out of and in the course of employment. Respondent argued that because there was no written rule prohibiting the placement of his feet on the work counter, that such an act did not deviate from the normal practices of a surveillance agent, and therefore, his accident did arise out of and in the course of his employment.

The Appeals Officer in the present case held that because Respondent was required to sit at a counter watching monitors for the majority of an eight (8) hour shift, the act of placing his feet on the work counter was justified to make himself more comfortable, and therefore, his accident was caused by a justifiable act due to the workplace conditions. Appellants argue that Respondent was not at an increased risk for injury due to his employment duties, but in fact caused his own injury by acting in

a manner that was completely beyond the scope of his employment. The fact that Respondent's decision to put his feet up on the counter caused his chair to flip over is undisputed. If we follow this Court's risk analysis in Rio All Suite Hotel and Casino v. Phillips, 126 Nev. Ad. Op. 34 (2010), to its natural conclusion, any act unique to Respondent that increases the risk of injury constitutes an injury that did not arise out of and in the course of employment.

The Appeals Officer also did not examine Respondent's action in the context of Mitchell. The sole act that should have been examined is whether or not Respondent's placement of his feet on the work counter constituted a work duty or requirement. He did not **have** to raise his feet up in order to view the monitors that he was required to watch. This action did not improve his view of the monitors, nor was there anything obstructing his ability to keep his feet on the floor. His supervisor did not order him to put his feet on the counter. The only reason his chair tipped over was because he put his feet up on the counter. There was no testimony that the chair was defective and had ever tipped over before or since. There is nothing inherently dangerous about sitting in a chair and watching television monitors.

The Appeals Officer's decision characterizes Respondent's action as a "momentary act of personal comfort." (Appendix p. 45.) Larson's Workers' Compensation Law, (2006 Ed.; Chapter 21.) discusses the "personal comfort doctrine":

> Some jurisdictions have held that seeking personal comfort is outside the course of employment if the method chosen is unusual or unreasonable . . . [M]any jurisdictions seem to divide employment-related activities into two groups: actual performance of the direct duties of the job, and incidental activities such as seeking personal comfort, going and coming . . . the former are always within the course of employment . . . even, in fact, if the method is a prohibited one. These acts . . . are the very essence of the work to be accomplished.
>
> On the other hand, the incidental acts have no such necessary status as a part of the employment. They have to fight for their position . . . to prove themselves incidents of the work. As a result, they can be removed from the protected orbit in ways which would not affect acts in direct performance of work duties at all . . . [F]or example, the use of a prohibited method of seeking personal comfort . . . is fatal to coverage of such acts.
>
> **Some courts, then, have refused to recognize as part of the employment not only personal comfort activities which are prohibited but also those which are so remote from customary or reasonable practice that they cannot be said to be incidents of the employment.**

> **[Implied Prohibition Test]** Since the test of "reasonableness" is at best a rubbery yardstick, there may be practical advantages in the substitution of the . . . more manageable concept of **implied prohibition . . . the rule . . . would then be that a personal comfort activity, although normally covered, is outside the course of employment if the method is impliedly prohibited. . . The first question . . . would be whether the employer would have prohibited the method if he had addressed himself to the subject . . . the provision of normal facilities would support an implication . . . that use of other and dangerous expedients was prohibited.**
>
> **The second question would be whether the employee knew or should have know of the implied prohibition. This question brings clearly into focus the factors of custom and employer acquiescence.** . . [An employer certainly] would have forbidden all acts of carelessness if it could. (Emphasis added.)

Whether there was a written policy forbidding Respondent putting his feet up on the counter should not be decisive. Respondent argued that because there was no written rule prohibiting the placement of his feet on the work counter, that such an act did not deviate from the normal practices of a surveillance agent, and therefore, his accident did arise out of and in the course of his employment. There is no workers' compensation statute or regulation which requires that the employer have written instructions that all possible dangerous acts are prohibited; this would be an impossible task. Therefore, the Appeals Officer's Decision's Finding of Fact No. 3 which found that Appellant Employer had nothing in writing prohibiting this should not have been considered a deciding factor.

In the instant matter, as supported by numerous witness statements, Respondent's action, of putting his feet up on the desk and leaning back in his chair, was impliedly prohibited by Appellant Employer. (Appendix pp. 172-180.) Appellants are able to satisfy the requirements of the implied prohibition test: (1) Appellant Employer would have prohibited Respondent's action if it had been addressed. Surveillance personnel did not lean back in their chairs and put their feet up because they needed to be alert at all times, and this was a dangerous, unprofessional action. Because it was not done, Appellant Employer had no reason to address it earlier, so the second part of the test is satisfied.

Gregg Brewer, Director or Surveillance's January 27, 2009 memorandum explained that it was **not common practice for the surveillance staff to put their feet on the desk while sitting at work.** (Appendix p. 181.) And surveillance inspector Sheldon Kanner testified that, **if one leaned back in**

**a chair and put his feet up, the monitors could not be completely seen.** (Appendix p. 61, lines 8-13.) Respondent certainly should have known that others did not prop their feet up dangerously as he did because he observed other employees' actions each day he worked. And, as a surveillance agent, he should have been particularly alert to others' actions. Indeed, getting so comfortable could easily make a surveillance agent fall asleep, thereby not performing the critical essence of his duties–surveillance. Therefore, propping one's feet at a surveillance job would certainly be an abnormal and dangerous action, and the injury which occurred as a result of it would not have been within the course and scope of employment. Further, Appellant Employer had provided him a newer chair; allowed investigators two (2) ten-minute breaks, and one (1) thirty-minute break and he could have even just stood up and stretched at work. (Appendix p. 63, lines 15-22.)

The evidence clearly establishes that Respondent could have stretched his legs in another fashion, other than propping his feet up on the counter in front of him. The implied argument that Respondent was essentially tied to this counter for eight (8) hours per day, with no other method for stretching his legs but to put them up on the counter is not supported by any evidence in the record. The act of putting his feet up on the counter, which was not a sanctioned position for watching his assigned monitors, took this injury out of the course and scope of his employment.

Based on the above facts and law, this industrial claim was properly denied. Given the lack of sufficient, objective evidence to support the Appeals Officer's Decision and Order, the Appeals Officer's Decision reversing the denial of the industrial insurance claim is not supported by substantial evidence and must be reversed. North Las Vegas v. Public Service Comm'n., 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982).

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## II.

## CONCLUSION

Accordingly, Appellants respectfully request that this Court reverse the District Court's Order Denying Petition for Judicial Review and find that this is not a compensable industrial insurance claim.

DATED this 25 day of April, 2011.

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## CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 25 day of April, 2011.

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## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I deposited in the United States mail, with postage fully prepaid thereon, or had hand-delivered, copies of the **APPELLANTS' REPLY BRIEF** in the above-captioned matter, addressed as follows:

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