

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

2
3 **FOCUS FRAMING and SUN CITY**
4 **ELECTRIC,**

5 Appellants,

6 v.

7 **MARTIN DURAN PEREZ**

8 Respondent.

SUPREME COURT NO: 79856

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DISTRICT COURT May 15, 2020 4:06:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

9 **RESPONDENT’S ANSWERING BRIEF**

10
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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 as described in NRAP 26.1(a), and must be disclosed:
4

5 1. The Respondent MARTIN DURAN PEREZ, FOCUS FRAMING,
6 states that he does not have any parent corporation, or any publicly held
7 corporation that owns 10% or more of its stock, nor any publicly held
8 corporation that has a direct financial interest in the outcome of the
9 litigation. NRAP 26.1(a).
10

11 2. The undersigned counsel of record for MARTIN DURAN PEREZ has
12 appeared in this matter before District Court. JACOB G. LEAVITT,
13 ESQ. has also appeared for the same at the administrative proceedings
14 before the Department of Administration.
15
16

17 These representations are made in order that the judges of this court may
18 evaluate possible disqualifications or recusal.
19

20 DATED this 15th day of MAY, 2020.

21 BIGHORN LAW

22 /s/ Alika K. Angerman, Esq.____

23 ALIKA K. ANGERMAN, ESQ.
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25 716 S. Jones Blvd.
26 Las Vegas, Nevada 89107
27 Attorneys for Respondent
28

I.

STATEMENT OF THE CASE

This is a workers' compensation claim that has been appealed by Appellants regarding the Appeals Officer's Decision and Order issued on May 3, 2018. On December 30, 2016, Respondent suffered an injury while in the course and scope of his employment as a laborer with Employer. Respondent was upset because he believed his paycheck was short from the work conducted a week earlier while he was a member of Pedro Rosale's crew. Respondent went to ask Mr. Pedro Rosales about his check. Respondent climbed to the roof of the house where Mr. Rosales was working. Respondent was talking to Mr. Rosales when Mr. Rosales' son intervened and pushed Respondent off of the roof. Respondent fell to the ground where he landed sustaining serious injuries.

On March 6, 2017, Employer issued a determination denying Respondent's claim.

On June 1, 2017, Hearing Officer Megan Trenkler issued her Decision and Order which REVERSED/REMANDED Employer's March 6, 2017 claim denial determination.

On February 9, 2018, the matter was heard before Appeals Officer York.

On May 3, 2018, the Appeals Officer issued a Decision and Order reversing claim denial. Appeals Officer York found that Respondent was employed by Focus when, on December 30, 2016, he was assaulted and pushed off a roof of a

1 house under construction. The circumstances of this assault lead the Appeals
2 Officer to conclude the claim is compensable. Appeals Officer York found it was
3 not a case where the assault and injuries were sustained through animosity and ill
4 feelings arising from some cause entirely unrelated with the employee's
5 company. The Appeals Officer found Respondent to have credibly testified that if
6 there was an issue with his check that he needed to talk to Pedro Rosales. There
7 is a clear indication that the work issue of a paycheck dispute was the catalyst
8 which led to this unfortunate incident.
9

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11
12 Appellants filed the instant Petition for Judicial Review with this Court
13 alleging shortcomings and legal inconsistencies in the Appeals Officer's Decision
14 and Order that are mere criticisms of the Appeals Officer's weighing of the
15 evidence in this case. The Appeals Officer in this case has produced findings of
16 fact and conclusions of law which are well reasoned and firmly rooted in the
17 substantial evidence. The District Court granted a request for a stay.
18

19
20 On July 2, 2019, the District Court denied the Petition for Judicial Review.
21 The Notice of Entry of Order was filed on September 13, 2019.

22
23 On October 14, 2019, Appellants filed the instant appeal to this Honorable
24 Court. Appellants also requested a stay from the District Court but the same was
25 denied.
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1 II.

2 **SUMMARY OF THE ARGUMENT**

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4 The Respondent has met burden and proven all the elements of a
5 compensable claim at every level of appeal. Respondent has proven that his injuries
6 arose out of the course and scope of his employment. Respondent had an issue with
7 the paycheck he received and spoke to the foreman, Pedro Rosales, who was in
8 charge of the hours for the subject work week. As the person responsible for
9 verifying and relaying the hours that his employees worked, Pedro Rosales is the
10 person with authority to resolve the paycheck dispute. Respondent disputed that he
11 spoke with Mr. Pao the safety manager regarding the check dispute. Mr. Pao is not
12 Respondent's direct supervisor. Further, Mr. Pao does not give a satisfactory
13 answer why Respondent would approach the "safety" manager to discuss a payroll
14 issue.
15

16
17 At the time of the injury, Respondent was engaging in a work-related action.
18
19 A paycheck is a motivating reason for people to go to work every day. To say a
20 paycheck is not work related is unreasonable. While it may not fit in Respondent's
21 exact job description, paychecks are clearly work related. Paychecks are a part of
22 every paid employee's job. The person in charge of verifying hours for the subject
23 work week was Pedro Rosales. The person who could correct a mistake with the
24 hours is the foreman, Pedro Rosales. Clearly, Pedro Rosales had the authority over
25 the payroll dispute. Even Mr. Pao admitted that Pedro Rosales could have made a
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1 phone call and told the payroll person to get the check corrected.

2 The District Court did not error by simply affirming the Appeals officer. It
3 is clear, Appellants did not meet their burden to grant the Petition for Judicial
4 Review and thus it was denied. By affirming the Appeals Officer's Decision and
5 Order, the District Court is in agreement with the findings of fact and conclusions
6 of law of the Appeals Officer. Appellants failed to prove that the Decision was not
7 supported by substantial evidence. Appellants did not prove that the Decision was
8 arbitrary or capricious or an abuse of discretion.
9

10 11 12 **III.**

13 **STATEMENT OF ISSUES**

14 The issue in this Appeal is whether the Appeals Officer's Decision and Order
15 reversing Appellants' determination regarding claim denial was proper in this case
16 because Respondent met the evidentiary requirements as required under Nevada
17 law. Further, did the District Court properly deny the Petition for Judicial Review.
18

19 20 **IV.**

21 **FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED**

22 On December 30, 2016, Respondent suffered an injury while in the course
23 and scope of his employment as a laborer with Employer. (Appendix p.
24 221)(hereinafter "APP p. ____"). Respondent was upset because he believed his
25 paycheck was short from the work conducted a week earlier while he was a
26 member of Pedro Rosale's crew. On December 30, 2016, Respondent went to ask
27
28

1 Mr. Pedro Rosales about his check. (APP pp. 9:22-25) Respondent climbed to
2 the roof of the house where Pedro Rosales was working. (APP pp. 15:11-16)
3 Respondent was talking to Pedro Rosales when his son intervened and pushed
4 Respondent off of the roof. (APP p. 10:2-4) Respondent fell to the ground where
5 he landed sustaining serious injuries to include, but not limited to “1) traumatic
6 fall 2) Closed head injury 3) Subdural hematoma 4) Possible right 8th rib fracture”
7 as the hospital diagnosis. (APP p. 249) Although not working on Pedro Rosales’
8 crew on December 30, 2016, Respondent credibly testified that if there was an
9 issue with his check that he needed to talk to Pedro Rosales. (APP p. 376)
10
11

12
13 A Criminal Complaint was issued against Pedro’s son, Jose Rosales
14 regarding the incident. (APP p. 326)
15

16 On March 6, 2017, Employer issued a determination denying Respondent’s
17 claim. (APP pp. 258-262)
18

19 On March 21, 2017, Respondent appealed Employer’s claim denial
20 determination. (APP p. 184)
21

22 On June 1, 2017, Hearing Officer Megan Trenkler issued her Decision and
23 Order which REVERSED/REMANDED Employer’s March 6, 2017 claim denial
24 determination. (APP pp. 187-189). Appellants filed an appeal. (APP p. 190)
25 Appellants also filed a Motion for Stay which was granted. (APP p.192)
26

27 On February 9, 2018, the matter was heard before Appeals Officer York. The
28 testimonies of four separate witnesses were taken: Respondent; Eduardo Leon;

1 Nicholas Pao and Kevin Mendoza. On the day of the incident, Respondent
2 received a check for the work done the previous week while working for Pedro
3 Rosales. (APP pp. 9-10; 13-15) Respondent believed his check was low and
4 testified that he went to Pedro Rosales to discuss the issue. (APP p. 9:22-25)
5 Respondent testified that he walked to where Pedro was working, climbed a
6 ladder to talk to Pedro Rosales on the second floor of a house. (APP p. 12:5-16)
7 Pedro Rosales was the person who gave Respondent his check. (APP p. 10:21-
8 23) During Respondent's discussion with Pedro Rosales, Pedro's son climbed the
9 ladder and pushed Respondent off the house. (APP 10:1-4)

13 Of note, Nicholas Pao and Kevin Mendoza were safety officers for the
14 employer who did not witness the incident. (APP pp.34; 42:5-7) Respondent also
15 stated that no one was wearing safety measures. (APP p.) Mr. Pao explained the
16 check payment process. (APP p. 38:1-13; 40:11-41:13) Further, Mr. Pao testified
17 that Pedro Rosales could have made a phone call and told "Lucy" to get the
18 check corrected. (APP p. 35:14-15).

21 Mr. Pao, a safety director for Employer, testified that he spoke to Respondent
22 on the day of the incident, but was not present prior to the incident. (APP p. 34)
23 Mr. Pao testified that he discussed Respondent's issue with his check and directed
24 Respondent to take it to the office at the end of the day and Lucy would get the
25 check corrected. (APP p.32:6-9) However, Respondent denied speaking to Mr.
26 Pao on the day of incident regarding his check. (APP p. 14:18-20) Further, Mr.

1 Pao admitted that he needs help when people are speaking “real fast” as there is
2 “somewhat of a language barrier.” (APP pp. 34-35) Clearly, Mr. Pao cannot state
3 with a certainty what he discussed in his alleged conversation with Respondent
4 as he needed to translate the conversation. Appellant relied on Mr. Pao’s
5 investigation but failed to recognize that Mr. Pao’s investigation relied heavily
6 upon his interview of Pedro Rosales. (APP p. 39:3-15) Obviously, Pedro Rosales
7 had an interest in protecting himself and his son from legal trouble and his
8 testimony cannot be relied upon. Further, Mr. Pao attempts to single Respondent
9 out as the only person without safety gear, then later corrects himself and admits
10 Jose Rosales was not wearing the proper safety gear as well. (APP p. 37:14-16)
11 With regards to the actual incident, Mr. Pao’s testimony cannot be relied upon as
12 he has no personal knowledge of the incident and is only reciting what Pedro
13 Rosales relayed to him.

14 Kevin Mendoza testified as a safety officer for employer. (APP pp.42-50).
15 Mr. Mendoza’s testimony was similar to Mr. Pao’s testimony. Mr. Mendoza
16 admitted that the first time he met Respondent was on the day of the incident.
17 (APP p. 46:1-9) Mr. Mendoza also described the duties of a safety officer. (APP
18 pp. 49:21-50:4) None of the job duties included payroll or the payroll process.

19 Appeals Officer York found that Respondent was employed by Focus when,
20 on December 30, 2016, he was assaulted and pushed off a roof of a house under
21 construction. The circumstances of this assault lead the Appeals Officer to

1 conclude the claim is compensable. (APP p. 377) Appeals Officer York found it
2 was not a case where the assault and injuries were sustained through animosity
3 and ill feelings arising from some cause entirely unrelated with the employee's
4 company. Id. The Appeals Officer found Respondent to have credibly testified
5 that if there was an issue with his check that he needed to talk to Pedro Rosales.
6 (APP p. 376) There is a clear indication that the work issue of a paycheck dispute
7 was the catalyst which led to this unfortunate incident. [Wood v. Safeway, Inc.,
8 121 NEV 724 121 P.3d 1026 (2005)]. (APP p. 377)
9
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11
12 Appellants appealed this Petition for Judicial Review of the Appeals Officer's
13 Decision dated May 3, 2018. Said Petition was filed with the District Court on
14 May 18, 2018. (APP pp. 371-381) The District Court granted a stay. (APP pp.
15 416-419)
16

17 On July 2, 2019, the District Court affirmed the Appeals Officer and denied
18 the Petition for Judicial Review. The Notice of Entry of Order was filed on
19 September 13, 2019. (APP pp. 490-495)
20

21 On October 14, 2019, Appellants filed an appeal with this Honorable Court
22 contesting the Appeals Officer's May 3, 2018 Decision and Order and the District
23 Court's affirmance of that Order. (APP pp. 528-539). Appellants also requested
24 a stay from the District Court but the same was denied. (APP p.550)
25
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1 IV.

2 **JURISDICTION**

3
4 Appellants appealed this Petition for Judicial Review of the Appeals
5 Officer's Decision dated May 3, 2018. NRS 233B.130. Said Petition was filed
6 with the District Court on May 18, 2018. On September 13, 2019, the Notice of
7 Entry of Order of the District Court's Decision and Order affirming the Appeals
8 Officer's Decision was filed. Appellants filed an appeal of that Decision and
9 Order with this Honorable Court on October 14, 2019. Respondents also
10 requested a stay from the District Court but the same was denied. See NRS
11 233B.150; NRAP Rule 3; NRAP Rule 4. This Court has jurisdiction over the
12 instant appeal.
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16 **A. ROUTING STATEMENT**

17 Under NRAP 17(b)(10), this case would be presumptively assigned to the
18 Court of Appeals as it concerns a Petition for Judicial Review of an
19 administrative agency's final decision.
20

21 **B. STANDARD OF REVIEW**

22 The Nevada Administrative Procedure Act, as contained in NRS 233B,
23 outlines the standard for review to be used when conducting a judicial review of a
24 final decision of an agency. NRS 233B.135 states, in relevant part, the following:
25

- 26 1. Judicial review of a final decision of an agency must be:
27 (a) Conducted by the court without a jury; and
28 (b) Confined to the record.

1 In cases concerning alleged irregularities in procedure before an agency
2 that are not shown in the record, the court may receive evidence concerning
3 the irregularities.

4 2. The final decision of the agency shall be deemed reasonable and
5 lawful until reversed or set aside in whole or in part by the court. The
6 burden of proof is on the party attacking or resisting the decision to show
7 that the final decision is invalid pursuant to subsection 3.

8 3. The court shall not substitute its judgment for that of the agency
9 as to the weight of evidence on a question of fact. The court may remand
10 or affirm the final decision or set it aside in whole or in part if substantial
11 rights of the petitioner have been prejudiced because the final decision of
12 the agency is:

- 13 (a) In violation of constitutional or statutory provisions;
- 14 (b) In excess of the statutory authority of the agency;
- 15 (c) Made upon unlawful procedure;
- 16 (d) Affected by other error of law;
- 17 (e) Clearly erroneous in view of the reliable, probative and substantial
18 evidence on the whole record; or
- 19 (f) Arbitrary or capricious or characterized by abuse of discretion.

20 4. As used in this section, “substantial evidence” means evidence
21 which a reasonable mind might accept as adequate to support a conclusion.

22 NRS 233B.135 (2015).

23 In reviewing a petition of relief from an administrative decision, the District
24 Court may not disturb the decision of an Appeals Officer unless the decision was
25 clearly erroneous or constituted an abuse of discretion. See Nevada Indus.
26 Comm’n v. Reese, 93 Nev. 155, 560 P.2d 1352 (1977). With regard to factual
27 determinations, the decision of the Appeals Officer, as trier of fact, are conclusive
28 so long as they are supported by evidence which a reasonable mind would consider
to be sufficient to support the Appeals Officer’s conclusion. See Nevada Indus.
Comm’n v. Williams, 91 Nev. 686, 541 P.2d 905 (1975). The court may not
substitute its own judgment as to the weight of evidence but is limited to

1 determining whether the Appeals Officer's determination was arbitrary or
2 capricious. See McCracken v. Fancy, 98 Nev. 30 (1982).

3
4 Most issues are not purely questions of law, but rather are issues involving
5 the finding of facts and the application of those facts to law. Deference is given by
6 the reviewing court to conclusions of law made by the appeals officer. See Jones
7 v. Rosner, 102 Nev. 215, 719 P.2d 805 (1986).

9 Regarding issues of law, it is appropriate for the reviewing court to make an
10 independent judgment, rather than use a more deferential standard of review. See
11 Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 849 P.2d 267 (1993). Issues of
12 purely legal questions are reviewed de novo; the appeals officer's fact-based
13 conclusions of law are entitled to deference when supported by substantial
14 evidence. See Law Offices of Barry Levinson v. Milko, 124, Nev. 355, 362, 184
15 P.3d 378, 383 (2008). A "pure legal question" is a question that is not dependent
16 upon and must necessarily be resolved without reference to any fact in the case
17 before the court. See Beavers v. State Dept. of Motor Vehicles & Pub. Safety, 109
18 Nev. 435, 851 P.2d 432 (1993).

19
20 In the present matter, the decision of Appeals Officer York is entitled to
21 deference because it involves a question of fact. The Appeals Officer considered
22 medical reporting and testimony of four people, two of which were actual
23 eyewitnesses to the incident along with written and oral arguments of counsel for
24 the parties and rendered his decision. As argued herein, this opinion was based on
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1 substantial evidence and does not constitute an abuse of discretion or
2 misapplication of law as alleged by Appellants in their Opening Brief. The District
3 Court properly denied the Petition for Judicial Review.
4

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6 V.

7 **LEGAL ARGUMENT**

8 **A. The Appeals Officer Correctly Analyzed the Issues Pursuant to**
9 **Nevada Law and The Resultant Decision and Order Is Neither**
10 **Erroneous Nor An Abuse of Discretion.**

11 The Appellants attempt to convince this Court that Appeals Officer York, in
12 all his years of experience, cannot properly analyze facts, testimony, and medical
13 reporting under Nevada Law. In doing so, Appellants attempt to relitigate the
14 factual findings of the Appeals Officer.
15

16 Here, Appellants allege the Appeals Officer excluded all evidence of how the
17 paycheck dispute resolution process was explained to Respondent. Mr. Pao, a
18 safety director for Employer, testified that he spoke to Respondent on the day of
19 the incident, but was not present prior to the incident. Mr. Pao testified that he
20 discussed Respondent's issue with his check. However, Respondent denied
21 speaking to Mr. Pao on the day of incident regarding his check. Further, Mr. Pao
22 admitted that he needs help when people are speaking "real fast" as there is
23 "somewhat of a language barrier." Clearly, Mr. Pao cannot state with a certainty
24 what he discussed in his alleged conversation with Respondent as he needed to
25 translate the conversation. Appellant relied on Mr. Pao's investigation but fails
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1 to recognize that Mr. Pao's investigation relied heavily upon his interview of
2 Pedro Rosales. Obviously, Pedro Rosales had an interest in protecting himself
3 and his son from legal trouble and his testimony cannot be relied upon. Further,
4 Mr. Pao attempts to single Respondent out as the only person without safety gear,
5 then later corrects himself and admits Jose Rosales was not wearing the proper
6 safety gear as well.
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9 With regards to the actual incident, Mr. Pao's testimony cannot be relied upon
10 as he has no personal knowledge of the incident and is only reciting what Pedro
11 Rosales relayed to him. The only person the Appeals Officer could rely upon
12 regarding the events of the incident was Respondent and that is exactly what the
13 Appeals Officer did. Further, the Appeals Officer specifically commented on
14 Respondent's credibility in the subject Decision and Order. This is clearly a
15 factual issue and Appellants have failed to show how the Decision was not
16 supported by evidence which a reasonable mind would consider to be sufficient
17 to support the Appeals Officer's conclusion. Appellants are attempting to have
18 this Court substitute its own judgment as to the weight of evidence without
19 showing that the Appeals Officer's determination was arbitrary or capricious.
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24 **1. The Appeals Officer Did Not Exclude Evidence to the Paycheck** 25 **Process**

26 Appellants allege that because the Appeals Officer did not reference the
27 testimony that all evidence was excluded of how the paycheck process works.
28

1 This is simply not true and a poor attempt by Appellants to relitigate the facts.
2 Mr. Pao did explain the process that goes into documenting the hours worked by
3 employees as well as verifying those hours which were used to create the
4 paycheck. However, Mr. Pao was a safety officer and called to testify regarding
5 his duties as a safety officer as well as his investigation and not a payroll and
6 benefits specialist. In addition, Mr. Pao was not designated as the person most
7 knowledgeable regarding payroll and benefits for his employer. The Appeals
8 Officer did consider the testimony of the witnesses and despite Mr. Pao alleging
9 he told Respondent to go to the office to correct his check, the Appeals Officer
10 found that Respondent credibly testified that if there was a problem with the
11 check that he needed to talk to Pedro Rosales. Appellants confuse the Appeals
12 Officer finding Respondent to be credible and relying upon Respondent's
13 testimony as legal error when in reality Appellants disagrees the Appeals
14 Officer's findings of fact.
15

16 Appellants simply contend that since the Appeals Officer did not comment
17 on the credibility of the witnesses and that it is reversible error. No attempt is
18 made to explain how commenting on the credibility of the witnesses would
19 change the outcome of the Appeals Officer's Decision. The reality is, that if the
20 Appeals Officer included all the testimony in the decision and order as Appellants
21 wanted the end result would be the same. The Appeals Officer would still find in
22 favor of Respondent because the Appeals Officer found Respondent to have
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1 credibly testified that if there was an issue with his check that he needed to talk
2 to Pedro Rosales. (APP p. 376) Further, Mr. Pao's testimony supports that Pedro
3 Rosales could have made a call to the office and had the check corrected. Clearly,
4 the Appeals Officer found Respondent to be most persuasive.
5

6 Further, Appellants fail to explain why they did not raise these issues when
7 they received the Proposed Decision and Order. The non-prevailing party has five
8 days from the date the Proposed Decision and Order is filed and served to review
9 it and issue any objections or proposed changes. In this case, the Proposed
10 Decision and Order was filed on April 16, 2018. (APP p. 72) Appellants were
11 silent and made no attempts whatsoever to bring this issue to the Appeals
12 Officer's attention during the five-day period. On May 3, 2018, the Appeals
13 Officer signed the Proposed Decision and Order. (APP pp. 65-71) Pursuant to
14 NRS 233B.130(4) a petition for rehearing or reconsideration must be filed within
15 15 days after the date of service of the final decision. Here, Appellants were silent
16 and made no attempts to file a Motion for Reconsideration or Rehearing.
17 Appellants sat on their hands and failed to pursue easier and more readily
18 available avenues to resolve issues it may have had with the Appeals Officer's
19 Decision and Order. However, Appellants simply waited until the thirty-day
20 appeal deadline approached then filed their Petition for Judicial review as well as
21 Motion for Stay and acted like they had no choice but to file a Petition for Judicial
22 Review and it was their only option. In reality, Appellants knew that the alleged
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1 failure to include Mr. Pao's testimony would not change the ultimate outcome of
2 the Appeals Officer's Decision and Order. Appellants only chance to have the
3 claim denial affirmed was to bypass the Appeals Officer and attempt to convince
4 the District Court to grant the Petition for Judicial Review.
5

6 **2. The Appeals Officer Properly Found the Injuries Arising from the** 7 **Subject Incident was Compensable**

8 Appellants cite a series of cases from other jurisdictions and even a treatise
9 in attempt to argue the subject assault was outside the course and scope of
10 Respondent's employment. In short, all the cases cited save one do not apply to
11 this particular case. Not only are the cases and treatise cited not binding, all the
12 facts are dissimilar to the subject incident. Appellants again attempt to have this
13 Court reweigh the facts that the Appeals Officer properly weighed.
14
15

16 The only case that would apply is also the general rule in Nevada and that is
17 "injuries resulting from assaults by fellow workmen when the attack results from
18 personal animosity unconnected with the employment, are not compensable."
19 Cummings v. United Resort, Inc., 85 Nev. 23 (1969) (Citing Pacific Employers
20 Ins. Co. v. Industrial Acc. Comm., 293 P.2d 502 (Cal. App. 1956)). In other
21 words, injuries unconnected to employment are not compensable. Appellants
22 acknowledge that this is the guiding principle in determining compensability of
23 workers' compensation claims. In this case, the Appeals Officer specifically
24 found this was not a situation where the assault and injuries were sustained
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1 through animosity and ill feelings arising from some cause entirely unrelated with
2 the employee's company. Further, the Appeals Officer found there was a clear
3 indication that the work issue of a paycheck dispute was the catalyst which led to
4 this unfortunate incident. (APP p. 377) Appellants contend that the Appeals
5 Officer committed reversible error because he failed to address the fact that the
6 subject altercation was not related to Respondent's employment. In reality, the
7 Appeals Officer addressed the altercation and simply ruled in favor of Respondent.
8 Appellants cite Larson's Workers' Compensation Law § 8.01[4] (2018) and
9 attempts to adopt an authority or power requirement to assault workers'
10 compensation claims. First, the treatise and the subsequent cases are not binding.
11 Second, even if the Court adopted an authority or power requirement to course and
12 scope, this additional requirement would be met. Appellants' argument relies
13 heavily upon the contention that Pedro Rosales had no power or authority to
14 correct the issue Respondent had and therefore the incident was taken outside of
15 the course and scope of employment.

21 Appellants contend it was legal error to find the claim compensable when
22 Respondent was explicitly informed by Mr. Pao and Mr. Mendoza that Pedro had
23 no control over paycheck dispute resolution. However, Respondent testified he
24 did not speak with Mr. Pao and Mr. Mendoza prior to the industrial incident.
25 Next, Mr. Pao and Mr. Mendoza were not payroll and benefits representatives
26 and were there to testify regarding their capacity as safety officers. It does not
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28

1 make sense that Respondent would approach the safety officers regarding a
2 paycheck dispute. If anyone did **NOT** have power or authority over the issue of
3 a paycheck dispute it would be the safety officers, Mr. Pao and Mr. Mendoza.
4 Interestingly, Mr. Pao testified that Pedro could not “cut” Respondent a check,
5 but Pedro could make a phone call and tell Lucy to get the check corrected. (APP
6 p. 35:6-24) Clearly, Pedro did have the power to correct the paycheck issue and
7 resolve the situation. Further, Mr. Pao knew that Pedro could call and correct the
8 issue. Therefore, this additional element would be met and the incident falls
9 within the course and scope of Respondent’s employment.

13 Appellants fail to recognize the Appeals Officer did comment on the
14 credibility of Respondent’s testimony. The Appeals Officer specifically found
15 Respondent credibly testified that if there was an issue with his check that he
16 needed to talk to Pedro Rosales. The Appeals Officer found there was a clear
17 indication that the work issue of a paycheck dispute was the catalyst which led to
18 this unfortunate incident. Therefore, the Appeals Officer properly found the claim
19 to be compensable. (APP pp. 376-377)

22 **B. Legal Standard of Proof of a Compensable Claim, Respondent Meets**
23 **The Requirements**

24 NRS 616C.150 only requires an injured worker to demonstrate that he was
25 injured within the course and scope of his employment by preponderance of the
26 evidence, nothing greater. To make the point on preponderance, McClanahan v.
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28

1 Raley's, Inc., the Nevada Supreme Court states "NRS 616C.150 does not require
2 an injured worker to offer a greater number of expert witnesses who express
3 opinions in his favor to establish that an injury arose. . .[r]ather 'preponderance
4 of the evidence' merely refers to the greater weight of the evidence." 34 P.3d
5 573, 576 (2001).
6

7
8 Workers' Compensation is statutorily driven and defined. Respondent
9 must prove, by preponderance that he was in the course and scope when an
10 accident occurred. NRS 616A.265 defines injury as a "sudden and tangible
11 happening" that produces an "immediate or prompt result" which is established
12 by medical evidence.
13

14 NRS 616C.030 defines the term accident as an "unexpected or unforeseen
15 event happening suddenly and violently, with or without human fault."
16

17 Case law, Rio All Suite Hotel & Casino v. Phillips, states that generally,
18 "injuries caused by employment related risks are deemed to arise out of
19 employment and are compensable." 240 P.3d 2, 5 (2010). Such as we have here,
20 Pedro Rosales has intimate knowledge that his son, Jose Rosales, has violent
21 tendencies and a violent history placing Respondent and others directly in harm's
22 way.
23
24

25 **1. Course And Scope**

26 The threshold requirement in an industrial injury is that Respondent's
27 injury must have occurred within the course and scope of employment. Phillips,
28

1 at 5.

2 Course and Scope simply means that the injured worker was at work, and
3 scheduled to be there, when the accident occurred. Here, Respondent was working
4 at an assigned time and scheduled to be in the same construction housing complex.
5 Respondent went to the house his prior foreman, Pedro Rosales, was working to
6 inquire as to why his hours were not properly reflected in his check. Pedro Rosales
7 was the foreman in charge for the period of hours on the subject check.
8 Respondent's pay and hours are indeed work related. The fact that this claim was
9 filed because of the intentional tort of Jose Rosales (Pedro's son) does not change
10 compensability. These injuries arose out of and in the course of employment.
11 Respondent was on the job when this incident occurred, and the injuries resulted
12 by the assault due to work-related issues (short paycheck). Nicholas Pao, a safety
13 manager for the employer, testified that Pedro Rosales could have made a phone
14 call to Lucy at payroll to get the check corrected. The witness for Appellants
15 freely admits Pedro Rosales could have corrected the hours on Respondent's
16 check which is the exact reason Respondent went to speak with Pedro Rosales to
17 begin with. Mr. Pao further states that the crew leaders submit the times
18 employees worked to the foreman who verify the work was done and send the
19 paperwork to the office. Pedro Rosales was the person to verify the hours and
20 send them to the office to generate a check. Pedro Rosales was the same person
21 to correct any errors. Pedro Rosales had the authority to change the hours on the

1 check. Pedro Rosales had control over the issue at dispute. The office is not going
2 to take the word of a worker without the foreman to corroborate the claim.

3 4 **2. Accident**

5 Accident is statutorily defined in NRS 616A.030 as “‘Accident’ means an
6 unexpected or unforeseen event happening suddenly and violently, with or
7 without human fault, and producing at the time objective symptoms of an injury.”

9 Clearly, Respondent did not anticipate being pushed off of a second floor
10 of a house. Respondent wanted clarification for his hours from his foreman that
11 he worked with as his pay is how he supports himself and family and was pushed
12 off by someone who was not part of the conversation. Appellants focus on
13 Respondent allegedly not being tied off as if that negates Respondent’s ability to
14 have a compensable claim. NRS 616A.030 clearly states “Accident” means with
15 or without human fault. The fact that Respondent may have not followed proper
16 tie off protocol does not prevent him from recovering under Workers’
17 Compensation.

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20
21 In the instant case, Respondent meets the statutory definition requirement.

22 23 **3. Injury**

24 Injury is defined in NRS 616A.265 as a sudden and tangible happening of
25 a traumatic nature producing an immediate or prompt result which is established
26 by medical evidence.”

27
28 Here, the medical records all demonstrate Respondent suffered an injury

1 to his head, cervical, thoracic, lumbar, abdominal and ribs. The initial physician
2 who completed the Form C-4 diagnosed Respondent with a subdural hematoma
3 (brain bleed) and related it as job incurred. (APP p. 221)
4

5 Appellants bear the burden, because Respondent cannot prove a negative,
6 under NRS 616C.175, that if it believes that Respondent has a prior condition,
7 Appellants, must prove that the alleged prior condition is the substantial cause
8 for the work injury, if not, then it is a compensable claim.
9

10 Respondent must prove four (4) things; course and scope, accident, injury
11 and notice, nothing more. Respondent suffered an injury causally related by the
12 Form C-4 doctor related to being pushed off a roof by co-employee Jose Rosales.
13 Even if there was a pre-existing condition, which Respondent contends there is
14 not, the statutory requirement is met, and the burden would then shift to
15 Appellants to prove under NRS 616C.175, otherwise.
16
17

18 **4. Notice**

19

20 Pursuant to NRS 616C.015(1), an injured employee must provide written
21 notice of a work-related injury as soon as practicable but within 7 days after the
22 accident. In this case, Respondent has testified that he was taken from the job site
23 to the hospital on the day of the accident. Appellants do not dispute that the
24 employer was reported on the same day of the accident. Therefore, this element
25 has been met.
26
27

28 Pursuant to NRS 616C.020(1), an injured employee must file a claim for

1 compensation with the insurer within 90 days of the industrial accident. Here, the
2 industrial accident occurred on December 30, 2016 and Respondent completed
3 the Form C-4 on the same day. Clearly, Respondent completed the claim for
4 compensation within 90 days of the industrial accident. Therefore, this element
5 has been met.
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7
8 In the instant claim, Respondent meets the statutory notice requirements.

9 **C. THE DISTRICT COURT'S DECISION AND ORDER WAS**
10 **PROPER**

11 The District Court properly affirmed the Appeals Officer Decision and Order
12 and denied the Petition for Judicial Review. Appellants improperly cite Poremba
13 v. S. Nev. Paving, 388 P.3d 232, 238 (Nev. 2017) to allege the District Court
14 erred by not making any findings of fact or law. However, Poremba clearly stated
15 that administrative agencies are required to issue orders that contain findings of
16 fact as well as conclusions of law when issuing orders. Id. Poremba does not state
17 that the District Court has the same requirements when granting or denying a
18 Petition for Judicial Review. Further, by affirming the Appeals Officer's
19 Decision and Order the District Court is in agreement with the findings of fact
20 and conclusions of law by the Appeals Officer. Thus, the District Court's
21 Decision was proper.
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VI.

CONCLUSION

The Appellants' Petition for Judicial Review lacks any basis and should be denied. As demonstrated herein, the Appeals Officer applied the facts to the applicable legal standards and rendered a Decision which is clearly supported by substantial evidence in the records and is not erroneous or an abuse of discretion. The Decision of the Appeals Officer is entitled to deference, and no issues brought forward within the Appellant's Opening Brief amount to reversible error. For the reasons set forth herein, Respondent respectfully requests that this honorable Court Deny the instant Petition for Judicial Review and that the District Court's as well as the Appeals Officer's Decision and Order be AFFIRMED.

Dated this 15th day of May, 2020.

Respectfully submitted,
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3 **CERTIFICATE OF COMPLIANCE**

4 1. I hereby certify that this brief complies with the formatting
5 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)
6 and the type style requirements of NRAP 32(a)(6) because this brief has been
7 prepared in a proportionally spaced typeface using Microsoft Word in Times
8 New Roman font size 14.
9

10 2. I further certify that this brief complies with the type-volume
11 limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief
12 exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14
13 points or more, and contains 5708 words and 612 lines of text.
14
15

16 3. Finally, I hereby certify that I have read this appellate brief, and to
17 the best of my knowledge, information, and belief, it is not frivolous or interposed
18 for any improper purpose. I further certify that this brief complies with all
19 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
20 which requires every assertion in the brief regarding matters in the record to be
21 supported by a reference to the page and volume number, if any, of the transcript
22 or Appendix where the matter relied on is to be found.
23
24

25 ...

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27 ...
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1
2 4. I understand that I may be subject to sanctions in the event that the
3
4 accompanying brief is not in conformity with the requirements of the Nevada
5 Rules of Appellate Procedure.

6 Respectfully submitted,
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