SENATE
COMMERCE & LABOR
COMMITTEE

Minutes of Meeting
Friday, March 25, 1977

The meeting of the Commerce and Labor Committee was held on March 25, 1977, in Room 213 at 1:00 P.M.

Senator Thomas Wilson was in the chair.

PRESENT: Senator Wilson
Senator Blakemore
Senator Ashworth
Senator Bryan
Senator Close
Senator Hernstadt

ABSENT: Senator Young

ALSO PRESENT: See attached list.

The Committee considered the following:

S.B. 271 ALLOWS ACTION BY EMPLOYEE AGAINST NEVADA INDUSTRIAL COMMISSION IF IT FAILS TO PROVIDE NECESSARY MEDICAL ATTENTION (BDR 53-828)

CHAIRMAN WILSON stated that S.B. 271 is on the agenda for the purpose of taking further evidence on one matter. He stated that in the course of earlier hearings on this bill the facts and circumstances surrounding the administration of the Rush case was discussed. He stated the Committee decided to defer any kind of a report from the Commission and further evidence from the claimant until this day and time. Further stated this is not a general hearing on the bill but an attempt to get enough data into the record to inform themselves as to the handling of that particular case.

Mr. Riley Beckett, stated that pursuant to the directive of the Chairman, he has prepared copies of the opening brief of the appellants on the case of Ralph O. Rush and Mary Rush vs. the NIC,

as well as the reply brief and the respondents answering brief. (See Exhibits A, B, and C)

Mr. Beckett stated that on August 3, 1973, Ralph Rush incurred an industrial injury while working as a mechanic for the Western Nevada Diesel Sales. According to the report that the NIC received on August 13, 1973, Mr. Rush reported "working on trailer - got something into eyes". He was subsequently seen by Dr. Sellyei on August 9, 1973.

Mr. Beckett further stated that on August 6, 1973, Mr. Rush originally saw his treating doctor, Dr. Osborne, who referred him to Dr. Sellyei. On September 3, 1973, Dr. Sellyei admitted Mr. Rush to the hospital and subsequently removed foreign body from the right eye and cataracts from the left. It was reported the cataracts were secondary - possibly due to trauma. He asked the Committee to remember it was the left eye that was surgically removed.

SENATOR BLAKEMORE asked Mr. Beckett what was really in the eyes. Mr. Beckett stated that Mr. Rush could best answer that, that the report reflects "something flew up and into his eyes." It does not describe what it is. Mr. Beckett assumed that it was metal particles of some sort.

Mr. John Reiser (from the floor) indicated removal of shavings was made from the right eye.

Mr. Beckett continued:

On October 23, 1973, Dr. Sellyei informed the NIC that he had just discovered on that date a retinal detachment in the eye and per the wording of the letter the NIC assumed that "he" was setting up an appointment at one of the University Centers as he indicated that they would be a better facility to handle this. SENATOR ASHWORTH asked which eye was referred to and Mr. Beckett indicated the left eye.

During that time Mr. Rush did receive temporary total disability payments from September 2, 1973, up to and including September 8th. The NIC, in requesting further information as to Mr. Rush's

status received a letter dated November 8 from Dr. Sellyei. By this letter quote: "retinal detachment was caused by a foreign body or not is extremely difficult for me to say because at no time could I see the back of the eye during or after the initial treatment."

By letter dated November 27th, Dr. Sellyei reported to NIC again that he was uncertain as to the cause of the retinal detachment and again reiterated that these facilities existed at a larger medical center.

By letter on December 13th, which the NIC received on December 17th, he indicated that he definitely felt that the retinal detachment was caused by the industrial injury. On the day that the NIC received that letter an appointment with Dr. Lonn in San Francisco was arranged. Mr. Rush was to see Dr. Lonn on January 7, 1974. Dr. Lonn saw Mr. Rush on January 7th and sent him home. On May 1, 1974, surgery was performed on Mr. Rush's left eye.

John Reiser stated that on January 16, 1974, Dr. Lonn wrote to Dr. Sellyei and said that it was not possible to visualize the retina at this 1/16/74 examination. After 3 days of trying to clear the eye so that he could visualize, he said it was impossible to predict how long the hemorrhage would remain. It was not possible to evaluate until the hemorrhaging cleared so he was sent home with periodic examinations by Dr. Sellyei.

Mr. Reiser stated that Mr. Rush was working on a grinding wheel as he understood it. Mr. Beckett stated that the accident occurred on August 3 and it was several days before he saw a treating physician. He stated he did work during that time and on August 9 saw Dr. Sellyei. October 23rd is the first time that anyone even knew of a retinal detachment. On September 5, 1975, the district court complaint was filed and it originally named John Reiser, Chairman, Don Breighner, the claims examiner and Dr. Richard

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Petty. Subsequently before that complaint was served, it was amended, and then named the NIC. Mr. Beckett stated Dr. Petty is the NIC physician who reviews these cases.

SENATOR WILSON stated that the issue here is where NIC either consciously or negligently deferred or neglected the authorization of treatment causing a delay, which in turn aggravated the injury and effected increased damage.

Mr. Beckett stated the case is before the Supreme Court. District Court threw the case out. He moved to dismiss and it was dismissed on quasi judicial immunity, on sovereign immunity; also on the aspect of citing California cases wherein you cannot sue for delay in medical treatment. Mr. Beckett said Dr. Sellyei did not try to attach the retina at that point and recommended that it should be done at a university center--that was what the problem was--who was to send him to the center.

Messrs. John Coffin and Mr. Rush came to the table.

Mr. Coffin stated Dr. Sellyei's letter to the NIC dated October 11th reflects the initial problem of NIC in deciding the claim. They just didn't believe that a cataract could form that rapidly. Dr. Sellyei indicated "I am personally quite against anybody obtaining claims from insurance companies for non-valid reasons, but it would seem that Mr. Rush may have a valid point". NIC was noticed on September 14th "in reply to your request as to why he was able to walk around with such a severe eye injury, may I suggest that the man was in severe financial distress and it was imperative for him to work."

On October 23rd Dr. Sellyei writes NIC advising "of the well healing cataract incision and the eye was healed to the point where he was able to visualize the retina, and he was found to have a retinal detachment which will require further evaluation at a retinal detachment center. He is therefore to be set up for an appointment at one of the university centers and will be notified as soon as the appointment has been made and he is able to see the physicians in charge."

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Mr. Rush stated Dr. Sellyei asked him to call NIC and he talked to Mr. Breighner who is no longer there. He told Mr. Breighner that he understood that he had refused Dr. Sellyei's request to send him to see Dr. Lonn in San Francisco to get further surgery since they don't have the facilities here in Washoe. Mr. Breighner told him, according to Mr. Rush, that he had done all he was going to do. He didn't care what happened and he absolutely was not going to send him to San Francisco. Mr. Rush stated that he then went out and asked Mr. Coffin to represent him. Mr. Rush further stated that he didn't go to the center himself because he did not have the money.

On November 23rd Dr. Sellyei wrote to the Commission again:

"In regard to your statement that the Nevada Industrial Commission claim is to be refused on Mr. Ralph Rush unless that it is stated on my part that the retinal detachment was definitely caused by the injury, it must be stated that at this point, as it was in my last letter, that the cataract did not permit a view of the retina at the time of the injury. It is therefore impossible on anyone's part to state what exactly happened to the retina as a result of the injury. The type of retinal detachment that he has is the type that is seen frequently with injuries to eyes. I would be surprised if anyone in the world could look at the retinal detachment and say that it was definitely caused by that one particular injury. Too many changes occur to validly make that statement.

On the other hand, Mr. Rush is in fairly immediate danger of going blind if he is left untreated. A retinal detachment of this type does not resolve itself spontaneously and must surgically be corrected, if it is not even too late to do this. As I have stated before, the facilities only exist in larger medical centers and he is in need of treatment at such a place."

Mr. Coffin stated that he believed the date Mr. Rush came to see him was December 15th, he called NIC and was able to assist the decision to finally

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get Mr. Rush to San Francisco. Also he called Dr. Sellyei and instructed him as to what exactly was necessary. When he was sent down, on January 7, the plane took a sharp drop and Mr. Rush felt something in his eye. When he arrived at the center the eye had clouded with the hemorrhaging. When Dr. Sellyei had sent him down from Reno the eye was clear and he could look at the retina.

Mr. Coffin stated it is a question of fact as to whether these warnings amount to evidence of negligence sufficient for a cause of action. His part in backing this bill is that it should be at least a jury question. Now there is no machinery for that.

Mr. Beckett stated the treating physicians responsibility is to the patient. The NIC will pay for the accident benefits that are appropriate in the case. There was a question as to whether that detached retina had anything to do with the industrial injury. It was not even noted until October 23rd. Mr. Beckett read the letter of October 23rd. (See Exhibit D).

Mr. Beckett stated he thought that it was reasonable assumption by the NIC that Dr. Sellyei was setting that up. He stated nothing was done by the NIC at that point. Mr. Coffin stated Dr. Lawrence Lonn wrote him on August 8, 1974, at his request. (See Exhibit D).

Mr. Rush stated that he was under a truck burning a hole with a high speed drill on an aluminum frame and it comes off hot. Hit him in the left eye and he rubbed his eye with his hand which he shouldn't have done. A reaction. The company made no effort to get him to a doctor. His wife had to find him a physician. Financially he said they were in bad shape. Worked a month before Dr. Sellyei operated on him. About 3 months after Dr. Sellyei operated on him he stated the doctor indicated he should see a specialist. Stated they were not equipped here and did not have anyone here to do the work. He wrote to Dr. Petty and requested that he have the further treatment. NIC wouldn't give it to him and wrote Dr. Sellyei to that effect. Dr. Sellyei asked that Mr. Rush call and when he

was told by Mr. Breighner "definitely nothing more for you. Will not send you to San Francisco, you can go there or go to hell or wherever you want to go." Mr. Rush then went to see Mr. Coffin.

SENATOR ASHWORTH asked if he really said he could go there, or go to hell or wherever. Mr. Rush stated those were his words.

Mr. Coffin in response to SENATOR WILSON'S inquiry stated he favored the consequential damage approach.

SENATOR BLAKEMORE asked if anything was done to the employer. Riley Beckett was not sure what was done on that. He stated they did have the authority to take action against an employer.

CHAIRMAN WILSON asked for copies of all the letters referred to in the testimony. (See Exhibit D).

Mr. Coffin stated Mr. Rush received $900.00 and he had advanced him $200.00. Mr. Coffin stated he has received about $100.00 so far.

Mr. Rush stated that the only time NIC showed any interest in him was when Dr. Sellyei removed his eye.

S.B. 340 REGULATES POLYGRAPH EXAMINERS (BDR 54-862).

Mr. Al Wittenberg, representing the Nevada Polygraph Association, stated the bill was introduced by SENATOR RAGGIO at their request. He said there have been major revisions to it in the form of A.B. 527 which the Assembly Committee on Judiciary was waiting to get. They have three other bills (A.B. 303, A.B. 518 and A.B. 423) and hearings are to be scheduled around April 1 or 2 to hear all as a package. He stated rather than appearing before this Committee and asking to amend this bill, they would like to hear all four pieces on the other side and indicated he had spoken to SENATOR RAGGIO. He further stated he would not be upset if the Committee killed this bill.

S.B. 340 Continued.

SENATOR BLAKEMORE moved to indefinitely postpone S.B. 340.
Seconded by SENATOR HERNSTADT
Motion carried unanimously.

Mr. Mike Dyer from the Attorney General's Office appeared and voiced no objection to indefinite postponement.

S.B. 348 PROVIDES FOR ESTABLISHMENT OF BRANCH OFFICE OF REAL ESTATE DIVISION OF DEPARTMENT OF COMMERCE UNDER DIRECTION OF DEPUTY REAL ESTATE COMMISSIONER. (BDR 54-1177).

The first witness was SENATOR NORMAN TY HILBRECHT, who stated the genesis of this bill was Senate Finance. This is basically a regulatory and not a finance matter, but in the real estate division budget there was a proposal based on a recommendation from the department head, and the division director, that a branch office manager be deleted from the Southern Nevada (Las Vegas) office of the division. Mr. McLeod, he said, told the Committee that the gentleman hadn't managed the office satisfactorily and apparently on occasion had exceeded his authority and therefore they were going to eliminate a branch office manager in Las Vegas. There was the feeling among several people on the Finance Committee that perhaps, because of information available, the office needed to be strengthend rather than weakened and that the deputy should be placed there.

SENATOR HILBRECHT stated a majority of the licensees of the division practice and live in Clark County. Some Senators from Clark County who campaigned recently will recall that one of the serious objections of the people in the real estate industry in Clark County was the fact that they were unable to maintain what they felt was the appropriate level of policing of the industry because of the fact that they could only get decisions out of the Carson City office. He stated he was asked by the Committee to have the bill drafted and the

Committee introduced it, feeling that this was a real problem that ought to be addressed.

He told the Committee about a client that he had represented and how he had to deal with the department. He did not discuss the merits of the case as it is in court. He stated he had contacted the then branch manager with an eye toward presenting the matter on a non-contested basis or on an agreed statement of facts, if you will, to the commission, who reviews these and passes judgment on licensure matters. He received a representation from the office branch manager that the agreed statement of facts that they arrived at after a few hours of reviewing the investigative file and interviewing people involved, would be accepted, and the matter would be presented in an expeditious manner to the next meeting of the Commission. After this oral agreement had been reached, and after it had been reduced to writing at his client's expense, by him, it was hand carried to the branch manager's office. SENATOR HILBRECHT found out later that apparently unopened, the envelope had been forwarded to Carson City where it was promptly rejected by a person who was identified to him as the deputy director who had the authority to pass on such presentations of agreed statements. The result of this was that the matter became a contested case under the Administrative Procedure Act and went to a full blown hearing (in addition to his client there was another individual involved) and that resulted in the drawing a full day of hearing of the Commission and expense to the State and subsequent appeals because the matter was not limited to agreed kinds of testimony, etc.

SENATOR HILBRECHT further stated he was not representing that the client he represented is right or wrong--just seems to him that he can identify several thousands of dollars of State money that has been unnecessarily dissipated because his client was willing to submit the case on an agreed statement of facts and he thought they had responsible men who had conducted the investigation and had agreed to this. He stated it is unworkable to wait the week, as he had, before finally receiving a telephone call from a gentleman in the Attorney

General's Office advising him that his superior had prescribed him from accepting that agreed statement of facts, and thereby necessitating the filing of a formal complaint by the State and proceeding to formal hearing. He feels that the people from the industry take the same position and this is not an isolated situation. That administratively it is unworkable to have a majority of the licensees in Las Vegas without having some speaking agent of the real estate division down there.

SENATOR HERNSTADT asked why the director couldn't be based in Las Vegas. SENATOR HILBRECHT indicated that would certainly be satisfactory with the real estate industry in Clark County.

SENATOR CLOSE asked if Finance has funded this position. SENATOR HILBRECHT responded that Finance has funded the budget that they have presented, but this position is now in Carson City.

Mr. Angus McLeod stated the District Court had ruled in the State's favor on all points and in fact actually said that nothing improper was done by the State and none of SENATOR HILBRECHT's clients' rights were violated. SENATOR HILBRECHT has now appealed to the Supreme Court.

Mr. McLeod continued to say the division can support part of the bill, that part being the statutory creation of a branch office in Las Vegas. However, they do object to the rest of the language in that the branch office is to be directed by the Deputy Administrator. The policy questions in the bill are two-fold. How much authority should a branch office have, should the director of branch office have authority equal to his superior, the administrator, and should the director of a branch office have authority to create policy on his own without approval of the administrator. There is no lack of authority in Las Vegas. That office, on its own, without any contact with Carson City initiates its own investigations and fully and thoroughly investigate those matters. Prepares cases against licensees for hearing before the advisory commission. The administrator, must in the final analysis,

approve the issuance of the complaint. He stated this bill is seeking a delegation of authority to the branch office which the administrator and Legislature should not condone. That every administrator of this division needs a deputy administrator in the headquarters office so that easy access may be had for policy decisions, discussion and formulation. Moreover the land sales registration section, the agency personnel section and the agency accounting section are all properly located at the headquarters office in Carson City. The bulk of the division employees are in Carson City. Someone must be in this office to direct it and coordinate with other agencies located in Carson City in the administrator's absence.

Mr. McLeod said the second policy question is whether the Legislature should by statute direct the specific kinds of staff that shall man the various offices throughout the State. It seems that those are administrative decisions and violate the separation of powers as he understands them. If the Committee decides to pass this bill he recommends that the phrase "that the deputy administrator is under the supervision of the administrator" be added, and secondly that they forward this bill back to the budget committees and create a new additional unclassified deputy administrator's position.

Mike Melner, Director of Commerce, stated that he believed they would like more staff in Clark County. The Committee was told that the man working in Las Vegas now is an Investigator III. (Investigator III is higher than an Investigator I) and he has the same authority as the district office manager did or the deputy would.

SENATOR WILSON stated the Committee was sensitive to what may be a service problem and that is different from this bill.

Angus McLeod stated that the way they are structured requires a delay in certain matters because they have an advisory commission that advises on policy.

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SENATOR ECHOLS indicated that his point is with service basically.

The Committee was concerned about the title of the person representing the division in Las Vegas.

Mr. Bill Cozart, of the Nevada Realtors Association, stated the Las Vegas Board of Realtors had met and by unanimous action (body of 1250 licensees) directed him to support this type of legislation. One of the biggest complaints involves the people there having the opportunity and the right and authority to investigate a complaint. They investigate the complaint but for some reason it is never brought to a hearing because of the faulty investigation or because the people in the north don't understand the people in the south and that is the general comment. They go through all the work and no complaints are ever filed. He stated they need someone there to be able to give them the answers.

SENATOR EUGENE ECHOLS said he believes the solution would be to upgrade the Southern Nevada office to a deputy director and make it available to whoever wants it. That person would pass on the decisions. No one in Southern Nevada is expecting to take away the decision making process of the director.

SENATOR BRYAN asked how many investigators the division has. Angus McLeod answered three in the north and three in the south.

ADMINISTRATIVE MEETING

SENATOR WILSON moved to "kill" S.B. 348.
Seconded by SENATOR HERNSTADT
Motion carried unanimously.

SENATOR ASHWORTH moved to submit a Committee letter to Senate Finance Committee saying that because of

the workload and proper establishment of the southern office the Committee recommends that they fund an unclassified employee to administrate the southern office of the real estate division.

Seconded by SENATOR BRYAN.
Motion carried unanimously.

SENATOR CLOSE moved for an interim study of the three tier system with an overview of NIC rules and regulations and procedures.

Seconded by SENATOR ASHWORTH.
Motion carried unanimously.

S.B. 271: SENATOR ASHWORTH moved for indefinite postponement of S.B. 271.

Seconded by SENATOR BLAKEMORE.
Motion carried unanimously.

CHAIRMAN WILSON placed a request for a study resolution on building codes which authorized city and counties through the State regarding the application of safety and life support systems and standards.

BDR 53-829 RELATES TO PRIVATE INSURANCE CARRIER.

Introduction accepted.

There being no further business the meeting was adjourned at 6:30 P.M.

Respectfully submitted,

Lyndl Lee Payne, Secretary

APPROVED:

Thomas R.C. Wilson, Chairman

Senate

SENATE

AGENDA FOR COMMITTEE ON COMMERCE AND LABOR

Date Friday March 25, 1977 Time 1:00 p.m. Room 213

Bills or Resolutions to be considered	Subject	Counsel requested*
S. B. 271	Allows action by employee against Nevada Industrial Commission if it fails to provide necessary medical attention (BDR 53-828)	
S. B. 340	Regulates polygraph examiners (BDR 54-862)	
S. B. 348	Provides for establishment of branch office of real estate division of department of commerce under direction of deputy real estate commissioner (BDR 54-1177)	

*Please do not ask for counsel unless necessary.

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SENATE

DATE 6-5-77

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TESTIFYING?	NAME	ORGANIZATION	ADDRESS	PHON
yes	Marquis W. McLeod	Div. of Real Estate	201 So. Fall - Carson City	885-428
NO	Jeanne Hannafin	Div. of Real Est.	201 S. Fall	885-428
yes	Mary E Rush	Self	2835 Wandell Way Reno	825-858
yes	Ralph D. Rush	Self	2835 Wandell Way Reno	825858
yes	John T. Coffin	NIC Clinic	210 So. Sierra Reno	329-116
NO	STEPHEN L. DACH	NEV. DIV. OF INV. & INVESTIGATIONS	430 JEANNELL DR	885-4405
yes	George D. Wendell	New Division of Investigation & Narc.	430 Jeanell Dr., CC	885-4408
yes	Richard E Hall MD	NIC	218 Coruille Ct - CC	885-22
NO	KEVIN A. MAHER	NIC	4529 EL CANELA WAY LAS VEGAS	451-013
NO	JOHN REISER	NIC	515 E MUSSER CC	885-528
NO?	W. J. C Bowell	NIC Legal Adv	515 E Musser CC	885-528
yes	Riley M. Beckett	NIC-Legal	"	885-5377
yes	KEN PULVER	P.I. Lic. Board-Nev	P.O. Box 1900 Reno	786-2161
yes	Bill Cozart	REALTORS	P.O. Box 7338 Reno	329-664
yes	Michael Dyer	Attorney General	Supreme Court Bldg	885-4170
No	Debra Hamlin	Attorney General	Supreme Court Bldg	885-4170
yes	Senator Schofield			
"	Senator Echols			
	Al Hittenberger	Nev. Poly graph Assn		

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

oOo

RALPH O. RUSH and MARY RUSH,

Appellants,

vs

NEVADA INDUSTRIAL COMMISSION; JOHN RESIER; DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, Individuals,

Respondents.

No. 9058

APPELLANTS' REPLY BRIEF

JOHN T. COFFIN, ESQ.
210 South Sierra Street
Reno, Nevada 89502

Attorney for Appellants

RILEY BECKETT, ESQ.
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada

Attorney for Respondents

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No. 9058

APPELLANTS' REPLY BRIEF

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Attorney for Apellants

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Attorney for Respondents

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TABLE OF CASES AND AUTHORITIES

STATUTES

REPLY BRIEF

In reviewing the opening and answering briefs together with the entire record on appeal in the instant case, it is apparent to appellants that the nature of the claim of this case may not have been clear to the district court and still is not clear to respondents. Certainly the Nevada Industrial Commission has exclusive jurisdiction over the injuries suffered by workmen in the State of Nevada while on the job. The gravamen of this action is for the negligence of the Nevada Industrial Commission and it's doctor for refusing to authorize treatment for the claimant after being advised by the claimant's ophthalmologist that unless such treatment were rendered the claimant would very likely lose his eye. The authorization for the recommended treatment was not forthcoming until counsel entered the case, and as a consequence, Mr. Rush did lose his left eye.

I. Respondents' first section of the arguement urges the court to adopt the California rule which has equated the employer's workmens compensation insurance carrier with the employer and has disallowed actions similar to the present case. The leading case for respondents' position is Noe vs. Travelers Insurance Company 342 P.2d 976 (Cal. 1959). In the Noe case, supra, the District Court of Appeal did in fact hold that an action against the employer's compensation carrier for negligent delay in providing medical treatment is exclusively within the jurisdiction of the Workmen's Compensation Law. But the court recites the Labor Code sections, which not only require the employer to provide such services, but makes it the responsiblity of the employer to pay for such services obtained by the injured workman where the employer negligently, or for some

other reason fails to provide proper medical care. Thus, the precise question before this honorable court is the subject of a specific code section under California law. That code section provides that any such controversies are exclusively within the jurisdiction of the industrial commission. In Nevada, however, there is no similar statutory mandate. In fact, the workmen's compensation laws in Nevada and California are vastly different in that in our State the commission itself, not only dictates and controls the treatments of the claimants, but pays for such treatment, pays compensation during disability, and pays any award for permanent partial disability as a result of the industrial accident. The Nevada Industrial Commission controls medical treatment by authorizing or failing to authorize treatments recommended by the claimants' attending physician.

In the instance of Mr. Rush, Nevada Industrial Commission authorized the treating doctor to provide care for the cataract condition which developed shortly after the initial trauma. But when the treating doctor notified NIC that there was a further and more serious condition discovered which required sending Mr. Rush to a large medical facility, the commission neglected to give such permission. There is no remedial Nevada Statute, as there is in California, which requires NIC to pay for treatment obtained by the claimant if wrongfully or negligently not provided by NIC. Also different from California, is the fact that in Nevada there is no independent body to appeal to for authorization of payment, since the Commission itself has exclusive jurisdiction over what medical treatment is authorized. After three months of disability due to the injury, Mr. Rush was obviously in no financial position to be

able to go ahead and obtain the treatment on his own and then later attempt to collect medical costs from NIC. Mr. Rush was indeed at the mercy of NIC which refused to authorize the medical treatment and thereby caused Mr. Rush to totally lose his left eye.

In addition to the very clear difference between the workmen's compensation law in Nevada and in California and apparent in the Noe case, supra, is the exclusion from the Noe ruling of independent actions against treating doctors. The primary case establishing this principal was Duprey vs Shane 249 P.2d 8 (Calif. 1952).

In Duprey, supra, the claimant had been injured while assisting her employer-doctor with a patient. Thereafter, the claimant was treated by her employer-doctor in such a negligent manner as to cause a further and distinct injury. Plaintiff received an industrial award and thereafter brought suit against the employer-doctor for medical malpractice. In upholding the trial court's award for the claimant against the doctor, the California Supreme Court sitting en banc stated:

> "There can be no doubt, of course, that so far as the original injury of December 8, 1947, is concerned, the employer being insured, the remedy before the Commission is 'the exclusive remedy against the employer for the injury.'... It is equally true, and admitted by all here concerned, that, in tort cases generally, when a person is injured by a tortious act and this injury is aggrevated by the negligence of the attending physician, such aggrevation of the injury is within the scope of the risk created by the original tortious act....
>
> "It seems equally clear that when an employee is injured in an industrial accident, and the attending physician retained by the insurance carrier is negligent and causes a new injury, the employee may not only sue the employer (or the carrier) before the commission,

> but may also sue the doctor for malpractice. The commission has no jurisdiction over that action against the doctor. This result is reached on the theory that a doctor in such cases is a 'person other than the employer' within the meaning of subsection 3852 of the Labor Code which provides, in part, as follows: 'The claimant of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer.'" page 13 (emphasis added)

In the instant case Dr. Louis Selyei, the treating doctor, recommended a course of treatment and warned that failure to promptly render such treatment would likely result in the loss of Mr. Rush's injured eye. Dr. Richard Petty, the doctor employed by NIC, was essentially directing the treatment of Mr. Rush, as he does of all claimants, in deciding whether the recommended treatment would or would not be authorized. Dr. Petty refused such authorization. Consequently Mr. Rush lost his eyesight. By analogy to the California case of Duprey vs. Shane, supra, the NIC and Dr. Richard Petty must be considered persons "other than the employer" referred to in NRS 616.560.

Further insight into the California ruling can be obtained from State Compensation Fund vs Superior Court 46 Cal. Reporter 891 (Calif., 1965), which is also heavily relied upon by respondents. This case involves a common law action against the employers compensation carrier for negligent inspection leading to an injury. The California Court stated:

> "This is a case of first impression in California on the precise point in issue. Other Calfornia cases which we will discuss furnish guidelines. In four other jurisdictions the question has been determined in favor of court jurisdiction, but since the problem is one of statutory interpretation and the statutes there being interpreted differ from California's system of workmen's compensation laws, the

> force of stare decisis does not have the magnetic pull it otherwise would have." page 892 (emph. ad.)

The court also pointed out in that case, as follows:

> "...the Insurance Code provides that each policy of compensation insurance shall contain a clause under which the insurer assumes a direct and primary liability for any proper claim." page 894

Thus it becomes apparent that the California court distinguished three of the cases relied upon by appellants herein on the basis of the California Statutes. In reviewing May vs Liberty Mutual Insurance Company,223 Fed 2d 174, the California court stated that the ruling there was different because the law in the Mays case originally did not refer to the employer's insurer and when a subsequent statutory amendment included such a reference, it did so in a statutory section that was only concerned with procedural matters. The California court distinguished Smith vs American Employer's Insurance Company, 163 A 2d 564 (New Hampshire 1960),Nelson vs Unionwire Rope Corp. 199 N.E.2nd 69 (Illinois 1964), and Fabricius vs Montgomery Elevator Company, 191 N.W. 2d 361 (Iowa, 1963) as follows:

> "...since all of them involved statutes where no attempt had been made by the legislature to identify the insurer with the employer in the suit authorization provisions of the act." page 898

By necessary implications then the California court approved the rule for the other jurisdictions and carefully delineated that it was only the precise equation of the employer and the insurance carrier under California Codes which gave rise to the rule that a workmen's compensation claimant could not bring an action against the insurance carrier for negligent medical treatment leading to a new or exacerbated injury.

In the case of Hoffman vs Rogers 99 Cal reporter 455 (Calif 1972) the Plaintiff alleged malpractice against the doctor for malpractice in treating the industrial injury which caused a new and exacerbated condition. The defendant doctor defended on the basis that he was also an employee of the Plaintiff's employer. California has a statutory provision similiar to that of NRS 616.560 (1) which disallows personal injury suits against co-employees. In holding that the plaintiff could bring an action against the doctor for malpractice the California court anologized to the duel legal personality theory of the Duprey case, supra. The court stated:

> "That amendment can not be interpreted as overturning the rules established by the Duprey case. In that case the defendant, Doctor Shane, was the employer of the plaintiff, so that the statutory language exculpating an employee would not make any difference in his situation.

The point sought to be raised by Appellants herein is that even the rule against actions against co-employees was thought by the California courts to be superceded by the common law right of the claimant to bring an action against the doctor for malpractice.

The case of Smith vs. American Employers' Insurance Company 163 A 2d 564 (New Hampshire 1960) is a case that is very similiar to the case at bar. In that case an action was brought against the workmen's compensation insurance company for negligent inspection of the employer's premises. In rendering its verdict the New Hampshire Supreme Court reviewed the statutory authorization in New Hampshire which is very similiar to NRS 616.560.

> "' When an injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in some person other than the employer a legal liability to pay damages in respect thereto, the injured employee, in addition to the benefits of

this chapter, may obtain damages from or proceed at law against such other persons to recover damages;"

In upholding the claimant's right to proceed against the insurance carrier, the New Hampshire Supreme Court stated:

> "It is obvious that the words 'some person other than the employer,' interpreted as they must be in accord with their 'common' usage (RSA 21:2) would include the defendant insurance carrier....It is a person by statutory defination (RSA 21:9) and in every sense one 'other than the employer.' If a defendant is not to be so considered, it must be because the Legislature has intended otherwise. However, an examination of the pertenent provisions of (RSA ch. 281) fails to disclose such an intent. Undisputably, there is no such expressed exclusion of the insurance carrier." page 567

> "In summary, we are asked by the defendant to construe a statute, which the Legislature has directed should be liberally interpreted, so as to bar the plaintiff from a fundamental common-law right which she would otherwise have. Furthermore, we are requested to do so in the absense of any provision to this effect in the law, either expressed or failure to be implied. We do not believe we can properly do this." page 568

Section 616.560 of the Nevada Revised Statutes provides,in part:

> 1."When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee, or in case of death, his dependents, may take proceedings against that person to recover damages, but the amount of the compensation to which the injured employee or his dependents are entitled under this chapter, including any future compensation under this chapter, shall be reduced by the amount of the damages recovered."

This statutory provision is remarkably similar to that

considered by the Supreme Court of New Hampshire in the Smith case, supra. If there is a prohibition against Mr. Rush's common-law right to bring an action for general damages for negligent failure to provide him with needed medical treatment, it must find its source in the Nevada Industrial Insurance Act. Appellants have been unable to find any such provision in Nevada Law. Although California has ruled in accordance with Respondents' position here, they did so with specific reference to statutes which are different from those of Nevada. In fact, the California courts by necessary implication have indicated that except for their statutory provisions equating an employer with an insurer under the Industrial Insurance Act, they would probably rule in accordance with the Smith case. State Compensation Fund v Superior Court, supra.

Respondents have argued that to allow such a suit would disrupt the entire scheme of the Nevada Industrial Insurance Act in our State. Appellants believe that such a contention is without merit. The Commission's failure to authorize treatment resulting in the dire consequences of this case is, happily, rare. Without such a cause of action the workmen of Nevada would be totally at the mercy of the whims of NIC and their doctor when attending physicians urgently recommend a specific course of treatment. To uphold NIC's position from here is tantamount to holding that injuried workmen in this State must properly file his claim, must comply with all directives as to where and when to get medical treatment, and then must be financially able to pay for his own treatment should NIC not authorize treatment recommended by the attending physician. Appellants believe that such a result was never intended by the Nevada Legislature in an enacting of the Industrial Insurance Act.

Appellants also believe that the California Rule stated in Noe, Duprey v Shane, and State Compensation Fund, supra, would allow such an action for negligence against the commission and against Dr. Petty under the Nevada Statutes. There is no logical distinction between Dr. Petty and the Doctor in the Duprey case. In both instances the injured workmen's well-being is totally in the control of the doctor who directs the treatment. Also, Nevada has not equated the employer and the commission as California has.

Because of the difference of the Statutory schemes of the two states it seems clear that the California Rule should not be followed by Nevada. It is respectfully urged that fairness to Nevada workmen dictates that the rule of Smith v American Employer's Insurance Company, supra, be followed to permit a remedy to the wrong suffered here by Mr. Rush.

Respondents claim that Mager v United Hospital of Newark 212 A 2d 664, Szydlowski v General Motors Corp. 229 N.W. 2d 365 and Jones v Laird Foundation, Inc. 195 S.E. 2d 821, are distinguishable on their facts because in those cases the employee was injured as a result of improper medical treatment by the employers or the employers insurance carrier's own medical staff. It is respectfully submitted that this is precisely the case before the court. Dr. Petty was a member of Mr. Rush's employer's insurance carrier's staff, because in this State, NIC is the insurance carrier.

Respondents state that Virden V. Smith, 46 Nev. 208, and NIC v Adair 67 Nev. 259, stand for the proposition that the Industrial Insurance Act should be liberally construed, which apparently means to respondents that the Industrial Insurance Act should be construed to cut off common-law rights wherever possible. These

cases both involve questions of coverage under the Act and were not at all concerned with the situation that we have before the Court. It is illogical to assume that a ruling that the benefit section of an Industrial Act should be liberally construed stands for the proposition that the Act should be liberally construed to cut off common-law rights for actions which are beyond the scope of the act.

II. Respondents again assert that the NIC is immune to common-law tort actions for any of their activities. But because the Act is mandatory and the only industrial insurance allowable in this State and because the commission authority over processing claims of injured workmen is almost absolute, there must be some machinery for protection of injured workmen from abuses by NIC. In this instance, as in most cases, the NIC and it's employee doctors take no active part in the treatment of injured workmen. The totality of their involvement is authorization of medical treatment recommended by attending physicians. Such actions are clearly "operational" under Nevada Law.

The case of State v Webster, 88 Nev 690 (1972), seems dispositive of this issue. The entire problem and the solution was succinctly outlined by this honorable court.

> "This State claims total immunity from suit, on the ground that the failure to install a cattle guard at the point where U.S. Highway 395 have joined the controlled-access freeway was an act of discretion for which the State was exempted from liablity....Here, the governmental function to be considered was the construction of a controlled-access freeway. It was not mandatory upon the State to construct the freeway. It could have continued to maintain the two-lane highway between Reno and Carson City. Whether or not, for the convenience of the traveling public, the State would construct a controlled-access freeway between the two cities or construct a portion

> of the route was an excercise of discretion based upon policy. It's decision to do so was a discretionary act. Once the decision was made to construct a controlled-access freeway in the area where this accident happened, the State was obligated to use due care to make certain that the freeway met the standard of reasonable safety for the traveling public. This is the type of operational function of government not exempt from liability if due care has not been excercised and an injury results." page 693, 694

As applied to the facts of this case, the decision to accept the claim of Ralph Rush was arguably a discretionary act within the meaning of the Webster case, supra. But once the decision to accept the claim was made, the commission had the obligation to handle the case with due care. Since the commission did not take an active part in the medical treatment, their only function was to follow the advice of the treating doctor. The only action that the commission and Doctor Petty were called upon to take was to say either yes or no to the request to send Mr. Rush to a large medical facility for treatment. Whether the refusal to authorize that treatment was negligent or not is a question of fact for resolution by the trial court. However, it seems clear that Mr. Rush should be allowed to have this question determined, in as much as the act was certainly on the"operational" level of a political subdivision of the State of Nevada. As such, the acts complained of here were within the limited waiver of sovereign immunity of this State.

III. Respondents next claim that all of NIC's actions are quasi-judicial in character. It is respectfully submitted that the only true quasi-judicial function of the Nevada Industrial Commission is determining the extent of permanent partial disability and the amount of the award therefore. It is an arguably quasi-judicial

nction for the commission to decide whether to accept a claim in the first instance. In NIC v O'Hare, 76 Nev. 107, this honorable court referred to the quasi-judicial character of NIC's act in rendering its final award. There was no comment regarding the ministerial actions of NIC in procurring recommended treatment for claimants during the course of the claim. Therefore it seems obvious that the O'Hare case, supra, does not support respondents' position.

Similiarly in the Arizona case of Industrial Commission v Superior Court, 423 P. 2d 375 (Ariz. 1967) the court was concerned with the act of finally deciding the merits of a claim of an injured workmen. In referring to the issue before the Court, it was ated:

> "The Industrial Commission, in making compensation awards, acts as a quasi-judicial body of limited jurisdiction." page 378

It is interesting that the Arizona court also discussed other phases of the activities of it's commission.

> "Liability for nonfeasance may attach when duty is ministerial, i.e., when it is in obedience to the mandate of legal authority and the act is to be formed in a prescribed manner without excercise of the officer's judgment as to the proprity of the act." page 379

It therefore seems clear that the cases cited by respondent are not authority for its position that all acts of employees of NIC are quasi-judicial in nature but only that the decisions of accepting an award and determining the extent and amount of disability are quasi-judicial in nature.

IV. From the briefest perusal of amended complaint it is clear that the fraud alleged was a characterization of the conduct

complained of rather than an allegation of the tort of fraud. As has been acknowledged in both briefs and is apparent in the transcript of the hearing on Defendants' motion for summary judgment, counsel for plaintiffs below offered to strike the word fraud from the pleading and leaving the other characterizations allowed by statute to allege a cause of action for punitive damages. There seems no logic in striking the entire cause of action where the term fraud is pled in this fashion and for the stated purpose. It would seem an extremely harsh rule in a notice-pleading state to rule that an entire cause of action for punitive damages would fail where the word fraud was used merely to characterize the conduct and where plaintiff has offered to strike the word from the pleadings. Under these circumstances it is submitted that the pleading party should be allowed to strike the word fraud from his cause of action.

V. Respondents' final contention is that allowing a tort action against NIC would condone an unconstitutional invasion of the trust funds set aside for workmen's compensation. Yet in this action as in any action against the State of Nevada or any of it's political subdivisions Plaintiffs are limited by statute and case law to recovery of $25,000.00. Prior to 1973 upon showing of need NIC regularly paid out sums in excess of $25,000.00 for the settlement of claims of injured workmen. While the claim before the court is not a work related injury in appellants' view, it was a wrong committed by the employees of the State of Nevada. Under these circumstances it would seem that the payment of any award, whether obtained by way of settlement or jury verdict,would be paid in same manner that successful claims against other political subdivisions of the State of Nevada are paid.

CONCLUSION

The central theme of appellants' position is that without the right to bring a common-law action against NIC and the doctor who refused to authorize needed medical treatment, Mr. Rush suffered a civil wrong for which there is no remedy. As the Nevada Industrial Insurance Act was designed to relieve Nevada workers from the disastrous plight of suffering a disabling injury on the job, that Act should not be utilized to bar common-law rights of action where the negligence of the commission's employees aggrevates the original or causes a new and more serious injury.

RESPECTFULLY SUBMITTED.

Dated this 21st day of March, 1977.

JOHN T. COFFIN, ESQ.
210 South Sierra Street
Carson City, Nevada

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I hereby certify that I did personally deliver a copy the attached APPELLANTS' REPLY BRIEF to the office of RILEY BECKETT, ESQ., at 515 East Musser Street, Carson City, Nevada this ___ day of March, 1977.

/s/

SUBSCRIBED AND SWORN to before me this 21st day of March, 1977.

SHIRLEY STODIECK
Notary Public — State of Nevada
Carson City
My Commission Expires Feb. 24, 1978

Notary Public

Exhibit D

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

RALPH O. RUSH and MARY RUSH,

Appellants,

vs.

NEVADA INDUSTRIAL COMMISSION; JOHN REISER; DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, INDIVIDUALS,

Respondents.

No. 9058

RESPONDENTS' ANSWERING BRIEF

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STATEMENT OF POINTS RAISED ON APPEAL

Appellants (hereinafter referred to as "RUSH") in their Opening Brief, (hereinafter referred to as "O.B.") state four issues (O.B. p. IV and V). The first issue directs itself to whether a workman can collect full benefits from the Nevada Industrial Commission (hereinafter referred to as "NIC"), and in addition maintain a common law action in negligence against the NIC. The second issue raised concerns whether sovereign immunity was waived through the actions of NIC's employees in the exercise of their official duties. The third issue deals with the applicability of the statute of limitations to this action. The fourth and final issue deals with RUSH'S failure to plead fraud with particularity, and if it was proper for the trial court to strike the entire causes of action, or should it have only struck the word "fraud."

NIC will present an overview of the facts supporting the trial court's decision. The NIC will then address itself to RUSH'S first issue dealing with the district court holding that RUSH was barred from bringing a common law action against the NIC. The NIC will then address itself to RUSH'S second issue of immunity dealing with the duel aspects of the discretionary versus ministerial dichotomy in Nevada's limited waiver of sovereign immunity statute, as well as quasi-judicial immunity. The third issue to be addressed will concern the statute of limitations. The fourth issue will concern the district court's striking of RUSH'S fraud counts of action. The final issue to be addressed concerns whether a common law action against the trust funds is constitutionally permissible.

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STATEMENT OF FACTS

RALPH RUSH on August 3, 1973, incurred an industrial injury while working as a mechanic for Western Nevada Diesel Sales. According to the report of injury form received by the NIC on August 13, 1973, Mr. Rush reported, "working on trailer - something got into eyes." Mr. Rush subsequently saw Dr. Sellyei on August 9, 1973, nine days after his accident. Dr. Sellyei on September 3, 1973, admitted Ralph Rush to the hospital, and subsequently removed a foreign body from the right eye, and cataracts from the left eye.

By letter dated October 23, 1973 (see record on appeal, hereinafter referred to as ROA, Exhibit "A", attached to Rush's points and authorities in opposition to motion to dismiss), Dr. Sellyei informed the Nevada Industrial Commission that he had just discovered on that date, that a retinal detachment was in the eye, and indicated that he is setting up for an appointment with one of the university centers, and he will be notified as soon as the appointment has been made, and he is able to see the physicians in charge there." During this time Mr. Rush had received temporary total disability payments from September 2, 1973 up to and including September 8, 1975. The NIC in requesting further information as to Mr. Rush's status, received a letter dated November 8, 1973 from Dr. Sellyei, (See ROA, Exhibit "A" of Reply Points and Authorities in Support of Motion to Dismiss). By that letter Dr. Sellyei indicated that he felt "[whether a retinal detachment] was caused by the foreign body or not is extremely difficult for me to say, because at no time could I see the back of the eye during or after his initial visit." By letter dated November 27, 1973, Dr. Sellyei reported to the NIC, again that he was uncertain as to the cause of the retinal detachment,

and again reiterated that these facilities only exist in large medical centers.

Dr. Sellyei finally, by letter dated December 13, 1973, (see ROA, Exhibit "C" of the Points and Authorities in Opposition to Motion to Dismiss), stated that he definitely felt that the retinal detachment, which Mr. Rush incurred, was caused by the industrial injury. The Nevada Industrial Commission received said letter on December 17, 1973, and on that very day, arranged an appointment at Dr. Sellyei's referral to Dr. Lonn in San Francisco, California.

Dr. Lonn saw Mr. Rush on January 7, 1974 and he was sent home. (See ROA Exhibit "B", Reply Points and Authorities in Support of Motion to Dismiss). On May 1, 1974, four months after Dr. Lonn's first examination of Mr. Rush, a retinal detachment surgery was performed on the left eye.

RUSH on September 5, 1975 filed a Complaint in the Second Judicial District Court naming John Reiser, Don Breighner and Richard Petty. RUSH subsequently filed an Amended Complaint on December 3, 1975, joining the NIC. A demand and motion for change of venue was made and the Honorable Grant L. Bowen subsequently ordered the case changed to the First Judicial District Court.

The Motion to Dismiss was filed December 31, 1975, and after being full briefed, oral argument was heard on June 14, 1976. At that time plaintiffs in open court stipulated to dismiss Count V of their complaint. On July 12, 1976 the Honorable Frank B. Gregory entered an order granting defendants' motion to dismiss. The appeal is taken from that order.

ARGUMENT

I

As their first issue on appeal, RUSH raises the question as to whether the district court properly dismissed a common law action against the NIC as being barred by the exclusive remedy provision of the Nevada Industrial Insurance Act. A more succinct phraseology of this issue is whether the NIC is a "third person" within the contemplation of the Nevada Industrial Insurance Act.

RUSH in this action is not suing the NIC to collect any compensation due them under the Nevada Industrial Insurance Act (hereinafter referred to as NIIA). In fact to date RUSH has received in excess of $36,000 of benefits under the act. Rather they are suing the NIC on the grounds that its negligence was responsible for his injury.

It is well established law consistently followed by this court that an employee's exclusive remedy for an industrial injury is restricted to such compensation as might be awarded under the NIIA. The recent case of Frith vs. Harrah's South Shore Corp., 92 Nev. A/O 133 (July 1976), expressed this holding and stated "[s]ince the enactment of the Nevada Industrial Insurance Act, Chapter 111, 1913 Statutes of Nevada, this court has held that compensation by the Nevada Industrial Commission is the sole remedy exclusive of any rights of a common law action against an employer, where an employee incurs an injury as a result of an accident which arose out of and in the course of his employment. NRS 616.270; 616.370. See LTR Stage Line vs. Nev. Ind. Comm'n, 81 Nev. 626, 408 P.2d 241 (1965); Kennecott Copper Corp. vs. Reyes, 75 Nev. 212, 337 P.2d 624 (1959); See also, Jackson vs. Southern Pac. Co., 285 F.Supp. 388 (D. Nev. 1968); Howe vs. Diversified Builders, Inc., 69 Cal.Rptr, 56 (Cal. App. 1968)."

The NIIA like worker's compensation acts in other states, deprives covered employees of the right to sue their employers at common law, while guaranteeing them certain statutory sums from their employer in case of accident or injury arising out of and in the course of employment. In effect, the NIIA and similar acts of other states, limits the amounts recoverable to lesser sums than an employee might recover at common law but makes such amounts payable in every instance of work-connected injury, rather than in just those instances where an employee can prove breach of common law duty. But the NIIA and similar acts of other states, does not limit common law rights of action against "some person other than the employer or a person in the same employ." NRS 616.560 specifically allows both the injured employee as well as the NIC to bring an action against a third party if the "injury was caused under circumstances creating a legal liability in some person other than the employer or a person in the same employ." It further goes on to provide that if the injured employee brings the action and recovers the NIC "shall have a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such recovery are by way of judgment, settlement or otherwise. In no case shall the injured employee or in case of his death, his dependents, realize double recovery for the same injury."

Under Nevada's workmen's compensation system, the Nevada Industrial Commission is the exclusive workmen's comp carrier, except for the seven remaining companys that had benefit plans in effect prior to July 1, 1947 that were grandfathered in. See NRS 616.256. Throughout the entire act it is clear that the legislature intended that the Nevada Industrial Commission

fit into the shoes and take the place of the employer in handling workmen's compensation benefits, and further the act contemplates that the employer may rely on the NIC as a means of fulfilling his liability to his employees under the Nevada Industrial Insurance Act.

RUSH is attempting to sue the NIC as a third party allegedly liable to them for common law tort. The district court found that RUSH'S exclusive remedy was under the NIIA and dismissed the common law action against the NIC. If the NIIA specifically granted or denied the right to sue the NIC, this court's task would be simple. Since it does not, the NIIA must be looked at as a whole, considering its scope and purpose to determine the legislative intent.

A reading of the entire act makes it evident that the Nevada legislature considers the NIC as the alter ego of the employer. The following are but a few of the applicable sections of the NIIA evidencing that fact.

NRS 616.220 states:

> 1. Adopt reasonable and proper rules to govern its procedure.
>
> 2. Prescribe the time within which adjudications and awards shall be made.
>
> 3. Prepare, provide and regulate forms of notices, claims and other blank forms deemed proper and advisable.
>
> 4. Furnish blank forms upon request.
>
> 5. Provide the method of making investigations, physical examinations, and inspections.
>
> 6. Prescribe the methods by which the staff of the commission may approve or reject claims, and may determine the

amount and nature of benefits payable in connection therewith. Every such approval, rejection and determination shall be subject to review by the commission. (Emphasis added)

7. Provide for adequate notice to each claimant of his right:

(a) To review by the commission of any determination or rejection by the staff.

(b) To judicial review of any final decision.

NRS 616.220 empowers the commission to "prescribe the methods by which the staff of the commission may approve or reject claims, and may determine the amount and nature of benefits payable in connection therewith. Every such approval, rejection and determination shall be subject to review by the commission." As previously noted in the Frith case, supra, NRS 616.270 and 616.370 make the industrial insurance act exclusive from any other liability for recovery of damages or other compensation for an injury which arose out of or in the course of the employee's employment. In furtherance of this, the legislature requires under NRS 616.285 that if an employer has in his services one or more employees, the terms and conditions of the Nevada Industrial Insurance Act "shall be conclusive, compulsory and obligatory upon such employer and his employee." In fact our legislature felt it of such a prime importance that every employer and employee be covered under the Nevada Industrial Insurance Act, that under NRS 616.630 if any employer fails to secure compensation under the terms of the act, he shall be fined not more than $500 for each offense and if the commission or any interested employee complains to the district attorney that his employer has violated the act,

"it shall be the mandatory duty of the district attorney to investigate the complaints, and if after investigation he shall find that the complaint is well founded, he shall prosecute the employer for the offense." That section goes on to hold that if the district attorney neglects to investigate the complaint, the attorney general's office is empowered to institute proceedings against the district attorney for a misdemeanor or to remove him from office.

RUSH in their O.B. states that this is a case of apparent first impression in the State of Nevada and concedes that there is a large body of law upholding the district court's ruling. (O.B. p. 6, l. 4-6) RUSH then cites in their opening brief the cases of Nelson vs. Union Wire Rope Corp., 199 N.E. 2d 769, Fabricius vs. Montgomery Elevator Co., [miscited], 121 N.W.2d 361, and Mays vs. Liberty Mut. Ins. Co., 323 F.2d 174. These cases have been either rejected later or legislatively reversed. In the Nelson case, supra, the Illinois Supreme Court interpreted Florida law and found that the insurer was a third party and subject to suit. Subsequently Carroll vs. Zurich, 286 So.2d 21 (Fla.App. 1973) rejected the reasoning of Nelson and interpreted Florida's statute to confer the immunity of the employer upon his carrier against a common law action by an employee. In Fabricius case [Iowa], and Mays case [federal court interpreting Pennsylvania law] the respective legislatures reversed the holdings. See 6 Iowa Code Ann., Section 88A.14 and Pa. Stat. Ann. Title 77, Section 501.

RUSH also cites the cases of Mager vs. United Hospital of Newark, 212 A. 2d 664, Szydlowski vs. Gen. Motors Corp., 229 N.W.2d 365, and Jones vs. Laird Foundation, Inc., 195 S.E.2d 821, as analogous to this case. These cases

are clearly distinguished on their facts, for the employee was injured as a result of improper medical treatment by the employer's or his insurance carrier's own medical staff.

The issue in this case at bar does not involve any failure to make a safety inspection at Mr. Rush's place of employment, or any direct negligent medical treatment by an NIC employee, rather this case involves a situation where RUSH alleges that any delay in medical services were attributable to the NIC and give rise to an independent third party action.

The leading case in the area of delay in medical services attributable to a carrier is found in Noe vs. Travelers Ins. Co., 172 Cal.App.2d 731, 342 P.2d 976. In that case plaintiff-employee injured her back during the course of her employment. The defendant-insurance carrier of her employer undertook to provide medical care. Subsequently the doctor chosen by the insurance carrier recommended and requested authorization for surgery. Despite repeated requests for such authorization the insurance carrier did not give its approval until some 14 months later. Plaintiff filed suit alleging that as a result of the delay, plaintiff's injuries became permanent, and that by such action plaintiff was also entitled to punitive damages. The court in an in-depth analysis of the workmen's compensation system, held that no cause of action was stated. The employee's exclusive remedy was under the workmen's compensation law. The court noted that the legislature did contemplate a situation in which the employer or the compensation carrier refused reasonable medical and surgical care with the statutory scheme providing a remedy by petition to the commission. The courts went on to add the following comment:

"...we must point out that if delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could become the bases of independent suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified." Id. at 979

"Workmen's compensation contemplates a substitution of the contractual rights and obligations which normally flow between worker and employer with a complete and exclusive statutory scheme based not upon contract but upon status. The relationship of employer and employee itself generates the rights and obligations; the legislation describes the content and extent of those rights and obligations." Id. at 977.

In the case of State Comp. Ins. Fund vs. Superior Court, 46 Cal.Rptr 891, the California District Court of Appeals issued a writ of prohibition holding that an employee injured in the course of his employment could not maintain a common law action in superior court for negligence against his employer's compensation insurer based on insurer's alleged failure to fulfill its commitment with employer to inspect employer's plant. The court specifically noted that "in seeking legislative intent courts must consider the consequences which will flow from a particular interpretation." Id at 896. It reasoned that the public policy of the state concerning worker's conditions would deteriorate if such a common law action would be allowed against the insurance carrier because compensation carrier's would be compelled either to strike the provision for inspection from their policies or substantially raise their premiums to cover their exposure to greater monetary

outlays. This would defeat the principle purpose in worker's compensation in fostering safe working conditions, especially if smaller employers were involved.

Again in the case of Deauville vs. Hall, 10 Cal.Rptr. 511, the issue of whether the injured employee could sue at common law for damages for aggravation allegedly due to mistreatment by employer's first aid men, was held to be within the exclusive jurisdiction of the industrial accident commission. The court went on to reaffirm the rationale expressed in Noe vs. Travelers Ins. Co., supra, "that independent suits would ultimately result in a breakdown in the system of compensation for industrial injuries and create unwarranted confusion and increase unnecessary litigation, the rule is that for whatever aggravated or increased disability arises out of any negligence on the part of the employer or carrier in providing medical treatment, the injured employee shall pursue his remedy therefor under the act." Id. at 514. [Emphasis added]

RUSH in his O.B. asserts that the tort complained of did not "arise out of or in the course of his employment." The cases of Noe vs. Travelers Ins. Co., supra; Deauville vs. Hall, supra; show this position is unfounded. The facts of this case show that even after RUSH was seen by Dr. Lonn in San Francisco on January 7, 1974, he was sent home to been seen at periodic intervals and was not operated on till May 1, 1974, some 4 months after Dr. Lonn's initial examination. The handling of this claim by the NIC in no way contributed to the loss of RUSH'S eye.

The Fabricius vs. Montgomery Elevator Co., supra, Nelson vs. Union Wire Rope Corp., supra, and Mays vs. Liberty Mutual Insur. Co., supra, cited by

RUSH in his O.B. deals with the compensation carrier's failure to adequately make safety inspections at the job cite. Besides the obvious non-sequitur in comparing negligence in safety inspections to a delay in medical treatment situations, the vast cases in negligent safety inspections cases of the workmen's comp carrier have refused to allow such a common law action. The cases of Modjski vs. Atwall, et al., 309 F.Supp. 119, and Brown vs. Travelers Ins. Co., 254 A.2d 24, an indepth analysis involving the equating of the workmen's comp insurer with the employer in the safety inspection area, quoted that the vast weight of authority report the position that no common law action can be brought against the employer's workmen's comp insurance carrier. As noted in the Modski case, supra, the results reached in Fabricius vs. Montgomery Elevator Co., supra, and Mays vs. Liberty Mutual Ins. Co., supra, have been specifically abrogated by the Iowa and Pennsylvania respective state legislatures. It is noted also that even in the dissent in Brown vs. Travelers Ins. Co., supra, Justice O'Brien concedes that the state compensation insurance fund is immune from common law liability and finds numerous reasons for attempting to distinquish the state fund from private carriers. Id. at 33.

RUSH in his O.B. cites the case of Markham vs. Pittsburgh Plate Glass Co., 299 F.Supp. 240, for the proposition that any statute cutting off common law rights should be narrowly construed. This court in construing the Nevada Industrial Insurance Act has held that it is remedial legislation and should be liberally construed. Virden vs. Smith, 46 Nev. 208, at 211. NIC vs. Adair, 67 Nev. 259, at 269. In the latter case this court noted that it is "one of the main purposes of the act [NIIA] - to have cases of this fairly and competently handled by the statutory board, and thus

greatly relieve the congestion of court calendars." Id. at 272. To allow RUSH to have a common law action against the NIC in this case at bar would encourage injured employees to accept compensation under the NIIA, and sue the NIC if they should be somehow unhappy in the handling of their claim.

RUSH cites the case of First National Bank vs. District Court, 75 Nev. 77, stating that it is distinguishable on the grounds that the case was concerned with whether the original injury fell under the Nevada Industrial Insurance Act. The holding of that case, however, is almost analogous to this case at bar. "At the present time not only has an award been made by the commission, but that award has now been accepted by the plaintiff below. In doing so, the plaintiff has accepted the industrial compensation so awarded in lieu of any common law rights she may have had. This amounts to accord and satisfaction of such common law rights and has accomplished a destruction of any right of action, merging it by accord with the compensation award she has accepted in his place." Id. at 87. This situation is analogous to the present case at bar. RUSH has accepted and received full medical benefits as well as a compensation award for his injuries which includes the loss of his eye.

It can be seen throughout the entire NIIA as well as this court's construing the NIIA that the NIC has been equated with the employer. In the case of Santisteven vs. Dow Chemical Co., 506 F.2d 1216, the Ninth Circuit Court of Appeals in dealing with a case on whether an employer had to indemnify a third party, the court specifically equated the employer with the Nevada Industrial Commission stating that the "employer or in Nevada, the state commission, is normally subrogated to the employee's rights ..."

Finally the legislative intent in defining "compensation" and "damages" is indicative that it did not intend to allow a common law action against the NIC. "Compensation" is defined under NRS 616.045 as money allowance payable to an employee or his dependents as provided by the NIIA, while "damages" is defined under NRS 616.050 as meaning the recovery allowed in an action at law as contrasted with compensation. Since the NIC is liable to pay compensation, it would be unreasonable also to find the NIC to be liable to pay damages while giving the NIC a subrogated interest and lien upon those damages. Thus the treating of the NIC as a third person under NRS 616.560 it would be subrogated to rights against itself and entitled to collect back any damages paid out. This is a logical incongruity!

II

NIC IMMUNE ON COMMON LAW TORT ACTIONS IN HANDLING CLAIMS.

RUSH'S second issue questions the propriety of the district court deciding that the NIC is immune from suit. Specifically, the issue of discretionary versus ministerial act is raised. Because the question of limited waiver of sovereign immunity under NRS 41.032, as well as the issue of whether the NIC's employees were acting in their official capacity and entitled to quasi-judicial immunity, was raised in the motion to dismiss, the NIC will consider both of these aspects.

A. NIC performed discretionary act in investigating further medical treatment.

NRS 41.032 states:

> 1. Based upon an act or omission of an employee of the state or any of its agencies or political subdivisions,

exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused.

This court in numerous cases dealing with the Nevada Industrial Commission recognized the necessary discretionary acts in handling an industrial injury claim. In the case of NIC vs. O'Hara, 76 Nev. 107, at 111, this court stated "[w]e recognize the desirability of having the commission or administrative tribunal assume a real responsibility for weighing and considering the facts in the fields where it had peculiar competence. We repeatedly referred to such experience and skill acquired by the administrative tribunals in their respective spheres. This we may again confirm with reference to administrative determinations, at the same time recognizing that the final action and judgment of the administrative tribunal made in the exercise of a quasi-judicial function is subject to judicial review." In Provenzaro vs. Long, 64 Nev. 412, at 427, it was again stated "[i]t is conceded that quasi-judicial powers must necessarily be exercised by the Nevada industrial commission in virtually every award that it makes. This is true of many administrative boards and of many administrative officers,

and is so patent that neither the listing of illustrations nor the citation of authorities is required."

The NIC on first receiving the report of injury on this claim, was notified only that foreign bodies had gotten into Mr. Rush's eyes. It subsequently became aware that Mr. Rush had a secondary cataract on the left eye and authorized and paid for all medical expenses connected in the removal of said cataracts, together with the total disability payments for the period that Mr. Rush was temporarily disabled and unable to work. It wasn't until October 23, 1973, approximately three months after the date of the original accident that Dr. Sellyei then discovered that RUSH had a detached retina. Dr. Sellyei himself informed the NIC that "whether this was caused by the foreign body or not is extremely difficult for me to say because at no time could I see the back of the eye during or after his initial visit." (See ROA, Exhibit "A", attached to Reply Points and Authorities in Support of Motion to Dismiss.) In fact even when RUSH had his eye examined by Dr. Lonn at the University of California in San Francisco, his condition was not considers urgent for an eye operation as the left eye had ditreous hemorrhage and made it impossible to evaluate his retinal status until the hemorrhage was cleared. Dr. Long recommended that he see RUSH for periodic intervals to assess his eye, and did not operate till May 1, 1974, some 4 months after the initial visit. (See ROA, Exhibit "B", attached to Reply Points and Authorities).

RUSH in their O.B. cite Pardini vs. The City of Reno, 50 Nev. 401, and McDonald vs. Virginia City, 6 Nev. 90, as analogous. Both of these cases involve the erecting by governmental agencies of a street or wall, and the

subsequent failure to maintain same. The courts found that the failure to maintain the street or wall resulted in liability to the governmental entity, who could not claim exemption as a discretionary function; these cases are clearly a non-sequitur as far as this action is concerned.

The handling of an NIC claim involves a high amount of discretion and judgment as decided in the above cases. NRS 616.220 as well as the commission's inherent ability to determine the amount and nature of benefits payable in connection with an industrial accident, requires a high amount of discretion and judgment with the claims examiner handling the claim, and likewise with Chairman Reiser reviewing claims, establishing policy and supervising NIC employees. Dr. Petty as chief medical advisor to the NIC duties are almost entirely discretionary. He is required to analyze medical information in files presented to him to determine the extent of anatomical disability, whether the doctors are treating non-industrial problems in the same claim and recommends alternatives if there is medical disagreement.

Generally speaking, a "discretionary act" within the meaning of the doctrine of governmental immunity for liability for discretionary acts performed by public officers and employees, is one which requires exercise in judgment and choice and involves comparable decision of what is just and proper under the circumstances. Burgdorf vs. Funder, 54 Cal.Rptr. 805.

RUSH in his O.B. places great reliance upon the case of Cohen vs. United States, 252 F.Supp. 679, for the proposition that "planning" level was under the discretionary exception, but it didn't apply to the "operations" level. It is worthy to note that this case was reversed on other grounds. See 398 F.2d 689. In this case the court awarded the famous

mobster Mickey Cohen, $110,000 damages, which was set off against the prior tax assessments of $393,469.65 owed to the U. S. Government, as a result of an assault by the known sociopathic prisoner. The assaulter had just escaped from the administrative segregation where he had been placed following an apparent threat made to another immate. As a result of the assault Mr. Cohen became lame and crippled permanently. The court found that the duty of care owed to the Bureau of Prisons to federal prisoners is fixed by detained USC, Section 402, which provides that the Bureau "shall ... (2) provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with the conviction of offenses against the United States or held as a witness or otherwise; (3) provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States." The court found that the government was on notice of the assaulter's psychotic tendencies, and that a duty of protection and safekeeping was owed, which was breached when the government did not properly supervise the assaulter in that he escaped his section, and subsequently assaulted Mr. Cohen. The court found that the government was not entitled to the discretionary exemption under the federal tort claims act, rather it was a ministerial duty by the Bureau of Prisons to confine a known prisoner with psychotic tendencies to his section of the prison, especially where the prison had ample security.

The public policy in assuring that public officers and employees are left to perform discretionary duties without fear of subsequent reprisal and litigation would be seriously hampered if not followed in this case at bar. The claims examiner, chief medical advisor, and chairman of the NIC, are

required by law to analyze each claim as it presents itself to insure that the monies received in trust from the employers throughout the State of Nevada are dispensed to injured employees, and those rendering necessary services to aid injured employees. To require that mere delay in investigating whether further medical treatment is related to an industrial injury gives rise to possible tort liability in handling these discretionary functions, could seriously cripple and stagnate the NIC by exposing its employees to tort liability for acts that they are required by law to decide by virtue of their position.

B. NIC EMPLOYEES ACTING IN QUASI-JUDICIAL CAPACITIES.

This court has especially recognized that the Nevada Industrial Commission acts in a quasi-judicial capacity.

> "In the administration of the important duties imposed upon the Nevada Industrial Commission, that commission will doubtlessly often be required, as it interprets its duties, to reject claims in whole or in part and both upon questions of fact and law." State vs. NIC, 40 Nev. 220, at 226.

> "While granting the fact that many of the acts of the commission are quasi-judicial, the court still insists that it is in no sense a judicial body but is distinctly an administrative body ... it is conceded that quasi-judicial powers must necessarily be exercised by the Nevada Industrial Commission in virtually every award that it makes." Provenzano vs. Long, 64 Nev. 412, at 426-427.

> "The court will recognize the desirability of having the commission or administrative tribunal assume a real responsibility of weighing and considering the facts in the field where it has particular confidence. We repeatedly refer to such experience and skill required by the administrative tribunals in their respective spheres. This we may again confirm with reference to administrative determinations, at the same time recognizing that the final action and judgment of the administrative tribunal

made in the exercise of quasi-judicial function is subject to judicial review." NIC vs. O'Hara, 76 Nev. 107, at 111.

RUSH in this matter never resorted to seeking review before the commissioners of the NIC in this matter. In fact the file is void of any reference to how Chairman Reiser is involved in this matter. If in fact RUSH was concerned about the urgency in being referred to a larger medical center why didn't he have Dr. Sellyei make the appointment as the doctor had indicated, or at least request a review by the commissioners of the NIC, and if unsatisfied with their decision, then seek judicial review. These remedies clearly provide sufficient relief in this case at bar.

The case of Industrial Commission vs. Superior Court, 423 P.2d 375, (Arizona 1967) is on all fours with this case at bar. In that case an injured employee and his wife brought a complaint for damages against Arizona's Industrial Commission. The employee alleged that he was injured in the course of his employment and made claim for compensation to the industrial commission. After some administrative proceedings, the claim was denied for lack of jurisdiction. Thereafter, the employee appealed to the Arizona Supreme Court. The Supreme Court upon stipulation of the parties ordered that the action be remanded to the Industrial Commission to be set for a hearing on the merits. Thereafter, the employee alleges that further hearings by the Industrial Commission were cancelled, and finally, the Industrial Commission again refused to hear the matter on the merits alleging lack of jurisdiction. Based on that, the employee filed a civil action for damages against the commission and also requested punitive and exemplary damages.

The Arizona Court of Appeals held that the Industrial Commission in

making compensation awards acts as a quasi-judicial body of limited jurisdiction, and that the commissioners were entitled as a matter of law to immunity from suit and the complaint should have been dismissed. The court found that the commission had exclusive jurisdiction subject to appellant review to determine all questions of fact and law involved in claims for industrial compensation under the act. Since nothing in the complaint appeared to indicate that the public officers were acting outside their official capacity, they were immune from suit. Additionally, the court went on to hold that where no cause of action was stated against the Industrial Commission and its employees in view of the fact that they were immune from suit, a Writ of Prohibition prohibiting further proceedings by the Supreme Court in this case was proper.

The court delved extensively into the rationale for its ruling. This applies on all fours with this case at bar.

> "It is readily apparent that an 'award' by the Commission would have placated the plaintiffs and terminated their lawsuit against named individuals. Public rights should not be thus bartered. The very purpose of the rule of immunity afforded to public officers was to avoid potential harrassment and/or coercion by means of a threat of a lawsuit:
>
> "The reason now given for the rule is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service.'" Id. at page 380.

"[T]he immortal words of Judge Learned Hand still ring true:

> 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it

> were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Id. at page 381.

To hold that Don Breighner as claims examiner handling this claim, Dr. Petty, as chief medical advisor reviewing the medical aspects of this claim, and John Reiser, as chairman of the Nevada Industrial Commission, subject to possible tort liability in handling their discretionary functions, would put the NIC in an unworkable situation; for it would hold the NIC subject to possible tort litigation in instances where there was a difference in medical judgment or perhaps even from delays in making payments. This would violate the fundamental premise that the entire workmen's compensation system is built on. That being, an attempt to put an end to private controversy and litigation in the industrial area in exchange for prompt cash-wage benefits and medical care to victims of work-connected injuries.

III

STATUTE OF LIMITATIONS

RUSH in their third issue expressed in their O.B. raises the question of whether the statute of limitations on a common law action against the commission commences on the date of the accident or at the date of the negligence of the commission. RUSH states in his argument in the O.B. that the judge's decision in this area is somewhat confusing. It appears that this issue is moot and need not be further explored. The following should clarify this.

The district court on its July 12, 1976 Order, dismissed Count V of plaintiffs' Amended Complaint, among other things, on the grounds that the cause of action was barred by the statute of limitations. Apparently the Honorable Frank Gregory did not appreciate the fact that it was stipulated between both counsels to dismiss Count V of plaintiffs' Amended Complaint. (See transcript of proceedings, hereinafter referred to as TOP, p. 6, l. 10-17; p. 14, l. 3-6, l. 12-14).

Under Count V of their Amended Complaint RUSH was seeking benefits under the NIIA which related back to the filing of the Original Complaint on September 5, 1975. The industrial accident incurred on August 3, 1973. Under NRS 616.625 the amount of compensation and benefits that an injured employee is entitled to is required to be determined as of the date of the accident or injury to the employee and the rights thereto shall become fixed as of such date. The judge thus applied NRS 616.625 to Count V and determined that in addition to the fact that RUSH could not bring a cause of action against NIC, he was also barred from collecting compensation under the NIIA by the statute of limitations. However, since it was stipulated in open court to

dismiss Count V by RUSH that issue of the statute of limitations would now appear moot.

IV

STRIKING OF FRAUD COUNTS PROPER

RUSH in the fourth issue raised in their O.B. questions the propriety of the district court striking Counts II and IV of their Amended Complaint on the basis that fraud had not been stated with particularity. It is conceded by RUSH that they did not allege fraud with particularity, and stipulated to strike the word "fraud." (See TOP of July 19, 1976, argument before the district court, p. 7, l. 12-14; p. 13, l. 16-18).

"Fraud is never presumed; it must be clearly and satisfactorily proven." Havas vs. Alger, 85 Nev. 627, at 631.

NRS 47.250(9) requires that there is a presumption that official duty had been regularly performed.

The allegation of fraud cannot be presumed, and if made, cannot be made conclusionary in form even under our modern notice pleadings. O'Connor vs. GSA, 332 F.Supp. 1246, at 1247.

RUSH contends by their eleventh hour offer at the oral argument on a motion to dismiss to drop the word "fraud", and leave oppression in Count II, and malice and oppression in Count IV, that he is entitled to save the Counts. The district court in its order rejected this stating that, "[t]he court is very cognizant of the fact that an allegation of fraud is a serious matter with the potential to cause great damage even though based on unsubstantiated claims. It is for this reason that the courts have required it to be pleaded with great exactitude and detail. The plaintiffs, however,

have not stated either in their Amended Complaint or opposition to defendants' present motion, the requisite facts necessary in order to constitute a valid cause of action for fraud." (See ROA, p. 2 of District Court's July 12, 1976 Order granting Motion to Dismiss) It is apparent that the gravelman of Counts II and IV were so tainted by the allegation of fraud in both the original and Amended Complaints that even without the word "fraud", the court felt compelled to strike the counts as pleaded.

Count IV alleging that Rush's wife is also entitled to punitive damages, fails because the primary action by her husband fails. This court in the landmark decision of GE vs. Bush, 88 Nev. 360, at 368, held that a wife was entitled to bring a cause of action for loss of consortium, but conditioned "her cause of action only if joined for trial by her husband's own action against the same defendant. Thill vs. Modern Erecting Co., 170 N.W.2d 865, at 869 (Minn. 1969)." The Thill case further enunciated that "her [wife's] right of action to be a derivative right, she may recover only if her husband recovers from the same defendant;" supra, at 869. See also Jones vs. Slatter, 220 N.W.2d 63;Burrow vs. Moyer, 519 S.W.2d 586.

Thus Count II of plaintiffs' complaint fails on two grounds, i.e., that RUSH is barred from alleging Count II, as stated in this brief's first section and that he failed to state fraud with particularity. As to Count IV brought by RUSH'S wife, that Count fails on three grounds, i.e., that she is barred from bringing a Count; that she failed to state fraud with particularity; and that her derivative action fails if her husband's action does not stand.

V

UNCONSTITUTIONAL IF TRUST FUNDS DIVERTED

The ultimate social philosophy and policy behind workmen's compensation is that by requiring employers to pay premiums into a fund for victims of work-connected injuries, the industrial injured victims are compensated and the premiums are passed on to the most appropriate source of payment, the consumer of the product. So sacred is this social policy in the State of Nevada that Article IX, Section 2, was enacted stating:

> "Any monies paid for the purpose of providing compensation for industrial accidents and occupational diseases, and for administrative expenses incident thereto, and for the purposes of funding and administering the public employee's retirement system, shall be segregated into proper accounts in the state treasury, and such monies shall never be used for any other purposes, and they are hereby declared to be a trust fund for the use and purposes herein specified." (Emphasis added)

This public policy argument was mentioned before the district court (See TOP, p. 16, l. 19-21).

RUSH is seeking "damages" which as defined under NRS 616.050 means recovery allowed in an action at law as contrasted with "compensation", which as defined in NRS 616.045 means the money allowance payable to an employee or his dependents as provided for in this chapter. Compensation to Mr. Rush has been paid and will continue to be paid as allowed by the Nevada Industrial Insurance Act. To date Mr. Rush has had all of his medical bills paid, temporary total disability payments during the period he was unable to work, rehabilitation expenses, plus an award for his disability, the total cost exceeding $36,000. To allow RUSH to be able to assert a cause of action against the NIC for damages in addition to the compensation already

paid would amount to an improper diversion of funds expressly prohibited by Article IX, Section 2 of the Nevada Constitution. As pointed out before the oral argument on the motion to dismiss, NRS 41.0337 requires that the state must be named as a party defendant on any action brought against any officer or employee, or former officer or employee of the state, and that the state has no right of contribution or indemnity against the officer or employee, unless his conduct was wanton or malicious. (See TOP, p. 3, l. 2-5).

C O N C L U S I O N

The facts in this case establish that RUSH has received full compensation under the NIIA for his industrial injury. What RUSH is seeking is full common law damages in addition to the full benefits he is entitled to under the NIIA. The NIC employees in investigating whether the retinal detachment was connected with the industrial injury acted properly and in their discretional duty to assure that the trust funds were being applied for industrially related medical services.

The trial court in reviewing the matter and deciding the motion to dismiss properly dismissed the various counts.

W H E R E F O R E, on the basis of the foregoing points and authorities, Respondents, NEVADA INDUSTRIAL COMMISSION, JOHN REISER, DONALD BREIGHNER and RICHARD PETTY, M.D., request that this Honorable Court affirm the Order Grantings Defendants' Motion to Dismiss of the Honorable Frank B. Gregory.

Respectfully submitted,

NEVADA INDUSTRIAL COMMISSION
515 East Musser Street
Carson City, Nevada 89701

By: Riley M. Beckett
RILEY M. BECKETT
General Counsel

AFFIDAVIT OF MAILING

STATE OF NEVADA)
: ss.
CARSON CITY)

SHIRLEY STODIECK, being first duly sworn, deposes and says:

That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 20th day of December, 1976, affiant deposited in the post office at Carson City, Nevada, a copy of RESPONDENTS' ANSWERING BRIEF, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to: JOHN T. COFFIN, ESQ., Post Office Box 3556, Reno, Nevada 89505.

That there is a regular communication by mail between the place of mailing and the place as addressed.

Shirley Stodieck
SHIRLEY STODIECK

SUBSCRIBED and SWORN to before me
this 20th day of December, 1976.

Dorothea T. Lloyd
NOTARY PUBLIC

(SEAL)

DOROTHEA T. LLOYD
Notary Public — State of Nevada
Carson City
My Commission Expires Dec. 27, 1978

Exhibit C

NOV 2 - 1976

IN THE SUPREME COURT OF THE STATE OF NEVADA

oOo

RALPH O. RUSH and MARY RUSH,

Appellants,

vs.

NEVADA INDUSTRIAL COMMISSION; JOHN RESIER; DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, INDIVIDUALS,

Respondents.

No. 9058

APPELLANTS' OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

oOo

RALPH O. RUSH and MARY RUSH, Appellants, vs NEVADA INDUSTRIAL COMMISSION; JOHN RESIER: DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, Individuals, Respondents.	No. 9058

APPELLANTS' OPENING BRIEF

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Respondents.

No. 9058

TABLE OF CASES AND AUTHORITIES

STATUES AND RULES OF CIVIL PROCEDURE

ISSUES PRESENTED FOR REVIEW

A. Where a workman in the State of Nevada suffers an industrial injury accepted by the Nevada Industrial Commission, and the treating doctor recommends a course of treatment needed to preserve the workmen's eyesight, and the Nevada Industrial Commission negligently fails to authorize the recommended medical treatment, does the Nevada Industrial Insurance Act preclude the workman from bringing a common law action in negligence against the Nevada Industrial Commission?

B. Where the Nevada Industrial Commission has accepted a claim for an industrial accident and has retained a medical specialist to treat the claimant, and that medical specialist advises the Commission that further medical treatment is required to prevent the loss of eyesight, is the decision of the Commission to approve or deny such further medical treatment constitute a "discretionary" or "ministerial" act by the Commission?

C. Where a claim of injury to the eye is accepted by the Nevada Industrial Commission and the Commission fails to approve recommended treatment for the claimant to prevent the loss of eyesight, does the statute of limitations on a common law action against the Commission commence at the date of the accident or at the date of the negligence of the Commission?

D. Where allegations in a complaint allege fraud, oppression and malice under NRS 42.010, and the facts pled are not pled with particularity as required by NRCP 9(b) is it proper to strike the

entire cause of action or should only the word "fraud" be stricken from the complaint?

STATEMENT OF THE CASE

This case arose when Plaintiff below was receiving medical treatment and compensation from the Nevada Industrial Commission. During the course of medical treatment the claimant's doctor recommended a course of treatment to the Commission which he stated was necessary to save the eyesight of the Claimant. The Commission failed to give approval to the recommended treatment with the result that the claimant lost total sight of the injuried eye.

A common law action in negligence was brought on behalf of the claimant against the Commission within two years of the acts complained of but more than two years after the initial industrial injury. The claimant's first amended complaint included a count for relief under the Nevada Industrial Insurance Act which was dismissed by stipulation of the parties at a subsequent motion to dismiss.

Defendants achieved a change of venue from Washoe County to Carson City County and moved to dismiss Plaintiffs' amended complaint on the basis that claimant's exclusive remedy was under the industrial insurance act, that approval or denial of treatment recommended by the treating physician was "discretionary" act, that pleading the word "fraud" with this insufficient particularity required those causes of action to be dismissed, and that the statute of limitations for the subsequent alleged tort dated back to the date of the original industrial injury.

It is the granting of the Defendants' motion to dismiss from which appellants lodged this appeal.

IV. STATEMENT OF FACTS

On August 3, 1973, while working as a mechanic for Western Nevada Diesel Sales, RALPH O.RUSH got metal shavings in his left eye thereby suffering severe injury to the eye. The NEVADA INDUSTRIAL COMMISSION accepted Mr. Rush's claim and sent Mr. Rush to Dr. Louis Sellyei, a licensed Opthalmoligist practicing in the City of Reno, for treatment. Soon thereafter Dr. Sellyei discovered that Mr. Rush had suffered a retina detachment which Dr. Sellyei reported to the Nevada Industrial Commission on October 23, 1973 and which was attached to Appellants' Points and Authorities in Opposition to the Motion to Dismiss as part of this record on Appeal.

Thereafter onNovember 8, 1973 Dr. Louis Sellyei reported to the Nevada Industrial Commission that the "severity of the detachment makes it necessary for him to be referred to a center where they do more elaborate retinal detachment procedures." This letter was attached as an exhibit to Defendant's Reply Points andAuthorities in Support of Motion to Dismiss. On November 27, 1973 Dr. Sellyei reported to the Commission that while it was impossible on anyones part to state exactly what happened to the retina as a result of the injury, and "the type of retinal detachment that he has is a type that is seen frequently with injuries to the eyes... On the other hand, Mr. Rush is in fairly immediate danger of going blind if he is left untreated. A retinal detachment of this type does not resolve itself spontaneously and must surgically be corrected, if it is not even too late to do this. As I have statedbefore, the facilities only exist in larger medical centers and he is in need of treatment

at such a place." This letter was attached to Appellants' Points and Authorities in Opposition to Dismiss as Exhibit "B".

Thereafter in frustration at being unable to obtain authorization from N.I.C., to receive the treatment that his physician recommended, Mr. Rush contacted counsel after which Dr. Louis Sellyei again wrote to the commission stating: "This is also in reply to one of your other previous requests, at which time you said it would be necessary to say that the retinal detachment, which Mr. Rush has incurred, is definitely caused by the injury. According to Mr. Rush, his vision prior to the accident to the left eye was entirely normal. The eye was exotropic but this occurs normally in a surprisingly large percent of the population. This alone does not interfere with vision. Following the accident the vision was immediately decreased and has remained decreased since the injury. One can therefor deduct that whatever change he had to his eye was the direct result of the injury that he suffered. This fact applies whether I could see the retina at the time of the injury or not." Despite these unequivocal warnings of dire consequences that could result to Mr. Rush, the Nevada Industrial Commission continued to withhold approval of the treatment of Mr. Rush in any area outside of Reno, Nevada.

Thereafter, at the intervention of counsel, Mr. Rush was finally granted approval to obtain an appointment with a Dr. Lawrence Lonn, an opthalmologist in San Francisco, California, and the first appointment with Dr. Lonn was kept January 7, 1974. A report of the initial examination of Mr. Rush by Dr. Lonn was reported in a letter to Louis Sellyei dated January 16, 1974 which was attached as Exhibit "B" to Respondent's Reply Points and Authori-

ties in Support of Motion to Dismiss.

Thereafter Mr. Rush was treated by Dr. Lonn over a period of time until it was determined that vision in the left eye could not be saved after which Dr. Lonn performed a total enucleation of the left eye. A prosthetic device was fitted and Mr. Rush was allowed to go under psychiatric treatment for the difficulties caused by the loss of his left eye. Thereafter Mr. Rush completed the administrative procedures under the Nevada Industrial Insurance Act and was awarded the statutory allotment for the total loss and enucleation of one eye..

A common law action in negligence against the Nevada Industrial Commission and the named individuals was then brought on behalf of Mr. and Mrs. Rush and was dismissed by the Honorable Frank D. Gregory on the 12th day of July, 1976. The Order granting Respondents' Motion to Dismiss is the Order that is appealed from herewith.

V. ARGUMENT

The gravamen of the action involved on this appeal is common law negligence against the Nevada Industrial Commission and the named individuals for failing to provide the Appellant with proper medical care. This action arises under the circumstances that Mr. Rush had an industrial accident which was accepted as a proper claim by the Commission who approved Mr. Rush's treatment by Reno opththalmologist Dr. Louis Sellyei. Dr. Sellyei reported to the Nevada Industrial Commission as early as October 23, 1973 that there was a serious condition in Mr. Rush's eye which could only be treated in one of the larger medical centers outside of Reno, Nevada. The Commission, although they had approved treatment by Dr. Louis Sellyei, chose to completely ignore the warnings and withheld approval of the recommended treatment until after Mr. Rush had obtained counsel and, after it was to late to take the sophisticated remedial measures needed to save the vision of the left eye. The central theme of Appellants' position, supported by the medical opinion of Lawrence Lonn, is that the severe injury suffered here by Mr. Rush was caused by the negligence of the Nevada Industrial Commission in failing to approve the treatment recommended by the treating physician in Reno, Nevada.

A. The District Court's Order granting Defendants' Motion to Dismiss stated that by receiving total temporary disability payments from the Nevada Industrial Commission Plaintiffs accepted such compensation in lieu of any common law right they may have had, amounting to accord and satisfaction of such common law rights. This statement reflects the District Court did not completely appreciate the gravamen of Plaintiffs' complaint. The injury, when accepted

by the Commission fell under NRS 616.515 which provides:

> "Every injuried employee within the provisions of this Chapter shall be entitled to receive, and shall receive promptly, such accident benefits as may reasonably be required at the time of the injury and within six months thereafter, which maybe further extended for additional periods as may be required."(Emphasis added)

Under the clear meaning of this statute once a claim is accepted the commission is required to provide benefits which include necessary medical care. The mandate of this statute was met by the Commission in intitially sending Mr. Rush to Dr. Louis Sellyei of Reno but was not met by the commission when they received Dr. Sellyei's unequivocal recommendation that Mr. Rush be sent to a larger medical center than Reno could provide in order to prevent the loss of sight of the left eye. Thus, when Mr. Rush accepted the benefits of total temporary disability at the outset of the injury he had no basis to make an election of remedies as there had been no tort commited against him by the commission. Thereafter, while Mr. Rush was being threated by Dr. Sellyei who was attempting to get the needed sophisticated care for Mr. Rush in a larger medical center, Mr. Rush was disabled and it would have been practically impossible for him at that time to make an election. The reason for this was that at that time no one knew that the negligence of the Commission in failing to approve recommended care would result in the total loss of the eye for Mr. Rush. Also, Mr. Rush was unable to work and also to survive without the assistance of the disability payments under the Industrial Insurance Act. Certainly it would be barbaric to require one at that point to chance great aggrevation of an injury by suddenly refusing further benefits of NIC while disabled and ignorant of what the ultimate outcome would

be.

While this is a case of apparent first impression in the State of Nevada other jurisdictions have considered this problem and have arrived at diverse conclusions. Counsel for Appellants would be remiss in his duty to the Court to ignore the fact that there is a large body of law upholding the District Court ruling. However, the better reasoned and more equitable cases hold that such a common law action for negligence in failing to provide recommended medical care which results in aggrevation or additional injury to a claimant allows such claimant to bring a common law action for that negligence and the resultant damages.

In Mager vs. United Hospital of Newark, 212A 2d 664, (N.J., 1965), Plaintiff suffered an industrial accident and was sent to the compensation carrier's own clinic which alledgedly negligently administered medical treatment resulting in the necessity of amputation of a leg and the ultimate death of the claimant. A summary judgment was granted for the carrier under the workmen's compensation law, equating the carrier and the employer. In reversing the lower Court the New Jersey Court concluded that the carrier and the employer could not be equated and referred to the fact that under New Jersey workmen's compensation law the claimant was allowed to bring action against third parties even though a claimant had received compensation from the Industrial Commission.

> "The third party referred to in section 40 is one other than the employer and the employee, who were parties to the employment agreement. The injured employee's action against such third party is not barred by his right of compensation under the act...." page 666

The Court went on to say that the beneftis paid by the carrier would

be allowed as a set off to any damages awarded in the common law action.

Nevada also allows an action against third parties at the same time a claim is processed through N.I.C. under NRS 616.560 (1).

> "When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under the circumstances creating a legal liability in some person, other than the employer or person in the same employ, to pay damages in respect thereof:
>
> "The injured employee, or in case of death, his dependants, make take proceedings against that person to recover damages, but the amount of the compensation to which the injured employee or his dependants are entitled under this chapter, including any future compensation under this chapter, shall be reduced by the amount of the damages recovered."

Thus the Nevada Statutes seem remarkably similiar to those of New Jersey in allowing the third party action while the claim is being processed administratively. This state differs from New Jersey in that the carrier here is the Commission itself, but that seems a distinction without a real difference. The opportunity for carelessness in processing a claim and providing medical treatment is at least as great with a public agency as it is with a private insurance carrier. This is exactly the case before the Court. According to the doctor's opinion, had the Commission authorized the treatment recommended by the treating physician, Dr. Louis Sellyei, it would have been possible to retain sight in the left eye of Mr. Rush. To deny Mr. Rush the opportunity to seek redress for this negligence on the part of the Commission would constitute deprivation of his common law rights which are not compensatible

under the Nevada Industrial Insurance Act.

In Szydlowski vs. General Motors Corp., 229 N W 2d 365 (Mich., 1975) the appellant court again was considering a summary judgment granted in favor of the employer, General Motors Corp. Plaintiff had suffered an industrial injury for which he was treated by Defendant-Employer's medical department in an alleged negligent manner. As in the previously cited case Defendant cited the "exclusiveness of the workman's compensation remedy" in attempting to affirm the summary judgment. In reversing the summary judgment and remanding the case for trial the Michigan court made two statements which seem applicable to the case at bar.

> "It is equally clear that where the 'conditions of liability' are not present, where the suit is not based on the employer- employee relationship, or where other than personal injuries are involved, workmen's compensation is not the exclusive remedy." page 367

> "Construing the complaint most favorably to Szydlowski, the non-movant, it is apparent that she has alleged facts which would justify the conclusion that her husband's death did not arise 'out of or in the course of' his employment with G. M.... Accordingly, the motion for summary judgment was improperly entered and must be set aside." page 368

In the case before the Court now the tort complained of by Mr. Rush did not arise "out of or in the course of" his employment with Western Nevada Diesel Sales. The wrong complained of here as in the Szydlowski case, supra, arose in the course of getting treatment for the industrial injury. To deny Mr. Rush the right of redress for an injury of such magnitude as the loss of the sight in one eye, which did not occur in the industrial accident but did occur by virtue of the negligence of the commission in refusing to authorize

proper treatment, is a denial of a common law right for which the Nevada Industrial Insurance Act provides no remedy. As was stated by the Federal Court in Markham vs Pittsburg Plate Glass Company, 299F. supp. 240 (U.S. District Court 1969) in interpreting Michigan law:

> "The Michigan statute cutting off common law tort right should be narrowly construed, as should any statute cutting off common law rights." page 242

As this very Court has cut off common law rights of workmen injured in the course and scope of their employment even when such arose out of very great negligence, it seems entirely unfair to cut common law rights where the claimant is pursuing his workmen's compensation injuries in accordance with the laws of this state. The magnitude of the loss of the sight of one eye together with the attendant psychic and emotional stress, that result from such a loss is totally outside of the scope of compensable injuries covered by the Nevada Industrial Insurance act.

In Rothfuss vs. Bakers Mutual Ins. Co. of New York, 257A 2d, 733, (New Jersey, 1969), Plaintiff alleged that the carrier negligently, willfully and wantonly failed and refused to provide medical treatment. The New Jersey court held that the complaint stated a common-law cause of action despite the workmen's compensation act and reversed a summary judgment granted below for defendant.

Plaintiff in Jones vs. Laird Foundation, Inc., 195 S.E. 2d 821, (W.VA. 1973), the West Virginia court ruled that a claimant was not barred by the industrial accident statutes from bringing an action against his own treating doctor for negligence in the treatment of an industrial injury.

Other cases which have upheld rules analogous to appellants' position are those involving the negligence of a compensation carrier in making safety inspections of the sites. In Fabricius vs. Montgomery Elevator Company, 191 N.W. 2d 361, (Iowa, 1963), an industrial compensation carrier had reserved the right to inspect the premises which he did negligently. Thereafter the claimant was injured. The defendant compensation carrier contended that it stood in the shoes of the employer and was thereby immunized from suit by the workmen's compensation law. In overruling this contention the Supreme Court of Iowa stated:

> "A statute will not be construed as taking away a common-law right existing at the time of its enactment unless that result is imperatively required." page 362

> "Defendant's citations to the effect the insurer has the same liability as the employer refered to the insurer's liability under its policy to pay compensation due from the employer to the employee. We do not find any that refer to a tort committed by the insurer, either related or unrelated to the employment or the policy." page 365
> (similar holding in Nelson vs Union Wire Rope Corporation 199 N.E. 2d 769) (Illinois, 1964)

A similiar situation was treated by the Third Circuit Court in interpreting the Pennsylvania Workmen's Compensation law in Mays vs. Liberty Mutual Insurance Company, 323 Fed.2d 174,(Third Circuit, 1963)

> "It is beyond dispute that the Act affects only the legal relation between employer and employee and does not purport to alter the employee's rights against third parties... thus, insofar as the employment relationship is concerned, the statute must be liberally construed in order to effectuate its remedial purpose, but its scope can not be extended in a manner which would destroy either the employee's common-law rights against third persons, or the common-law conception of third persons."(citation ommitted)

> The essence, indeed the very legislative definition, of the employer-employee status is the master-servant relationship. As the Pennsylvania Supreme Court held in Zimmer, 146 A at 131, 'The Act does not affect the existing common-law right to sue the wrongdoer, unless that wrongdoer is the master.' The master-servant relationship is totally lacking in the matter subjudice. Hence, to hold that Liberty is the employer of Mays within the meaning of the Act would not only be to abrogate by judicial legislation the employee's common-law rights, but would directly controvene the intent of the legislature as manifested in the Statute." page 177

There seems no good reason to distinguish between the negligent acts of the employer's industrial compensation carrier in the above cited cases and the Nevada Industrial Commission in the instant case. The Commission's negligence in failing to approve the treatment recommended by Mr. Rush's treating physician here was a negligent act of "a third party" within the meaning of the Nevada Industrial Insurance Act which caused Mr. Rush to lose the sight of one eye. That tort occured totally out of the scope of Mr. Rush's employment and was not an act by Mr. Rush's employer. Therefor it is both logical and equitable that Mr. Rush be allowed to pursue his common law remedies against the Commission for its negligent act.

The facts of the instant case are clearly distinguishable from the cases cited by the District Court in rendering its order dismissing Appellants' Complaint. First National Bank vs District Court, 75 Nev 77, dealt with a factual situation in which there was a real question as to whether the original injury fell under the Nevada Industial Insurance Act. In the instant case, the claim was originally completely under the Act. It was the subsequent negligence of the Commission itself which caused the real injury to Mr.

Rush. At the time the industrial benefits were initially accepted by Mr. Rush, there was no cause of action against the Commission as the negligence had not occurred.

There is also the fact that the cause of the total loss of sight in the eye was not delineated by Dr. Lawrence Lonn until August of 1974. To require that a claimant make an election of remedies while disabled and receiving no income is grossly unfair in that it constitutes use of the legal process for starve individuals into "electing" to accept the terms and conditions of the Nevada Industrial Insurance Act. This in no way constitutes a voluntary election of remedies and if upheld would invite further abuses by the Commission in the handling of industrial accident injuries.

The case of Stolte vs District Court, 89 Nev. 257, dealt with the coverage of the Act for an employee of a subcontractor who had not elected to come under the Act where the prime contractor had made such election. The issues of Stolte were markedly different from those of this case. Pershing Quicksilver Company vs Thiers, 62 Nev 382, treated the question of whether mercury poisoning fell under the Act as it was then written. Argonez vs Taylor Steel Co., 85 Nev 718, again dealt with the coverage of the Act as between employees of contractors and subcontractors.

It is submitted that the cases cited by the District Court do not reach the issue presented by the instant case and are therefore, inapplicable.

B. Another basis for granting the Commission's Motion to Dismiss was the District Court's ruling that the decision not to authorize the treatment recommended by the treating physician was a "discretionary" act on the part of the Commission. It is respect-

fully submitted that the mere act of granting or denying approval of medical treatment for a claimant recommended by his treating physician is not "discretionary" act within the meaning of the NRS 41.032 (2).

A skeletal outline of the acts of the Nevada Industrial Commission in handling a claim is set out in the transcript in the argument of counsel for Respondants at page 4. "They have to determine first of all whether a claim comes under the Nevada Industrial Insurance Act; after that whether the person is entitled to total temporary disability benefits; whether doctor's bills are to be paid or not; whether they are related to the industrial injury. (tr. 4, 113-8) Respondant's counsel then argued that all of these acts were very discretionary. It appears to appellants that while there maybe discretion involved in whether to accept a claim or not on the part of the Commission, once a claim is accepted the decision to authorize medical treatment recommended by the treating physician is a purely ministerial act. In the words of counsel for appellants the duty of the Commission at this point in the handling of the claims is quite perfunctory. "Now the Commission at this point does not control and does not enter into the doctor-patient relationship at all. All it does is pay the bills." (tr. 14,1128-30) As counsel for respondents correctly stated the Commission has no part in deciding what medical treatment is necessary for individual claimant. That decision is left to the treating physician. Where this precise question has come before this court in the past the court has distinguished between forming a plan and performing work under that plan, stating that the prosecution of the work itself is ministerial in character and not protected by the immunity doctrine

The court further stated that once a decision was made to erect and maintain a retaining wall adjacent to a Reno Street that it was a ministerial function and decision as to whether to place a railing or barrier on top of that retaining wall or not. Pardini vs. The City of Reno, 50 Nev 401. The similiar ruling was made in McDonald vs Virginia City, 6 Nev 90 where this court held that although the city was not obligated to construct a street, once it was constructed the failure to maintain the street so as to be safe for passers by was actionable negligence.

In the landmark case of Cohen vs United States, 252 F. supp. 679, (1966), the central issue was whether the placing of prisoner Mickey Cohen in the same area where dangerous and violent prisoners was kept was a ministerial or discretionary function. The court discussed the fact that every decision made involved some discretion but that the decision in issue was a "ministerial" function.

> "The exclusion is properly limited to the planning level and not the operational level; and to acts of a governmental and not a ministerial function.... Thus it may protect against an improvident high level decision but not against a negligent act even though some discretion is involved in each." page 687

> "While there is some element of incontestable administrative decision regarding the conditions of confinement between the prison officials and the person confined, as regards third persons, (including other prisoners", it is reasonable to conclude that some duty of care is owned in this regard. As seen, the government has a duty of protection and safe keeping. In the discharge of that duty the government must exercise ordinary care in (1) the classification of prisoners and in (2) the custody of prisoners properly classified." page 688

It is hard to imagine how there would be any more discretion in rendering a decision as to approve or disapprove treatment recommended by a claimant's treating physician than in deciding in which section of the prison to place a particular prisoner. In fact, it seems that there is much more discretion required in placing individual prisoners than in approving recommended medical treatment. For this reason it is respectfully submitted that the decision to approve or disapprove medical treatment when recommended by a claimant's doctor is purely ministerial function and not within the exclusion of NRS 41.032 (2).

C. In rendering the order of dismissal the district court stated as a further grounds for the dismissal the statute of limitations under NRS Chapter 616 applies. This is somewhat confusing because there does not appear to be a statute of limitations within Chapter 616 of the Nevada Revised Statutes.

As the record on appeal reflects Plaintiff's original complaint herein was filed at 3:01 p.m. September 5, 1975. Plaintiff's first amended complaint was filed December 3, 1975 at 2:30 p.m. Under NRCP 15 (c) the amended complaint relates back to the date of the original pleading, which was prior to the second anniversary of the acts complained of here. Therefore it would seem that the common law action in negligence is timely.

The district court,however, stated that the claim was barred because it was filed more than two years after Mr. Rush's accident. Appellants would agree with this position if they were proceding under the provision of NRS 616 and 617. But this is not the case. At the hearing on Respondant's motion to dismiss counsel for Appellants stated that Count 5 of the amended complaint was moot and both

counsel agreed that it should be dismissed. (tr. 6, 11 10-18) Therefore the allegations of Count 5 of Plaintiff's first amended complaint were not considered by the Court as it was clear to everyone that Plaintiff below was proceeding in a common law action for negligence and not under the provisions of the Nevada Industrial Insurance Act. Therefore it would seem impossible to justify holding that the provisions of NRS 616.625 govern the statute of limitations to this common law action and negligence when the statute of limitations applicable to such a common law action is clearly set out in NRS 11.190 (4)(e).

D. The District Court struct down Counts Two and Four of the amended complaint on the basis that fraud had been stated with insufficient particularity. As can be seen by the briefest perusal of Counts Two and Four the allegations of fraud were made, not as an independent cause of action, but to characterize the actions of defendants and bring the case within NRS 42.010. NRCP 9(b) clearly states that fraud shall be stated with particularity and so Respondents' position below is well taken. But as counsel for Appellants offered during the hearing on Respondents' motion to dismiss, the word fraud should be stricken from Count Two and Count Four deleting the word "oppression" in Count Two and the words "malice" and "oppression" in Count Four. It is clearly stated in NRCP 9(b) "malice, intent, knowledge, and other condition of mind of a person maybe averred generally." Therefore it is submitted that the district court should have stricken the word "fraud" from Count Two and Count Four and left the remaining allegations of those two counts in tact.

all complaints not pleaded

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VI CONCLUSION

The facts of the instant case display a wrong for which there is no remedy if the Order dismissing Mr. Rush's amended complaint is upheld. Many times in recent years this Honorable Court has decreed that when a workman is injured on the job in this state his sole remedy lies in the benefits available under the Industrial Insurance Act. The legislature has taken away the right of a claimant to a deNovo hearing before the DistrictCourts, where one is aggrieved by the findings of the Commission, and as of the writing of Appellant's Opening Brief, the challenge of this law has not been resolved by this Court. The availablity of a lumpsum settlement after a long period of disability and loss of income has also been taken away from the individual claimant under NIC for all but minor disabilities.

One of the unique features and major advantages that this Honorable Court enjoys over the Courts of last resort of more populus states is its inherent ability to know and be aware of how well or how poorly any governmental entity is serving its function for the people of this state. This Court is certainly not unaware of the industrial commission's record with regard to assisting workmen injured on the job.

It is a matter of public record that over 200,000 Nevada workers are covered by the Nevada Industrial Insurance Act. It is a matter of common knowledge that the abuses of and inequities toward NIC claimants are many, and that the complaints of the citizens of this state in this regard have been loud and persistant. Yet the rights of the individual claimant before this small but powerful

bureaucracy seem to diminish with every legislative session and judicial determination.

This case presents a claimant who followed the mandates and directions of the commission after suffering an industrial injury which would not have, in the medical opinion of the treating doctors, resulted in the loss of eyesight. Yet the sight of one eye was lost by appellant, merely because the employees of the commission withheld approval of treatment recommended by the doctor until such treatment was to late. The individual's loss should and could have been prevented by the excercise of reasonable care on the part of the commission in approving the treatment recommended by the doctor which they hired to treat claimant. This was not done. This loss constituted not only a major physical disability but a psychological disability as well.

To deny Mr. Rush the right to redress by way of a common law action against the commission would not only sanction a wrong without a remedy in this case, but sanction the abuses and inequities that other claimants have and seem to continue to suffer when injured on the job in this state.

It is respectfully submitted that the Order granting Respondents' Motion to Dismiss should be reversed.

RESPECTFULLY SUBMITTED.

DATED this 2nd day of November, 1976.

JOHN T. COFFIN, ESQ.
210 South Sierra Street
Reno, Nevada

Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF NEVADA

oOo

RALPH O. RUSH and MARY RUSH, Appellants, vs. NEVADA INDUSTRIAL COMMISSION; JOHN RESIER; DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, Individuals, Respondents.	No. 9058

APPENDIX TO BRIEF

Complaint filed September 5, 1975

Amended Complaint filed December 3, 1975

Motion to Dismiss filed January 3, 1976

Points and Authorities in Opposition to Motion to Dismiss filed February 2, 1976

Reply Points and Authorities in Support of Motion to Dismiss filed February 1y, 1976

Supplemental Points and Authorities in Support of Motion to Dismiss filed June 9, 1976

Order Granting Defendants' Motion to Dismiss filed July 12, 1976

Notice of Appeal filed July 28, 1976

Designation of Record filed July 28, 1976

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEVADA)
) SS
COUNTY OF WASHOE)

I hereby certify that I did personally deliver a copy of the attached APPELLANTS' OPENING BRIEF to the office of RILEY BECKETT, ESQ. at 515 East Musser Street, Carson City, Nevada this 2nd day of November, 1976.

JOHN T. COFFIN, ESQ

Subscribed and Sworn to before me
this 2nd day of November, 1976.

Notary Public

CHRISTINE A. CAREY
Notary Public - State of Nevada
Washoe County
My Commission Expires July 3, 1978

MIKE O'CALLAGHAN
GOVERNOR

STATE OF NEVADA
NEVADA INDUSTRIAL COMMISSION

JOHN R. REISER
CHAIRMAN

CLAUDE EVANS
COMMISSIONER REPRESENTING LABOR

JAMES S. LORIGAN
COMMISSIONER REPRESENTING INDUSTRY

Exhibit D

ADDRESS ALL CORRESPONDENCE TO
NEVADA INDUSTRIAL COMMISSION

REPLY TO

515 E. Musser Street
Carson City, Nevada
89714

March 29, 1977

Senator Thomas Wilson
Commerce and Labor Committee
Room 313, Legislative Building
Carson City, Nevada 89701

ATTENTION: Linda Payne, Secretary

Dear Senator Wilson:

I have been requested to respond to certain allegations made pertaining to the Ralph Rush claim and Claims Department policy in adjudicating claims.

I have researched the claim of Ralph Rush and can find no documentation or notes pertaining to the alleged conversation between claims examiner Don Breighner and Ralph Rush. An affidavit was taken from Mr. Breighner on March 28, 1977 denying the statement alleged, and it is enclosed.

It is interesting to me that an incident of this nature was never brought to my attention nor was it ever brought out at any hearings on this claim. Telephone demeanor and courtesy is stressed in the orientation of new employees and in on-going training programs.

It is inconceivable to me that Mr. Breighner or any other Claims Department employee would ever tell an injured worker to "go to hell". In our processing and adjudication in claims we strive to be objective and impartial. If an element of doubt exists it is resolved in favor of the injured worker.

The enclosed letter from Mr. Blomdal to Attorney John Coffin, dated December 17, 1973, would tend to substantiate this policy.

I am enclosing statements from Dr. Richard Petty and Dr. Richard Hall, Nevada Industrial Commission Medical Advisors, on procedures and policy involving medical problems confronting the Claims Department.

Other pertinent material from the Ralph Rush claims file is enclosed for your review.

Sincerely,

William V. Daggett

William V. Daggett
Claims Manager
Nevada Industrial Commission

WVD:ad

Enc.

MIKE O'CALLAGHAN
GOVERNOR

STATE OF NEVADA
NEVADA INDUSTRIAL COMMISSION

JOHN R. REISER
CHAIRMAN

CLAUDE EVANS
COMMISSIONER REPRESENTING LABOR

JAMES S. LORIGAN
COMMISSIONER REPRESENTING INDUSTRY

ADDRESS ALL CORRESPONDENCE TO
NEVADA INDUSTRIAL COMMISSION

REPLY TO

515 East Musser Street
Carson City, Nevada 89714

Exhibit D

March 29, 1977

William Daggett, Claims Manager
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89714

Re: SB 271

Dear Mr. Daggett:

In Senate Bill 271, a proposal was made which would seriously undermine and materially alter the role and function of the Medical Advisor at NIC as it currently exists. In order to understand the extent that this bill would change the function of the Medical Advisor, let me first explain the role as it exists at the present time and the reasons for it.

When a claim is made to NIC, it is the Medical Advisor's function to make a determination if the medical facts as presented can be attributed reasonably to the industrial injury. In discharging this responsibility we must constantly remember that we have two directly interested parties involved. Number one is the claimant whose interest is to receive the benefits of the NIC coverage which included medical costs as well as temporary total disability payments if he is unable to work. Equally important are the rights of the employer who ultimately has to pay the bills for the services. Either party has an equal right to question the decisions that are made in relation to the claim. If the claimant is dissatisfied, he may appeal through the usual three appeal bodies, namely, Claims Hearing, the Commissioner's appeal and ultimately the Appeals Officer. Likewise, the employer has exactly the same rights and frequently does appeal the decision made concerning the acceptance of the claim as related.

The Medical Advisor has to decide if the medical problems presented are reasonable and attributable to the industrial accident described. Frequently when claims present an unusual medical development which is unexpected, the gathering of appropriate information to make this judgement may take weeks or even months. We utilize not only our own clinical experiences for decision making, but also depend upon consultation with other medical people, either to ask their opinions to actually examine the claimant to try to arrive at a just decision. Once we make this

decision, we are frequently challenged during the appeals process to defend the decision that was made and to be able to demonstrate logically and clearly the steps leading up to the decision and the reason for the decision.

Therefore, it is clearly evident that as medical people, our role and function is quite different than that of the treating physician. All of the thrust of medical practice and medical ethics clearly place the responsibility for medical treatment upon the shoulders of the clinician treating the patient. His decisions have to be made with one thought in mind, that is, the safety and benefit of his patient. Matters of who pays the bill or the presentation of medical facts to the third party become very much a secondary responsibility as far as the clinician is concerned. This difference of responsibility is particularly evident in cases of emergency care and treatment. If a doctor delays emergency care and treatment to take care of third party issues such as giving or seeking information determining insurance coverage, etc., to the added risk of his own patient, he is in fact derelict in his duty. Furthermore, any responsibility that the treating clinician has towards the insurance company that might or might not cover the cost of treatment are a secondary issue in respect to his own responsibilities.

If Bill 271 should become law, it puts the Medical Advisor of the insurance company in an entirely different position. He becomes involved in and responsible for the medical treatment of the patient. This at a time when he seldom has even received the pertinent medical information and in which he has absolutely no way to have any personal contact with the patient to determine for himself what medical treatment is appropriate. Furthermore, medical treatment for many industrial injuries rightfully falls into the category for treatment by specialists in their own field. It is unreasonable to expect that the Medical Advisor of the insurance company to be equally and appropriately skillful in all of these specialties which might be necessary to treat the patient appropriately. The clinician often has to proceed upon a course when it is not clearly delineated at that time where responsibility lies for the insurance coverage of the claim. It is frequently impossible to collect or act upon such information with the dispatch that clinical judgements have to be made and treatment instituted.

I think every effort should be made to clarify to the legislature this difference in responsibilities that exist in accordance with current law. I think the bill would be very destructive to the whole structure of workmen's comp insurance if the added responsibility of concern and responsibility for immediate treatment should be thrust upon the insurance company rather than leaving it as it is at the present, a responsibility of the treating doctor to insure that either he gives the treatment of that his patient is referred to someone who can give the appropriate treatment at the appropriate time and not be involved in responsibilities of whether or not a claim is acceptable or whether or not treatment of this particular

facet of the medical problem fits in with the overall legal responsibility of the employer through the insurance company to pay for the cost of the treatment.

The Rush case, which has been cited as an example, is indeed very much to the point. In the Rush case, the treating doctor was presented originally with a man with minor eye injuries. Our next record indicated a condition which was serious, potentially dangerous and emergent. It required fairly immediate treatment in the nature of removing a cataract. Following this operation an unforeseen and unsatisfactory condition developed in the eye with the occurrence of a retinal detachment. This, in turn, was another emergent and rapidly evolving situation which demanded immediate attention and action. All of these responsibilities clearly rest upon the treating physician, in this instance, Dr. Sellyei, an ophthalmologist, who had undertaken treatment of the eye condition.

From the point of view of the medical examiner, the time sequence and the way the case was presented as well as the scanty information at hand immediately presented a very unusual medical problem. The first information that was forwarded to the insurance company was a brief note that the patient had had an eye injury and as a result an emergency removal of a cataract had been done. Under the circumstances to discharge his responsibility, ~~to~~ the Medical Advisor immediately was presented with an unusual medical problem which was not common, which he did not expect as a result of his minor injury which had been previously recorded. In order not to be derelict in his function and to be certain that indeed the cataract was related to and directly the result of the industrial accident, the Medical Advisor had to proceed with further investigation of the facts leading up to the problem and seek further information before he advised acceptance of this portion of the claim. In the meantime, the patient, of course, had been accepted as an eye injury and treatment instituted as well as disability payments. At no time was the Medical Advisor under the impression that he had any responsibility for the actual treatment of the patient or conduct of the case from a medical point of view. His responsibility lay only in the area of determining whether it was reasonable for the insurance carrier to pay for this complication that had arisen with the claimant's eye. As you can see, the two responsibilities are quite different and demand an entirely different time framework. The Medical Advisor was under no problem of urgency to make his decision. On the other hand, the clinician was obviously working within a time framework which demanded urgency and prompt action.

It is unreasonable to shift the burden of responsibility of the patient and the patient's care to a third party in which there is no provision for access to the patient information immediately. Likewise, the Medical Advisor is not necessarily professionally equipped to deal with the

clinical diagnosis and management of the problem. And most pertinent, the Medical Advisor never has personal access to the emergency patient.

NEVADA INDUSTRIAL COMMISSION

Richard A. Petty, M.D.
Chief Medical Advisor

Richard E. Hall, M.D.
Medical Advisor

REH:jg

NEVADA INDUSTRIAL COMMISSION
CARSON CITY, NEVADA
Form C-2 (Rev. 9-68)

REPORT OF INJURY OR OCCUPATIONAL DISEASE and WORKMAN'S CLAIM FOR BENEFITS

CLAIM NUMBER

FIRST REPORT OF ACCIDENT TO BE COMPLETED BY EMPLOYEE, PHYSICIAN AND EMPLOYER

THE NEVADA INDUSTRIAL COMMISSION REQUESTS THIS COMPLETED REPORT TO BE MAILED TO THE CARSON CITY OFFICE WITHIN FIVE (5) DAYS OF THE ACCIDENT. (IF INJURY OCCURRED IN CLARK COUNTY, SEND TO LAS VEGAS OFFICE.)

EMPLOYER—COMPLETE AND SIGN THE FOLLOWING:

EMPLOYER

Name on Certificate of Insurance: Western Nevada Diesel Sales & Service-Haney Trans Service — Policy Account Number: 57611

Mailing Address: 1285 Glendale Rd. Sparks, Nev. 89431 — Telephone Number: 359-4710

Nature of Business: Diesel Repair — Under what classification have you been reporting employee?

EMPLOYEE

Name (Per Payroll): Ralph Rush — Social Security Number: 554-07-9699

Home Address: 2835 Rondell Way Space 10 Reno, Nev. — Age: 58 — Sex: Male

Marital Status: Yes

Occupation and Usual Duties: Diesel Repairs — Name state in which hired: Nevada — Length of employment with you in Nevada: 2 mo. — How Long Employed By You? 2 mo. (Months)

ACCIDENT OR EXPOSURE

Accident or Exposure Occurred — Place: 1285 Glendale Rd. — Hour: 2:00 PM X — Date: 8-3-73

Describe how Accident Occurred: Working on trailer--something got in his eye

Did injured report accident or exposure at once? (Explain "No") Yes	☐ No Yes X
Did he report accident or exposure to his supervisor? (Give name)	☐ No Yes X
Were there witnesses to accident or exposure? (Give names) Floyd Collins	☐ No Yes X
Was an investigation of unsafe conditions and/or unsafe acts made? If yes, please submit copy.	X No Yes ☐
Did accident or exposure to occupational disease occur while at regular work and on company time? (Explain "No")	☐ No Yes X *
Was injured intoxicated or misconducting himself at time of accident? (Explain "Yes")	☐ Yes No X

DISABILITY AND DEPENDENCY

Date disability commenced 8-3-73 — Last day wages were earned — Date back on Job: 8-3-73 *

If and when doctor says employee may do light work, will you have such work available?	☐ No Yes ☐
Are you paying his wages during disability?	X Yes No ☐ *
Wages: Give average monthly wage regardless how paid $900.00	(Monthly) *
Is injured furnished room....., meals..... (number) or other advantages in addition to wages? (Explain)	X No Yes ☐
How many total dependents does injured claim for tax purposes?	0 *

I CERTIFY TO THE TRUTH OF THE FOREGOING STATEMENTS:

Date report completed Aug 6 19 73 — Signed by [signature] — Title [illegible]

FOR N. I. C. USE ONLY

Policy No.....
Class.....
Policy Form.....
Status Clerk.....
Date....., 19....

Checked by.....

APPROVED BY: EXAMINER.....

DATE.....

RECEIVED
RECEIVED
AUG 13 1973
NEVADA INDUSTRIAL COMMISSION

1300

864

FOR PROMPTNESS IN HANDLING BE SURE CLAIM IS COMPLETE AND LEGIBLE.

ADA INDUSTRIAL COMMISSION
CARSON CITY, NEVADA
Form C-2 (Rev. 9-72)

REPORT OF INJURY OR OCCUPATIONAL DISEASE and WORKMAN'S CLAIM FOR BENEFITS

CLAIM NUMBER: N4-1492

FIRST REPORT OF ACCIDENT TO BE COMPLETED BY EMPLOYEE, PHYSICIAN AND EMPLOYER

THE NEVADA INDUSTRIAL COMMISSION REQUESTS THIS REPORT BE MAILED TO THE CARSON CITY OFFICE WITHIN FIVE (5) DAYS OF THE ACCIDENT.

EMPLOYER—COMPLETE AND SIGN THE FOLLOWING:

EMPLOYER

Name on Certificate of Insurance	Western Nevada Diesel Sales & Service-Haney Trans Service	Policy Account Number	57611
Mailing Address	1285 Glendale Rd. Sparks, Nev. 89431	Telephone Number	359-4710
Nature of Business	Diesel Repair	Under what classification have you been reporting employee?	7531

EMPLOYEE

Name (Per Payroll)	Ralph Mush	Social Security Number	554-07-9699
Home Address	2835 Wrondell Way - Space 10 Reno, Nev.	Age 58 Sex	male
		Marital Status	Yes
Occupation and Usual Duties	Diesel Repairs	Dept. Assigned: Mechanic	Name state in which hired: Nev.
			Length of employment with you in Nevada: 2 mo.

ACCIDENT OR EXPOSURE TO I

Place of accident? Street	1285 Glendale Rd.	City: Reno, Nev.	State
Date of Accident	8-3-73	Hour	A.M. 2:00 P.M.
What was employee doing when injured?	Working on trailer-- something got in his eye	Injury sustained on employers premises?	☐ No ☒ Yes

How did accident occur? (Be specific and in detail; use additional sheet if necessary.)

Something flew up and into his eyes

Name object or substance which directly injured employee?	Possible aluminum shavings	Part of body affected? both eyes	Did injury result in death? ☐ Yes ☒ No

Did injured report accident or exposure at once? (Explain "No")	☐ No ☒ Yes
Did he report accident or exposure to his supervisor? (Give name) Bud Haney	☐ No ☒ Yes
Were there witnesses to accident or exposure? (Give names) Floyd Collins	☐ No ☒ Yes
Was an investigation of unsafe conditions and/or unsafe acts made? If yes, please submit copy.	☐ No ☐ Yes
Was injured intoxicated or misconducting himself at time of accident? (Explain "Yes")	☐ Yes ☒ No

DISABILITY AND DEPENDENCY

Date disability commenced	8-3-73	Last day wages were earned	Date back on job: 8-3-73
If and when doctor says employee may do light work, will you have such work available?			☐ No ☒ Yes
Give average monthly wage?	$ 900.00	Are you paying his wages during disability?	☒ Yes ☐ No
Is injured furnished room....., meals..... (Number) or other advantages in addition to wages? (Explain)			☒ No ☐ Yes

I CERTIFY TO THE TRUTH OF THE FOREGOING STATEMENTS:

ate report completed Aug 10, 1973 Signed by [signature] Title Brokerage

Policy No.	FOR NIC USE ONLY	RECEIVED
Class	Checked by	SEP 6 1973
Policy Form	APPROVED BY: EXAMINER	NEVADA INDUSTRIAL COMMISSION
Status Clerk	DATE	1301
Date, 19		

FOR PROMPTNESS(HANDLING BE SURE CLAIM IS C(PLETE AND LEGIBLE.

R64

M RUSH, RALPH O. 345-4 SELLYEI RECORD OF ADMISSION 74-1492
58 2835 WRONDEL NO.10 #17
CATH RENO, NV. 2-26-15
2140322900 NIC 9-3-73

WASHOE MEDICAL CENTER — Reno, Nevada

COST CENTER	RM. NO.	BED	ADMIT TIME	ADMIT DATE MO.	DAY	YR.
121	345	4	13 55	9	3	73

LAST NAME	FIRST NAME	MI	SEX	DATE OF BIRTH MO.	DAY	YR.	AGE	RACE	VETERAN
Rush	XXXX Ralph O.		Y M / F	2	26	15	58	Cauc	☐YES ☒NO

PERM. ST. ADD.: 2835 Wrondel Way #10 — CITY STATE ZIP: Reno, NV 89502 — YEARS IN AREA: 1½ yrs — PHONE AREA CODE: 702 — PHONE NO.: 323-5580

TEMP ST. ADD. — CITY STATE ZIP — STUD. OCCUP. — TELEPHONE — ☐HOTEL ☐MOTEL ☐REL. ☐FRIEND

MAR. STAT.	S	DIV	WID	SOC. SEC. NO.	RELIG CODE	RELIGION	LODGE	SAFEKEEPING NO.
X M		SEP		554-07-9699	12	Cath	None	

DR. CODE: 69 8165 — DOCTOR: Sellyei — CONS. DR. CODE — DIAGNOSIS: Cataract left eye

AL-LER-GIES: ☐YES ☒NO — DESCRIBE ALLERGIES — PREV. ADMIT DATE: None — PREV. ADMIT NAME — MAIDEN NAME

BROUGHT FROM: Home — BROUGHT BY: Pri Car — DESCRIBE ACCIDENT TYPE: ☐PED ☐DRIVER ☐PASS — HOW ADMITTED: ☐ER ☒DIRECT

NOTIFICATION HAVE (LAST NAME, FIRST NAME, INITIAL): Rush, Mary E. — ADDRESS: X ☐SAME AS PATIENT — RELATIONSHIP: ☐OTHER ☐FATHER ☐MOTHER ☒SPOUSE — TELEPHONE NO.: 323-5530

NEAREST OTHER RELATIVE NOT AT SAME ADDRESS: Torribio, Lucille — ADDRESS: 2554 Central Ave,. El Monte, CA — RELATIONSHIP (DESCRIBE): mother in law — TELEPHONE NO.: 213-443-6774

1ST GUAR. LAST NAME: Rush — FIRST NAME: Ralph O. — RELATIONSHIP: Self

GUAR. ST. ADD.: 2835 Wrondel Way — CITY STATE ZIP: Reno, NV 89502 — PHONE AREA CODE: 702 — PHONE NO.: 323-5580

EMPLOYER: Haney Transportation — ADDRESS: 1285 Glendale Rd. Sparks, NV — YEARS EMPL.: 1 yr — OCCUPATION: Heavy Duty Mechanic

RES. ☒OWN ☐RENT — NO. OF DEP.: 1 — INCOME — BANK & BRANCH: FNB Kietzke & Roberts — TYPE OF ACCOUNT: X ☐CK ☐SV. — AUTO MAKE: Chevy — YR.: 1966 — FINANCED BY: A & D Motors Gentry

CREDIT REFERENCES: A & D. Motors Gentry Way — DEPOSIT $ — DATE — RECEIPT NO.

2ND GUAR. LAST NAME: Rush — FIRST NAME: XXXXXXXX Mary E. — RELATIONSHIP: Wife

GUAR. ST. ADD.: 2835 Wrondel Way # 10 — CITY STATE ZIP: Reno, NV 89502 — PHONE AREA CODE — PHONE NO.: 323-5580

EMPLOYER — ADDRESS — YEARS EMPL. — OCCUPATION: Homemaker

MATERNITY CODE: ☐MOTHER ☐BABY BOY ☐BABY GIRL — CONDIT VISITOR TYPE — C V — NURS BOARD: ☐YES ☐NO — DIAG. CODE — GEOGRAPHIC CODE — ANTIC. DISCH. DATE — RELAT ACCT NO. — MED. REC. NO.

☐ACCEPTED CO. PATIENT ☐REFER TO COUNTY - ADMITTED THRU ER OR DIRECT ☐POLICE HOLD — AGENCY

INSURANCE CO. N.I.C. — GUARANTOR NO. 1

NAME: Date of Injury July 73 Grp Haney Transportation — INS. CO. NO. 0124 — ADDRESS: Not positive of Date — CITY, STATE & ZIP

POLICY NO. — GROUP NO. — CODE

INSURED: Ralph O. Rush

SS 554-07-9699 — BIRTHDATE

INSURANCE CO. — GUARANTOR NO.

NAME — INS. CO. NO. — ADDRESS — CITY, STATE & ZIP

POLICY NO. — GROUP NO. — CODE

INSURED

SS — BIRTHDATE

STATISTICAL CODE: CC 0 — SV CC 0 — '03 62

REMARKS: Possible NIC Caused by injury at Haney Transportation
Wife stated Doctor thought it might be NIC
Papers have been file with NIC
Info by phone
NI

(Over) In Mother

ADMINISTRATIVE FILE COPY 1302

Y . RUB , RALPH . 345-4
53 2335 RUSSELL R. NIC [redacted]LLYEI
[redacted]TH RENO, NV. 2-28-15
[redacted]0322900 NIC 9-3-73

[redacted]-120) 345-4

WASHOE MEDICAL CENTER

RENO, NEVADA

PROGRESS RECORD

9-3-73 Pt. for removal cataract OS

Hellyer

3 Sept 73 Pre anaesth

58 yr ♂ 1+ pk/day ̄s cough or sputum
Prev. anaesth well tol. No for, understands &
accepts anaesth — either local or gen
Class II [signature]

9/4/73

[illegible]

[illegible]

[illegible]

[signature]

"Confidential Information for Professional Use Only"

Form #23704

1303

[illegible] 345-4
5 3 [illegible] 1([illegible] SELLYEI
CATH - RENO, NV. 2-26-15
2140322900 NIC 9-3-73

(10-120) 345-4

WASHOE MEDICAL CENTER
NURSES' OBSERVATIONS

Form #23680

DATE	TIME	
9/3/73	1430	AUTHORIZATION SIGNED Yes I.D. BAND ON # 2140322900
		URINE SPECIMEN TO LAB. YES BLOOD WORK DRAWN YES
		ORIENTED TO UNIT Yes VISITING HOURS EXPLAINED Yes
		INSTRUCTIONS RE: NURSE CALL SYSTEM Yes DENTURES: UPPER NO LOWER YES partial
		DENTURE CUP Yes MONEY YES RINGS NO WATCH YES GLASSES NO
		CONTACT LENSES NO OTHER NO
		PROSTHESIS: NO
		T. 98² P. 80 R. 24 BP. 116/62 HT. 6'1" WT. 149
		SKIN CONDITION: Good
		ALLERGIES: None Known CLOTHES YES
		HOW ADMITTED: Car DR. NOTIFIED ☐
	1500	CONDITION: Satisf. [illegible signature]
	1730	[illegible]
		[illegible]
	2100	Quiet [illegible signature]
SEP		4 1973
	[illegible]	[illegible] NPO for surgery [illegible]
		[illegible]
	[illegible]	[illegible]
	[illegible]	[illegible] [illegible signature]
	0730	NPO
		[illegible]
	0900	Neosporin opth sol gtts i to [illegible] eye
	1000	Cyclogyl [illegible] gtts i to [illegible] eye [illegible]
	1015	Neosynephrine 10% gtts i to [illegible] eye [illegible]
	1100	Demerol 100mg
		Robinul 0.3mg IM given
		Vistaril 100mg IM given
		[illegible] in [illegible] given
	1130	To OR [illegible signature]
	1635	Ret'd from OR [illegible]
	1815	Demerol 100mg [illegible] pain [illegible]
	[illegible]	[illegible] [illegible signature]
		SEP 5 1973
	[illegible]	[illegible]
	[illegible]	[illegible]

1304

NURSES' OBSERVATIONS

(CONTINUED)

Form #23680-1

345-4

SELLYEI

9-26-15

NIC 9-3-73

DATE	TIME	
		Quiet P.M. –
		Cramps c̄ pain
		SEP 7 1973
		Seems to sleep
		Slept soundly
	0300	Dr. Sellyei in – dsg changed.
		[illegible] taken well.
		[illegible]
	12 –	Lunch taken well
	1400	quiet PM.
	1600	BP 130/80 P. 92 . Placed [illegible]
	1730	[illegible]
	1800	[illegible] 100 [illegible]
	1900	To surgery [illegible]
	2030	Ret'd from surgery. BP 130/90 [illegible]
	2115	[illegible]
	2200	Chloral hydrate 500 mg (po) given for sleep
		SEP 8 1973
		Awakened for [illegible] T 97[2] P 76-18 BP 124/70
		[illegible]
		Slept well. Good [illegible]
	0615	[illegible] Comp 65 Caps ī given for [illegible] Headache
	0730	Breakfast – taken well.
		Dr Sellyei here
	0930	Dsch via w/c ē 5 Rx

Received: belongings [illegible] safekeeping [illegible] RX 5

Cleared cashier [illegible] Condition: [illegible]

Discharged per w/c to home

Via car with [illegible]

By aide

Original document is of poor quality

CONSENT TO OPERATION AND ANESTHESIA

PATIENT RUSH, RALPH O. AGE 58 years

DATE September 3, 1973 TIME 1:55PM A.M. P.M. PLACE Admitting Office

1. I hereby authorize Dr. SELLYEI and whomever he may designate as his assistants, to perform upon RALPH O. RUSH the following operation: CATARACT SURGERY LEFT EYE; and if any unforeseen condition arises in the course of the operation calling, in his judgment, for procedures in addition to or different from those now contemplated, I further request and authorize him to do whatever he deems advisable.

2. The nature and purpose of the operation, possible alternative methods of treatment, the risks involved, and the possibility of complications have been explained to me. I acknowledge that no guarantee or assurance has been made as to the results that may be obtained.

DRS. WILLIAMS, LOUDON, BEYE, CHRISTIAN or DOROSTKAR

3. I consent to the administration of anesthesia to be applied by or under the direction of Dr. (s)_____, and to the use of such anesthetics as he may deem advisable.

4. I consent to the disposal by authorities of the WASHOE MEDICAL CENTER Hospital of any tissues or parts which may be removed.

5. I consent to the taking of any photographs in the course of this operation for the purpose of advancing medical education.

6. For the purpose of advancing medical and nursing education, I also consent to the admittance of authorized medical observers to the operating room.

I CERTIFY THAT I HAVE READ AND FULLY UNDERSTAND THE ABOVE CONSENT TO OPERATION AND ANESTHESIA, THAT THE EXPLANATIONS THEREIN REFERRED TO WERE MADE AND THAT ALL BLANKS OR STATEMENTS REQUIRING INSERTION OR COMPLETION WERE FILLED IN AND INAPPLICABLE PARAGRAPHS, IF ANY, WERE STRICKEN BEFORE I SIGNED.

Signature of patient Ralph O. Rush

Signature of patient's husband or wife _____

"Confidential Information for Professional Use Only"

When patient is a minor or incompetent to give consent:

Signature of person authorized to consent for patient _____

Relationship to patient _____

Witness: _____

I am aware that sterility may result from this operation although such a result has not been guaranteed. I know that a sterile person is incapable of parenthood.

Signature of patient _____

Signature of patient's husband or wife _____

1306

58 2835 WRONDEL NO.1C SELLYEI
CATH RENO, NV. 2-2(
214 NIC 9-3-

LABORATORY REPORTS

SEROLOGY

FOR OUT PATIENT USE ONLY

M RUSH, RALPH O. 345-4
58 2835 WRONDEL NO.1C SELLYEI
CATH RENO, NV. 2-26-15
2140322900 NIC 9-3-73

D 1415 9-3 am

X	RPR NON REACTIVE		P. TULARENSIS		HETEROPHILE SCREEN
	FTA		FEBRILE AGGLUTININS		PRESUMPTIVE
	CRP		SALMONELLA: O ANTIGEN H ANTIGEN		G.P. ABS.
	R-A TEST	R-A TITER	GROUP A		OXCELL ABS.
	ASO TEST		B		
	COLD AGGLUTININS		C		DATE REQUESTED 9-3
	BRUCELLA		D		DATE PERFORMED 9/4
	PROTEUS OX-19	OX-2	E		

CHART COPY
WASHOE MEDICAL CENTER-RENO, NEVADA

URINALYSIS

FOR OUTPATIENT USE ONLY

M RUSH, RALPH O. 345-4
58 2835 WRONDEL NO.1C SELLYEI
CATH RENO, NV. 2-26-15
2140322900 NIC 9-3-73

X	ROUTINE	MICRO	COLOR	Yel	CHARACTER	Clear	PH 5.0
	PREGNANCY TEST		SPECIFIC GRAVITY	1022	WBC	Many /HPF	
	FAT		PROTEIN	neg	RBC	Many /HPF	
	PORPHOBILINOGEN		GLUCOSE	neg	CASTS	None /HPF	
	PSP		KETONES	neg	CRYSTALS	Few Amorph /HPF	
	24 HR. PROTEIN		BILIRUBIN	neg	EP. CELLS	Many /HPF	
	UROBILIN		OCCULT BLOOD	neg	BACTERIA	Mod /HPF	TIME COLLECTED:
	UROBILINOGEN QUAL.	neg	OSMOLALITY		MUCOUS THREADS	Few /HPF	DATE REQUESTED 9-3 NURSE
	UROBILINOGEN SEMI-QUANT.				TRICHOMONAS	Present /HPF	DATE PERFORMED 9-3 TECHNOLOGIST

CHART COPY
WASHOE MEDICAL CENTER - RENO, NEVADA

HEMATOLOGY

OUTPATIENT USE ONLY

DATE REQUESTED 9-3
NURSE
TECHNOLOGIST
DIFFERENTIAL

% POLYS	% STABS	% LYMPHS	% MONOS	% EOSINO	% BASO	% META	% MYELOS	% PRO	% CHANULO	% BLASTS
59		36	2	3						

M RUSH, RALPH O. 345-4
58 2835 WRONDEL NO.1C SELLYE
CATH RENO, NV. 2-26-15
2140322900 NIC 9-3-73

☐ Hemogram ☐ Sed. Rate ☐ Reticulocytes ☐ Pdl ☐ Platelet Count

DATE PERFORMED 9 0 3

TEST	NORMAL VALUES	3	C	4	1	4	0	3	3	3
WBC X 10^3	M-4.8-10.8 F-4.8-10.8	6 0 0	8 . 7	9 4	5 . 7	5 . 7	3 . 6	1 . 6	4 . 5	
RBC X 10^6	M-4.6-6.2 F-4.2-5.4									
Hgb gm	M-14-18 F-12-16									
Hct %	M-42-52 F-37-47									
MCV μ^3	M-80-94 F-79-97									
MCH $\mu\mu g$	M-27-31 F-27-31									
MCHC %	M-32-36 F-32-36									

R.B.C. NORMOCHROMIC NORMOCYTIC
POIKILOCYTOSIS
ANISOCYTOSIS
HYPOCHROMIA
MACROCYTOSIS
MICROCYTOSIS
POLYCHROMIA
SED. RATE M.M. 1 HR.
PLATELETS /CU. MM.
RETICULOCYTES %
PLATELETS adequate number normal morphology

CHART COPY
WASHOE MEDICAL CENTER - RENO, NEVADA

WASHOE MEDICAL CENTER

RENO, NEVADA

PHYSICAL EXAMINATION

HUSH, Ralph
ROOM: 345-4

Well developed, well nourished male who is alert and cooperative.

Ocular findings: Visual acuity on the right is 20/20 without correction. Visual acuity on the left is hand motion questionably and light perception with good projection for sure. The right eye appears normal. There is no residuals from the small foreign bodies that he had. The left eye reveals an intact corneal scar sensually. The anterior chamber is shallow. There is a very dense opacity lens. Pupil dilates well without any problem. Fundus is non-visualized on the left. Appears normal on the right. There is a beginning exotropion present on the left.

ENT: Negative.

CHEST: Clear to P/A.

HEART: Regular rhythm without murmurs or cardiomegaly.

ABDOMEN: Soft, nontender. No organomegaly.

EXTREMITIES: Negative.

IMPRESSION: Cataract, left eye.

LS:hw
Tr: 9/4/73
cc: Dr. Sellyei

L. Sellyei

L. SELLYEI, M.D.

9/5 HPI [illegible] – Struck in the eye
c some type of metal particle [illegible] –
prior to 8/9 73 — This resulted in a for.
body feeling — he was seen on 8/9/73, in
the office at which time he was found
to have a small foreign body in the
(R) eye as well as a corneal laceration
which was small to moderate in size
and on the left and a cataract

Surgery ~ Left eye – Cataract – Dr Sellyei

Pt states he was hit in both eyes
M. Moller RN

74-1492
Ralph O. Rush

8-3-73 F.B. Both Eyes.
8-9-73 F.B. Removed Right eye.
9-4-73 removed Secondary Cataract, left eye.
I Feel We Should only Be obligated to the medical Aspect of removing The F.B. or $32.50 plus eye x-ray of 8/13/73.
your Comment please.

9/7/73 Concur — no Right — for cataract

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

September 14, 1973

Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Att'n: Mr. Al Blomdal

Re: Ralph Rush
DI: 8/3/73

Dear Mr. Blomdal:

I am writing in regard to Mr. Ralph Rush, who seems to be creating a problem for you people. In reply to your request as to why he was able to walk around with such a severe eye injury, may I suggest that the man was in severe financial distress and it was imperative for him to work. This is the explanation that he gave to me when I also questioned him about that. Also in reply to your request as to how could a cataract possibly form in such a short interval, I might suggest to you that traumatic cataracts have been known to form with severe injuries in a matter of minutes to hours. The reason the cataract was removed was that it was causing an elevated intraocular pressure which would lead to complete loss of the eye if it were not treated.

I sincerely believe that this man has a legitimate complaint and should not be hassled just because he was trying to work and perform his necessary duties while injured.

Sincerely yours,

Louis F. Sellyei, Jr., M.D.

Louis F. Sellyei, Jr., M.D.

LFS:te

RECEIVED

SEP 17 1973

NEVADA INDUSTRIAL COMMISSION

WASHOE MEDICAL CENTER
RENO, NEVADA

PATIENT HISTORY

Form #2371L

RUSH, Ralph
ROOM: 345-1

L. SELLYEI, M.D.

HISTORY OF PRESENT ILLNESS:
The patient is a 58 year old white male who was struck in the eye with some type of metal particle he believes, prior to 8/9/73. This resulted in a foreign body feeling. He was seen on 8/9/73, in the office at which time he was found to have a small foreign body in the right eye as well as corneal laceration which was small to moderate in size and on the left and a cataract. The anterior chamber was partially shallowed. X-ray of the left globe failed to reveal any evidence of metal particles in the eye. He was followed conservatively with topical antibiotics. The lens increased in size on the left to the point where the intraocular pressure is now elevated. He has light perception vision and he is admitted for cataract extraction of the left eye. The corneal wound has healed to the point where it is felt it will not be disturbed by the procedure.

PAST HISTORY:
Had a hernia operation about ten years ago. Denies any allergies. No present medications.

SYSTEMS REVIEW:
Entirely negative except for ocular findings as above.

LS:hw
Tr: 9/3/73
cc: Dr. Sellyei

L. Sellyei
L. SELLYEI, M.D.

9/21/73 Rev'd Petty, M.D. Not industrial cataract.

"Confidential Information for Professional Use Only"

1313

12 00

PATIENT LAST NAME	PATIENT FIRST NAME	MI	AGE	DATE OF BIRTH	MAR. STAT.
[illegible]	[illegible]			/ /	SI M SEP DIV

CODE	M F / SE SP	FIRST NAME	MI	LAST NAME	EMPLOYER
		[illegible]		[illegible]	
	M F	FIRST NAME	MI	LAST NAME	EMPLOYER

ADDRESS	CITY	STATE	ZIP
[illegible]	[illegible]		

DOCTOR	XIX-MED-NIC-INS.	SOC. SEC. NO
SELLYEI	[illegible]	[illegible]

BROUGHT BY	BROUGHT FROM	ACCIDENT TYPE
	Home	[illegible]

CREDIT INFORMATION-DRIVERS LICENSE OR ADMITTING DIAGNOSIS — RELIGION

DOCTOR REQUESTED	CALLED	SERVICE DOCTOR	CALLED
Sellyer	1740		
	RESPONDED 1740		RESPONDED
	ARRIVED Cov.		ARRIVED

THE UNDERSIGNED HEREBY CONSENTS TO AND AUTHORIZES TREATMENT WHILE IN THE EMERGENCY ROOM AT WASHOE MEDICAL CENTER AND ALSO AUTHORIZES WASHOE MEDICAL CENTER TO RELEASE MEDICAL INFORMATION TO MY INSURANCE COMPANY IF NECESSARY.

PATIENT SIGNATURE X

WITNESS X

ALLERGIES none

X-RAY	
LAB	
EKG	
PHAR	4.20
TOTAL CHARGES	32.00
PAY-MENTS	
BALANCE	32.00

NURSES NOTES: BP 148/156 T-97⁸ P-76 R-16

c/o passing out & shaking after an emotional upset.

POSITIVE CLINICAL FINDINGS

Surgery several weeks ago on (L) eye for removal of a traumatic cataract. Became [illegible] upset today when talking to insurance company. Became [illegible] & passed out.

Neuro - WNL

Vistaril 50	2.20

DOCTOR'S ORDERS AND TREATMENT

Vistaril 50 mg IM given 18[illegible]

RECEIVED

SEP 27 1973

NEVADA INDUSTRIAL COMMISSION

ER FEE	11.30
PRO FEE	13.70
TOTAL ER	27.20

IMPRESSIONS: Anxiety

TIME STAMP: 18:05

DOCTOR'S SIGNATURE: [signature]

DISPOSITION: ☒ HOME ☐ ADMIT ☐ OTHER: SPECIFY

TRANSPORTATION: ☒ OWN ☐ AGENCY ☐ AMB

INSTRUCTIONS: ☒ SEE YOUR PRIVATE PHYSICIAN WITHIN ___ DAYS ☐ RETURN TO THE CLINIC DATE ___ TIME ___ A.M. P.M. FOR ☐ REDRESSING ☐ REMOVAL OF SUTURES ☐

I HAVE RECEIVED THE FOLLOWING MEDICATION: TETANUS TOXOID ______ CC; PENICILLIN ______ UNITS; OTHER

PRESCRIPTION GIVEN: ☐ YES ☐ NO — FOR — DRUG & DOSE

SPECIAL REMARKS:

NURSE'S SIGNATURE: [signature]

PATIENT'S SIGNATURE AND ACKNOWLEDGMENT OF INSTRUCTIONS: [signature]

EMERGENCY ROOM — MEDICAL RECORDS — WASHOE MEDICAL CENTER

1313

October 2, 1973

Louis F. Sellyei, Jr., M.D.
1000 Ryland Street
Reno, Nevada 89502

Re: Ralph O. Rush
Claim: 74-1492
Injured: 8-3-73

Dear Dr. Sellyei:

The Commission has received the various medical reports from the Washoe Medical Center, as well as your letter dated September 14, 1973. As indicated in your letter, and our Chief Medical Advisor, Dr. Richard Petty, M.D., agrees with you in it's entirety, that in a case of serious eye injury, a cataract can form quite rapidly. We do, however, question a severe eye injury at this point.

In reviewing your patient's history you do document a corneal laceration "which was small to moderate in size and on the left, and a cataract". Further on in the history you indicate "the corneal wound has healed to the point where it is felt it will not be disturbed by the procedure". It would therefore seem, from a medical point of view, that this cataract was not caused by the trauma which occured on August 3, 1973.

The Commission has also checked with prior employers of Mr. Rush and this gentleman is known to have had prior medical problems with this left eye. Our Chief Medical Advisor has reviewed the medical record and he too is in complete concurrence with your statement. There is no question that Mr. Rush did have a cataract and surgery was necessary. However, we do question the injury of August 3, 1973 being the etiology of this cataract.

Any comment would be greatly appreciated.

Very truly yours,

Al Blomdal
Claims Examiner

AB:ca

1314

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

October 11, 1973

Mr. Al Blomdal
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Re: RUSH, Ralph
Claim: 74-1492
Injured: 8-3-73

Dear Mr. Blomdal:

Thank you for your letter regarding Mr. Ralph O. Rush who has claim number 74-1492. In yor second paragraph you state that it would seem there_fore, from a medical point of view, that this cataract was not caused by the trauma which occured on August 3, 1973 because of the corneal laceration which was small to moderate in size and was healed to the point where it was felt it would not be disturbed by the procedure. In my statement on the hospital form I was referring purely to the cataract extraction not interfering with the corneal laceration. The corneal laceration had not been sutured because of its small size. The size of a corneal laceration does not have any direct connection with the formation of a cataract. It can form following a pinpoint laceration or one which is involving the entire cornea. The cataract was removed primarily because it was enlarging in size and causing a secondary glaucoma. Whether the cataract was present prior to the injury is impossible for me to say with certainty because I had not examined the man before his injury. Even if it were present and the injury caused an enlargement of the cataract, it would seem to have a cause and effect relationship necessitating it's removal.

It is impossible for me to determine the severity of the injury other thah he did have a corneal laceration. If you do question this, which is just beyond my scope, as to his previous medical problems, I can just go by

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

what the gentleman tells me at the time of the examination. The type of findings that he did have are quite compatable with a most recent injury. I am personally quite against anyone obtaining claims from insurance companys for non-valid reasons, but it would seem that Mr. Rush may have a valid point.

If I can be of any further help, please let me know.

Sincerely yours,

Louis F. Sellyei, Jr., M.D.

LFS:tle

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

October 23, 1973

Mr. Al Blomdal
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Re: RUSH, Ralph O.
Claim: 74-1492
Injured: 8-3-73

Dear Mr. Blomdal:

Mr. Ralph Rush was seen last on 10-23-73 at which time he was found to have a healing cataract incision, a corneal laceration which had healed well, and the eye was healed to the point where I was able to visualize the retina and he was found to have a retinal detachment which will require further evaluation at a retinal detachment center. He is therefore to be set up for an appointment at one of the university centers and he will be notified as soon as the appointment has been made and he is able to see the physicians in charge there.

I hope this information will be of value to you in this matter.

Sincerely yours,

L. Sellyei, Jr., MD

Louis F. Sellyei, Jr., M.D.

LFS:tle

RE: Ralph Rush

CLAIM NO.

MEDICAL DEPARTMENT

Chief Medical Advisor:

Do you see anything since your last comment (refer to Dr Sellyei's latest report) which might alter your thinking. If not, I intend to send denial letter as being considered our liability at this time.

DB

TO
CLAIM DEPARTMENT: 11/20/73 Ok destroy LP

CHIEF MEDICAL ADVISOR

1318

4370

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

November 8, 1973

Mr. Al Blomdal
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Re: RUSH, Ralph
Claim: 74-1492
Injured: 8-3-73

Dear Mr. Blomdal:

In reply to your request for further information regarding Ralph Rush, he does definitely have a retinal detachment involving the left eye and the characteristics of the detachment with a band extending between two portions of the retina make it highly suspicious for having been caused by some type of intraocular disarrangement. Whether this was caused by the foreign body or not is extremely difficult for me to say because at no time could I see the back of the eye during or after his initial visit. The cataract prevented a clear view of the fundus. Ocular foreign bodies are one of the leading causes of retinal detachment if there is no further predisposition with the family history, etc. The severity of the detachment makes it necessary for him to be referred to a center where they do the more elaborate retinal detachment procedures. The equipment is not available in the Reno area to have this procedure performed.

I hope this information will be of value to you.

Sincerely yours,

L. Sellyei MD

Louis F. Sellyei, Jr., M.D.

LFS:tle

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

November 27, 1973

Mr. Al Blomdal
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Re: RUSH, Ralph
Claim: 74-1492
Injured: 8/3/73

Dear Mr. Blomdal:

In reply to your statement that the Nevada Industrial Commission claim is to be refused on Mr. Ralph Rush unless that it is stated on my part that the retinal detachment was definitely caused by the injury, it must be stated that at this point, as it was in my last letter, that the cataract did not permit a view of the retina at the time of the injury. It is therefore impossible on anyone's part to state what exactly happened to the retina as a result of the injury. The type of retinal detachment that he has is the type that is seen frequently with injuries to eyes. I would be surprised if anyone in the world could look at the retinal detachment and say that it was definitely caused by that one particular injury. Too many changes occur to validly make that statement.

On the other hand, Mr. Rush is in fairly immediate danger of going blind if he is left untreated. A retinal detachment of this type does not resolve itself spontaneously and must surgically be corrected, if it is not even too late to do this. As I have stated before, the facilities only exist in larger medical centers and he is in need of treatment at such a place.

Sincerely yours,

L. Sellyei MD

Louis F. Sellyei, Jr., M.D.

LFS;tle
enclosure

RECEIVED
NOV 28 1973

1320

Comment to: Don Breighner

Re: Ralph Rush
Claim No: 74-1492

December 4, 1973

This represents the third or fourth time I have reviewed this claim as to its acceptability and it seems we continue to receive letters from Dr. Sellyei, in an attempt to force acceptance. According to the medical records on or about 8/3/73, this now 58 year old diesel mechanic was admitted to Washoe Medical Center on 9/3/73, for the purpose of removing a cataract. The history as given by Dr. Sellyei indicates that he was struck in the eye with some type of metal particle and he was seen on 8/9/73 by Dr. Sellyei in his office where he observed a small foreign body in the right eye as well as a corneal laceration and also apparently observed a cataract in the left eye. He proceded to further investigate with an x-ray which revealed no evidence of metal particles in the left eye. He reports that the visual acuity on the right was 20 - 20 without correction, and on the left light perception and hand motion only was apparent. He removed the cataract from the left eye and subsequent examination revealed that he has a retinal detachment in the left eye which requires lazer beam therapy. The claim has been denied since it was felt that something dropping into his eye, and we're not sure which eye it was, since it was not so stated in the C-2 initially, but later it would seem he had something in both eyes. "Foreign body, right eye, corneal laceration with intraocular foreign body, left eye". Dr. Sellyei in his medical commentary cannot relate all of this as definitly caused by any injury but such "is a possibility". Dr. Sellyei's latest communication dated 11/27/73, has been presented for my comment and I do not see anything in it to change our original opinion and it would seem that if this is acceptable it would have to come to an administrative decision. I certainly do not feel from the reports that we have in the file that the trauma was of significant degree to have caused his cataract and if the cataract is accepted we then will have to accept the detached retina as either a sequela or the result of the trauma and subsequent surgery. There is an element of doubt and as has been the policy in the past if there is an element of doubt it could be decided in favor of the claimant. I wou'd like to have a precise history as to what this accident really was. Some sort of an investigation along these lines seems appropriate to me. If he had a penetrating wound to his left eye this, of course, could result in his cataract as well as his detached retina but we have no history that I can find that would indicate any severe tramatic episode to his eye.

RICHARD A. PETTY, M.D.
Chief Medical Advisor

1321

RAP:mg

December 6, 1973

Carson City, Nevada 89701

Louis F. Sellyei, M.D.
1000 Ryland Street
Reno, Nevada 89502

Re: Ralph O. Rush
74-1492
8-3-73

Dear Dr. Sellyei:

The Chief Medical Advisor has reveiwed your request of November 27, 1973, for surgical intervention in line with treatment of a detached retina on the above claimant, and from the information presently contained in your file, we are unable to assume liability for this procedure as having originated from the incident of injury that initiated this claim. Therefore, at this time, we must regard your proposal as a request in line with treating nonindustrial pathology.

Thank you for attention to this matter.

Sincerely,

Don Breighner
Claims Examiner

DB:sd

PETER ECHEVERRIA
ALFRED H. OSBORNE
JOHN T. COFFIN
E. A. HOLLINGSWORTH
ARTHUR T. NICHOLLS
LEW W. CARNAHAN
JOHN L. CONNER

ECHEVERRIA AND OSBORNE, CHARTERED
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELLORS AT LAW
555 SOUTH CENTER STREET
RENO, NEVADA 89501
TELEPHONE 323-8678

December 13, 1973

Al Blomdal
Claims Examiner
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada

Re: Ralph Rush
Claim No: 74-1492

Dear Al:

Please find enclosed an authorization for release of information and accept this as notification that we have been retained by Mr. Rush to represent him in his pending N.I.C. matter.

This letter will also advise you of our attorney's lien in this matter and notification that all future correspondence should be directed to this office.

I have had a conversation with Dr. Louis Sellyei, who is Mr. Rush's treating physician and Dr. Sellyei advises me that by history, together with his examination, that in his medical opinion the detatched retina was caused by the industrial accident on August 3, 1973.

I might also inform you that my interview with Mr. Rush indicated that he has always had what he calls a cockeye, that being the left eye which seemingly wanders off to the side. Mr. Rush has further indicated that he has never in his life had any difficulties with vision in the eye except for doing close work as he has grown older. Under these circumstances I think there can be absolutely no doubt but that there is a causal relationship between the accident of August of this year and the current condition.

Your information from co-workers of Mr. Rush is that in their opinion he could never really focus both eyes on them is obviously their impression of him looking at them with one normal eye and one "cockeye".

As Dr. Sellyei has indicated in his previous reports to you, this man must have surgery or loose the sight of his left eye permanently. There is absolutely no time for delay on this matter and I would appreciate your giving me a call upon receipt of this letter.

Best personal regards.

Very truly yours,

John T. Coffin

JTC:ls
Enc.

DEC 14 1973

NEVADA INDUSTRIAL COMMISSION

1324

LOUIS F. SELLYEI, Jr., M.D., Ltd.
SURGERY AND DISEASES OF THE EYE
1000 RYLAND, RENO, NEVADA 89502
TELEPHONE 702 / 786-4777

December 13, 1973

Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada 89701

Attention: Mr. Al Blomdal

Re: Ralph Rush
DI: 8/3/73

Dear Mr. Blomdal:

I am writing again regarding Ralph Rush at his request as well as that of his attorney, Mr. John T. Coffin. This is also in reply to one of your other previous requests, at which time you said it would be necessary to say that the retinal detachment which Mr. Rush has incurred is definitely caused by the injury. According to Mr. Rush his vision prior to the accident to the left eye was entirely normal. The eye was exotropic but this occurs normally in a surprisingly large percent of the population. This alone does not interfere with vision. Following the accident the vision was immediately decreased and has remained decreased since the injury. One can therefore deduct that whatever change he had to his eye was the direct result of the injury that he suffered. This fact applies whether I could see the retina at the time of the injury or not.

Sincerely yours,

Louis Sellyei, Jr. MD

Louis F. Sellyei, Jr., M.D.

LFS:tle

STATE OF NEVADA

NEVADA INDUSTRIAL COMMISSION

December 17, 1973

Carson City, Nevada 89701

Echeverria and Osborne, Chartered
Attorneys and Counselors at Law
555 South Center Street
Reno, Nevada 89501

RE: Claimant: Ralph O. Rush
Claim No: 74-1492
Injured: 8-3-73

Attention: John Coffin:

Dear Mr. Coffin:

Pursuant to our telephone conversation of December 17, 1973 the following information is submitted for record purposes.

As you know there is considerable doubt as to Mr. Rush's present medical problem and the circumstances of the injury. This problem has been discussed in considerable detail with Dr. Petty and myself. In fairness to all parties it is felt that Mr. Rush's medical problem should be immediately taken care of under medical investigation and the etiology or causation be documented at a later date. I have so indicated this to Dr. Louis F. Sellyei, M.D., Reno, Nevada.

Very truly yours,

Al Blomdal
Claims Examiner

AB:sd

74-1492

FRANKLIN MEDICAL CENTER
Castro and Duboce
San Francisco 94114

Date 1/8/74

Nevada Industrial Commission — Address 515 East Muss Carson City, Nevada
Insurance Carrier

ient Ralph O Rush DOI: 9-3-73 Address 2833 Arondel Way Reno Nevada 89502

loyer Western Nev Diesel Address Sales & Service 1285 Glendale, Sparks, Nev

above patient was admitted to this hospital on 1/7/74 upon the orde
and under the care of Doctor Dr. L. Lonn .This patient occupies a

Ward bed	X				rate of which is $	
Semi-private	XXX	Dr. ordered		Patient requested	rate of which is $	88.00
Private room		Dr. ordered		Patient requested	rate of which is $	

s charges for other services at the established rates of this hospital.

lly signify your approval or rejection by signing and returning this blank to us.

FRANKLIN MEDICAL CENTER

Nevada Industrial Comm — (X) confirms
Name of Insurance Carrier ( ) rejects Workmen's Compensation Coverage.

1327

ejected, reason

ature: Don Berry Lonn Title: Claims Examiner Date: 1/17/74

LAWRENCE I. LONN, M. D.
MEDICAL CORPORATION
FRANKLIN MEDICAL OFFICE BUILDING
FORTY-FIVE CASTRO STREET
SAN FRANCISCO, CALIFORNIA 94114
(415) 621-2526

January 16, 1974

Louis F. Sellyei, Jr., M.D.
1000 Ryland St.
Reno, Nevada 89502

Re: RUSH, Ralph

Dear Lou:

Thank you so much for asking me to examine this fifty-eight year old man in retinal consultation. He was seen on January 7 and explained that on August 3, 1973, he was working with an electric drill and felt something hit his left eye. Within a period of three weeks his vision became worse on the left, apparently due to a cataract formation. On September 4 a cataract extraction was performed, and subsequently your examination revealed the presence of a retinal detachment.

His past medical history is unremarkable with the exception of a hernia repair twelve years ago. He denied allergy, and the family history was noncontributory.

On examination visual acuity without correction measured 20/30 RE and light perception with poor projection LE. The extraocular motions were full in all directions of gaze. Biomicroscopy revealed early nuclear sclerosis on the right but the right eye was otherwise unremarkable. The left eye was aphakic. Fine KP were present centrally, and a hyphema was noted inferiorly in the anterior chamber. Numerous red cells were present in the vitreous.

Fundus examination on the right failed to reveal any abnormality. On the left no red reflex could be obtained, secondary to the massive vitreous hemorrhage. Intraocular pressure measured 18 mmHg RE and 7 mmHg LE.

An attempt was made to clear the vitreous hemorrhage by immobilizing him in the hospital, with both eyes patched, head elevated, and strict bedrest. This regimen was maintained for three days, with some clearing of the superior vitreous. However, it was still not possible to visualize the retina with any degree of accuracy and he was therefore discharged.

1328
RECEIVED
FEB 7 1974
NEVADA INDUSTRIAL COMMISSION

I've advised Mr. Rush that it's impossible to predict how long the vitreous hemorrhage will remain, but that it will not be possible to evaluate his retinal status until the hemorrhage has cleared.

I agree with you that the best course would be for him to see you at periodic intervals, and when the retina can again be visualized I would be very anxious to examine Mr. Rush at that time.

Many thanks again, Lou, for this most interesting referral.

Very sincerely,

LAWRENCE I. LONN, M.D.

LIL:bjl

LAWRENCE I. LONN, M. D.
MEDICAL CORPORATION
FRANKLIN MEDICAL OFFICE BUILDING
FORTY-FIVE CASTRO STREET
SAN FRANCISCO, CALIFORNIA 94114
(415) 621-2526

August 8, 1974

John T. Coffin
147 E. Liberty St.
Reno, Nevada 89501

Re: RUSH, Ralph O.

Dear Mr. Coffin:

Thank you so much for sending the additional material regarding Ralph Rush. I am in complete agreement with Dr. Sellyei that not only is there little doubt that the retinal detachment was produced by his injury, but also can state there is a greater than 51% chance that if he had received early surgery vision might have been restored or maintained in his left eye.

Please contact me if I can be of any further assistance in this matter.

Very sincerely,

LAWRENCE I. LONN, M.D.

LIL:bjl
cc: Louis F. Sellyei, Jr., M.D.

RUSH, Ralph

A2-020198

Lawrence Lonn, M.D., Asst: F. Williams, M.D.

5/1/74

Retinal detachment secondary to a giant retinal tear, left eye

Same

Retinal detachment surgery, left eye with injection of intravitreal gas

ANASTHESIA:

General

PROCEDURE:

Following adequate levels of general anasthetic, the left eye was prepared and draped in the usual fashion. Lid sutures were placed and the conjunctiva was incised at the limbus to form a peritomy. All four rectus muscles were isolated and slung on #4-0 silk for traction. Using indirect orthalmoscopy the giant retinal tear in the superior half of the globe was visualized with the secondary retinal detachment and the retinal flopped over the inferior retina.

Using the Keeler cryocautery machine and monitoring applications with indirect opthalmoscopy the retina from the level posterior to the equator to the level anterior to the equator were treated using transcleral cryocautery.

A sclerotomy was then prepared in the upper temporal quadrant at the level of the 1 0'clock meridian about 5 mm. posterior to the ora serrata. A mattress suture was placed across this sclerotomy and a similar sclerotomy was prepared in the lower temporal quadrant at the 4 0'clock meridian over pars plana with a similar mattress suture placed over that sclerotomy.

The cord was then perforated through the superior temporal sclerotomy to release subretinal fluid. After considerable fluid was released a mattress suture was temporarily tied over this sclerotomy. Attention was then directed to the inferior temporal sclerotomy at which point a #27 gauge needle was introduced through the choroid and at a point between the detached retina and the attached retina. The patient's head had been turned to the left side prior to this maneuver. The needle was connected by means of a plastic tubing to a syringe containing a mixture of 60% SF6 gas and 40% air which had been drawn through 2 milipore filters. The SF6-air

mixture was then injected into the globe to reconstitute the normal pressure of the globe.

The mattress sutures over the two sclerotomies were then permanently tied and cut and conjunctiva was closed with interrupted #5-0 plain. The eye was dressed with a sterile eye pad and the patient was then somersaulted with his feet swinging an arc through the air so that he was then in a prone position. This maneuver massaged the air bubble over the detached retina and was intended to tamponade the retina against the choroid in the area of the detachment.

The patient left the operating room in good condition. There was no specimen.

Lawrence I. Lonn, M.D.

LILrb
5/7/74--Transcribed

74-1492

PETER ECHEVERRIA
ALFRED H. OSBORNE
JOHN T. COFFIN
E. A. HOLLINGSWORTH
ARTHUR T. NICHOLLS
JOHN L. CONNER
DAVID K. BABA

ECHEVERRIA AND OSBORNE, CHARTERED
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELLORS AT LAW
555 SOUTH CENTER STREET
RENO, NEVADA 89501
TELEPHONE 323-8678

May 15, 1974

Mr. Don Breighner
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada

Re: Ralph Rush

Dear Don:

This will confirm our conversation of this afternoon in which I indicated to you that Mr. Rush must return to Dr. Lonn's office in San Francisco for post-surgical examination this week.

The expenses of this trip are $55.27 for air-fare, $42.00 for round trip of cab to and from the San Francisco Airport, and $25.00 for one-day sustenance. Would you kindly forward that check to Mr. Rush immediately, so that he can make this trip.

Thank you for your courtesy in this matter.

Very truly yours,

John T. Coffin

JTC/mbt

paid 5-16-74 Judy

NEVADA INDUSTRIAL COMMISSION

CLAIMS DEPARTMENT

TELEPHONE COMMUNICATION FROM/TO: DATE 12/5/74 TIME _____ A.M. P.M.

RE: _____ NATURE OF REQUEST: _____

DOCTOR: _____

HOSPITAL: _____

CLAIMANT: _____

EMPLOYER: _____

OTHER: _____

ACTION TAKEN: Call From Dr. Selexii
He wants To remove left eye
Next week - Says Clmt hasn't done
Too well following eye surgery in
Bay Area. I advised We would need a
Comprehensive medical report & rationale
for Dr Petty To review prior To giving
OK on This one - The sending same This
PM.

Signature

CS-101
5523
9-26-74

Nevada Industrial Commission
Form G2L

INTEROFFICE MEMORANDUM 1781

TO: Don Breighner
FROM: Bill Haggett
SUBJECT: Ralph Rush

ACCOUNT NO.
CLAIM NO. 74-1492
DATE 12-9, 1974

please call Dr Selyea and approve eye surgery. I have discussed this with Dr. Petty & he concurs

12/9/74

Done, did & done

DB

NEVADA INDUSTRIAL COMMISSION
Form G2E

INTEROFFICE MEMORANDUM

6000

TO: FILE — ACCOUNT NO.

EXAMINER: DON BREIGHNER — CLAIM NO.

SUBJECT: ~~JOHN R.~~ RUSH — DATE: DECEMBER 13, 19 74

Ralph K

I received a phone call from John Coffin, who appeared to be very upset. Mr. Coffin advised he had just been notified by Mr. Rush, who was also quite upset, according to John, that one of our nurse's, whose first name was Terry, had come to his home and had been bothering he and his wife about details on the history of this claim and other matters pertaining to his current condition. He also indicated that Terry advised him I had directed her to pay this visit to Mr. Rush's home.

John said that he does not ~~was~~ want his clients solicited or bothered directly by any of our representatives and that they should deal directly with him. He wondered why this had been ordered and what the nature of our investigation was. At this point I emphasized to Mr. Coffin that I had no knowledge of any such action, that I had not, to my knowledge, ever discussed this claim with any of our industrial nurses in Reno and that I could only assume actions were result of independent initiative or ordered by someone else, of whom I had no knowledge at this point.

I pointed out to John that it was my understanding Mr. Rush was to have enucleation of the left eye this week and that I would have had no reason to have ordered such an inquiry or visitation by any of our nurses. I pointed out to John that quite frequently our industrial nurses do conduct hospital visits during the claimant's period of confinement for the purpose of seeing how they are getting along and maintaining a rapport between claimant and his treating physician. John replied that Mr. Rush had the surgery earlier this week and that, in any event, he did not feel that good judgement was exercized in paying this claimant a home visit at this rather inappropriate time.

He pointed out that Mr. Rush had been under quite a bit of depression in the past anyway, and that when one loses an eye, one undergoes quite a traumatic experience psychologically. To this I would have to agree.

Mr. Coffin said he felt I was going to be implicated as the fall guy in this case since, apparently, Terry had led the claimant to believe that I, as Claims Examiner, had ordered her to visit Mr. Rush at his home. I advised John that I would document the file with regard to this conversation and again reiterated that I had no reason to have requested such action. I suggested that he submit his protest in writing for the benefit of whomever might have be responsible. I also advised him that I would discuss the matter with the Claims Manager, Bill Daggett. I intend to contact Terry at the Reno Office in order to determine additional details and get her side of the story.

DB:jf49

Nevada Industrial Commission
Form G2L

INTEROFFICE MEMORANDUM 1781

TO File

FROM Don B

ACCOUNT NO.

CLAIM NO.

SUBJECT Terry - Ind. Nurse

DATE 12/13, 19 74

(Re: my Phone call)

Terry informed that she saw in Hosp. Never saw him @ home Said clmt was asking about his claim. She advised that he is quite bitter & hostile toward NIC & any one who works for them. Unstablepersonality @this Time A very upset over loss of the eye etc. She advised the wife, who was visiting @ hospital, is very hostile also.

Terry has dictated a memo to file covering any observations & discussion while @ hospital. Clmt is still hospitalized as of this date.

DB

1337

NEVADA INDUSTRIAL COMMISSION
Form G21

INTEROFFICE MEMORANDUM

6000A

T... DON BREIGHNER ... ACCOUNT NO.

ESTIGATOR ... TERRY NELSON, R.N. ... CLAIM NO.

SUBJECT ... RUSH, RALPH O. ... DATE DECEMBER 19, 1974

PERSONAL DATA: Name: Ralph O. Rush
Address: 2835 Rondell Way, #10, Reno, Nevada 89502
Phone Number: 825-8580
Birthdate: February 26, 1915
Social Security Number: 554-07-9699
NIC Claim Number 74-1492

PROGRESS NOTE:

On Friday, December 13, 1974, Mrs. Myers, the head nurse on the Surgical Unit at Washoe Medical Center called to inform me that Mr. Rush had been discharged that morning by Dr. Sellyei. I attempted to call Mrs. Rush to speak with her of our plan of the day before of having a Home Health Aide spend four hours a day for the next coming week to care for Mr. Rush and to evaluate his being able to care for himself. At that early hour, I was unable to contact Mrs. Rush by phone, therefore, I called Mr. Rush in his hospital room. I spoke with him about his discharge and that I also was conferring with him on the plans to have someone come in his home and care for him and to see how he would do. He did not tell me that he objected to this. He spoke about his going home and that his only medication that he could remember the doctor telling him was to put drops in his left eye cavity once a day in the morning. Therefore, he did not need a professional nurse to come in. During our phone conversation, Mr. Rush did not display any hostility towards me, and I felt that he had accepted me outside of the NIC hostility that he displayed the day before. I was finally able to speak with Mrs. Rush approximately 9:30 in the morning and she told me that she had talked with their lawyer, John Coffin, the day before after I had visited, because her husband was terribly upset and she did not know what to do. I told her that I appreciated her predicament with her husband being upset and being in the hospital and handling his emotional state from loosing an eye and having a person come in who worked for an organization that he more or less hated. My conversation with Mrs. Rush lasted approximately 1/2 hour and I told her as much as I could about what my job was and what I could do for her and her caring for her husband. I displayed my concern for him, during the first week being home alone. Mrs. Rush told me that she probably would stay home from work, if Mr. Rush did not want someone to come into the home and care for him. I discussed with her my having to be in Carson City and Gardnerville Friday, so I would be away from the phone and that if he did refuse the Home Health Aide, to please call my office and notify them so I could call the service when I returned to cancel if this was to be the plan. When we ended our conversation, Mrs. Rush did not seem upset. She only wished for her husband to regain his health and herself to be free of all the emotional tension that she has felt, especially in the last week from his having surgery.

NEVADA INDUSTRIAL COMMISSION
Form G21

INTEROFFICE MEMORANDUM

6000A

T... DON BREIGHNER — ACCOUNT NO.

...ESTIGATOR TERRY NELSON, R.N. — CLAIM NO.

SUBJECT RUSH, RALPH O. — DATE DECEMBER 19, 19 74

This morning I spoke with Homemaker Services in regard to a message that I had received that Mr. Rush had cancelled the Home Health Aide Service. Homemakers informed me that they had called as they always do to the home to notify Mr. and Mrs. Rush of the Home Health Aide's name and approximately when she would arrive on Monday morning and was there any change in the times that she was contracted for and was there any other duties that they would want the aid to perform. Homemakers was informed by Mrs. Rush that their lawyer, Mr. Coffin, was to call and cancel the Home Health Service, and that Mrs. Rush was going to be staying home to take care of her husband in the ensuing week. Homemaker Service told me that they had informed Mrs. Rush of what services they provide and what company they were owned by and that if there was anything that they could do for her to please call her. Homemakers felt that their conversation was informative to Mrs. Rush and that there was no animosity displayed to them. They were concerned with Mr. Rush cancelling someone coming into the home to care for him as I had displayed and hoped that this patient would do well at home.

I will make no attempts to call Mr. or Mrs. Rush at home. I feel that they have overtly informed us that they do not want any possible nursing care that NIC could provide for them. I feel my contacting them may incur more hostility towards NIC interferring in their lives. I do feel that their lawyer, Mr. Coffin, has advised them to refuse nursing care and to my way of thinking this is poor advice. In my professional nursing opinion, Mr. Rush does require someone in the home to begin his rehabilitation, plus to evaluate his being able to care for himself and to be alone, plus Mrs. Rush, as she had told me, does need to work. Therefore, they could begin reorienting both their lives in a more organized and less highly emotional tension atmosphere.

I will call Dr. Sillyei and inform him of Mr. Rush's refusal of the Home Health Aide, about which I had spoken with him on Friday and he concurred with my opinion of having an aide go into the home to help care for Mr. Rush and to evaluate his being home alone.

I will contact you if I have any other contact with Mr. and Mrs. Rush in the future.

TN:rt72

cc: Dr. Petty

D: 12-16-74
T: 12-17-74

JOHN T. COFFIN
ARTHUR T. NICHOLLS

COFFIN AND NICHOLLS
ATTORNEYS AND COUNSELLORS AT LAW
147 EAST LIBERTY STREET
RENO, NEVADA 89501
TELEPHONE 702/322-3495

December 18, 1974

William V. Daggett
Claims Examiner
Nevada Industrial Commission
515 East Musser Street
Carson City, Nevada

Re: Ralph Rush
Claim No: 74-1492

Dear Bill:

As I advised you on the phone, there has been another incident in which members of the N.I.C. have contacted my client directly. This incident involves Ralph Rush who was visited by some nurse who started pumping him about the details of his accident. This is a breach of professional ethics and, if it continues, my only recourse is to sue John Reiser and the other Commissioners for intentional interference in contractual relationship which is a tort under Nevada law, which tort directly concerns this type of activity. This has been a problem for a long period of time and is long overdue for final resolution.

If you have any questions in this regard, please don't hesitate to contact me. I would like to get to the bottom of this right away.

Very truly yours,

John T. Coffin

JTC:ls

cc: Wm. J. Crowell, Esq.
Gordon Rice, Esq.
John Reiser

1340

CROWELL, CROWELL & CROWELL
ATTORNEYS AT LAW
POST OFFICE BOX 1000
CARSON CITY, NEVADA
89701

SUITE 11
CROWELL BUILDING

MEMBERS
WM. J. CROWELL
WILLIAM J. CROWELL, JR.
ROBERT L. CROWELL

TELEPHONE
882-1011
AREA CODE 702

December 30, 1974

John T. Coffin, Esq.
Coffin and Nicholls
Attorneys at Law
147 East Liberty Street
Reno, Nevada 89501

Re: Ralph Rush
N.I.C. Claim No. 74-1492

Dear John:

I am in receipt of a copy of your letter of December 18, 1974 to William V. Daggett, Claims Examiner, regarding the contact made by the nurse for the Nevada Industrial Commission with Mr. Rush to determine primarily his extent of injuries, and more particularly, to determine an outline of rehabilitation services which the Commission under law is requested to furnish to any injured workman.

I refer you to N.R.S. 616.222, effective July 1, 1973, granting the Commission the power to provide and require acceptance of rehabilitation services.

I also refer you to N.R.S. 616.220 relating to the powers and duties of the Commission and authorizing it to adopt reasonable and proper rules to govern it procedures, etc.

Pursuant to N.R.S. 616.222 and to implement rehabilitation services the Commission adopted a rule and policy to assign a project team to each injured workman, said team to consist of a Claims Examiner, a Medical Specialist (registered nurse) and a Rehavilitation Counselor. This team is to work in concert and together in implementing the rehabilitation program.

It follows therefore that in order to implement the program the injured workman must be made aware of the service to be rendered to him by the Commission with particular reference to rehabilitation service. This in no way precludes the injured workman from his right to administrative processing of his claim under the rules and regulations of the Commission and any ultimate review of his claim by the Court.

December 30, 1974

TO: JOHN T. COFFIN, ESQ.

RE: N.I.C./RALPH RUSH
N.I.C. Claim No. 74-1492

Therefore, in answer to your letter on this matter (and as personally discussed with you briefly) there was no intention to circumvent you in your professional representation of the injured workman, nor an attempt to create a breach of professional ethics.

I believe that attorneys can join with the Commission in cooperating to the extent that the injured workman derives all of the benefits to which he is entitled under the Nevada Industrial Insurance Act. I further believe that acting and cooperating together we can all try to accomplish what is in the best interest of the injured workman.

If you, as a member of the State Bar, feel that we are not properly approaching the subject, representing the Commission, I certainly would like to have your thoughts as well as those of other members of the Bar on this over-all matter.

Kindest regards.

Sincerely yours,

Wm. J. Crowell

WJC/mh

cc: John R. Reiser, Chairman, N.I.C.
cc: William V. Daggett, Claims Examiner, N.I.C.
cc: Gordon W. Rice, Esq.

Nevada Industrial Commission
Form G2L

INTEROFFICE MEMORANDUM

1781

TO: Commissioner Evans

FROM: George Seibel

SUBJECT: Ralph O. Rush

ACCOUNT NO.

CLAIM NO. 74-1492

DATE March 19, 1975

RALPH O. RUSH REPORTED SOMETHING IN BOTH EYES WHILE WORKING ON AUGUST 3, 1973. THE REPORT WAS RECEIVED ON AUGUST 13, 1973 FROM HIM AND HIS EMPLOYER. THE DOCTOR'S REPORT WAS RECEIVED SEPTEMBER 6, 1973 AND THE CLAIM ACCEPTED SEPTEMBER 7, 1973. THE MEDICAL REPORT CONFIRMED A FOREIGN BODY IN THE RIGHT EYE AND CORNEAL LACERATION WITH INTRAOCULAR FOREIGN BODY, LEFT EYE, AND REMOVAL OF SECONDARY CATARACT, LEFT EYE.

THERE WAS A QUESTION OF N.I.C. LIABILITY OF THE CATARACT AND FIRST PAYMENT OF COMPENSATION WAS NOT MADE UNTIL SEPTEMBER 21, 1973 AS CLAIMANT CONTINUED WORKING UNTIL SEPTEMBER 1, 1973.

THE CLAIMANT'S CONDITION DETERIORATED AND EVENTUALLY A RETINAL REPAIR WAS DONE ON MAY 1, 1974 IN ADDITION TO THE CATARACT EXTRACTION OF SEPTEMBER 4, 1973. DR. GILMORE WAS CALLED IN TO TREAT A PSYCHIATRIC CONDITION, AND ON DECEMBER 10, 1974 DR. SELYEI ENUCLEATED THE LEFT EYE.

THE CLAIMANT IS STILL UNDER MEDICAL TREATMENT AND BEING PAID COMPENSATION AT THE RATE OF $211.26 BI-WEEKLY.

EXPENSE TO DATE IS $11,757.68 FOR MEDICAL TREATMENT AND $8,459.40 FOR COMPENSATION, FOR A TOTAL OF $20,208.08.

JOHN COFFIN IS THE CLAIMANT'S ATTORNEY OF RECORD.

A HEARING FOR EVALUATION OF ANY P.P.D. WILL BE SCHEDULED AS SOON AS THE TREATING DOCTOR INDICATES THE CLAIMANT IS READY.

MIKE O'CALLAGHAN
GOVERNOR

STATE OF NEVADA
NEVADA INDUSTRIAL COMMISSION

JOHN R. REISER
CHAIRMAN

CLAUDE EVANS
COMMISSIONER REPRESENTING LABOR
JAMES S. LORIGAN
COMMISSIONER REPRESENTING INDUSTRY

ADDRESS ALL CORRESPONDENCE TO
NEVADA INDUSTRIAL COMMISSION

REPLY TO
515 E. Musser St.
Carson City, Nv. 89701

March 20, 1975

Senator Gene Echols, Chairman
Senate Commerce-Labor Committee
State of Nevada
Legislative Building
Carson City, Nv. 89701

Dear Senator:

At the joint hearings of the Senate Commerce-Labor and the Assembly Labor hearings of March 18, 1975, there were a number of claimants that expressed dissatisfaction with their treatment by the Nevada Industrial Commission.

As the Commissioner representing Labor on the Commission I was quite concerned and made it a point to get the names of these individuals and did a complete review of their respective files, to ascertain if the Nevada Statutes had been properly administered.

I have attached a copy of a resume of their files for you and your committee's perusal.

Sincerely yours,

Claude Evans
Commissioner

CE:lk

ARTHUR M. STORMENT, JR., M.D.
FRANKLIN MEDICAL OFFICE BUILDING
45 CASTRO STREET, SUITE 437
SAN FRANCISCO, CALIFORNIA 94114

(415) 621-7030

May 9, 1974

Louis F. Sellyei, Jr., M.D.
1000 Ryland
Reno, Nevada 89502

Re: Ralph Rush

Dear Dr. Sellyei,

Enclosed is a copy of my consultation on Ralph Rush requested by Dr. Lawrence Lonn during his recent Franklin Hospital admission. Again, he was at risk for acute bronchitis and pulmonary insufficiency due to his smoker's chronic bronchitis. However, during the immediate postoperative period, he did not spike a temperature nor did he develop any symptoms or signs of acute bronchitis. He was last seen on May 5, 1974, and is not to be seen unless requested again by Dr. Lonn to do so.

Yours truly,

Arthur M. Storment, Jr., M.D.

AMS:klh
Encl.
cc: Lawrence Lonn, M.D.

CONSULTATION REPORT

PATIENT: RUSH, Ralph O
CASE: 20199--107-B
PHYS: L. Lonn, M.D.
CONS: A. Storment, M.D.
DATE: 5/1/74

REASON FOR CONSULTATION:

Medical clearance prior to ophthalmic surgery.

PRESENT ILLNESS:

The patient re-enters, having been discharged from the hospital on 1/10/74 for a vitreous hemorrhage in the left eye. Conservative treatment was maintained at that time, and since his discharge his vision has improved somewhat. He is now re-admitted for surgery.

He denies any medical illnesses in the interim between his last hospitalization and this one. He still smokes two packs of cigarettes per day, has some shortness of breath and cough without sputum. He denies chest pain or palpitations.

On his previous admission he had an abnormal electrocardiogram, suggestive of an old anteroseptal myocardial infarction.

PAST HISTORY:

Is unchanged since his previous admission.

REVIEW OF SYSTEMS:

He has a slight postnasal discharge. Has no sore throat, no runny nose or earache.

C-R: As in present illness.
G.I.: His appetite is good. He has gained weight since his last admission. His bowel movements are regular. Has had no indigestion.
G.U.: Unremarkable.

PHYSICAL EXAMINATION:

Height: (6 feet, 1 inch).
WEIGHT: as yet unrecorded.
TEMPERATURE: As yet unrecorded.
PULSE: (80).
BLOOD PRESSURE: (110/70).

EYES: There is redness of the left eye, which was not further examined.

THROAT: Is slightly red with a postnasal discharge.

NECK: Is supple. The neck veins are flat. No goiter is felt. The carotid pulsations are full, and there are no carotid bruits.

THORAX: Increased PA diameter and reduced excursion.

HEART: Is not enlarged, and the sounds are of good quality. There are no gallops, rubs or murmurs.

LUNGS: Increased expiratory phase. No rales or wheezes.

ABDOMEN: Is soft and nontender and moderately obese. The liver is felt two fingerbreadths below the right costal margin. There is no shift in dullness or fluid wave.

EXTREMITIES: There is a trace of edema in both ankles. The dorsalis pedis pulses are easily palpable.

IMPRESSION: Detached retina, per Dr. Lonn.

Mild emphysema and chronic bronchitis.

Probable mild nasopharyngitis with postnasal discharge.

Probable arteriosclerotic heart disease with an old anteroseptal myocardial infarction on a previous electrocardiogram.

RECOMMENDATIONS: I see no contraindications to the proposed surgery. He should have a chest X ray and EKG prior to surgery, which have been ordered.

Thank you for asking me to see this patient. I will follow him with you during his hospitalization.

ASfmb
cc: L. Lonn, M.D.
A. Storment, M.D.
5/2/74--Transcribed.

A. Storment, M.D.

74-1192

ARTHUR M. STORMENT, JR., M.D.
FRANKLIN MEDICAL OFFICE BUILDING
45 CASTRO STREET, SUITE 437
SAN FRANCISCO, CALIFORNIA 94114

(415) 621-7030

January 15, 1974

Louis F. Sellyei, Jr., M.D.
1000 Ryland
Reno, Nevada 89502

Dear Dr. Sellyei,

Enclosed is a copyof my consultation requested by Dr. Lawrence Lonn on Ralph O. Rush at the Franklin Hospital on January 7, 1974. As you can see, I found no reason to contraindicate surgical procedure which was projected.

Yours truly,

Arthur M. Storment, Jr., M.D.

AMS:klh
Enclosure
cc: Lawrence Lonn, M.D.

MEDICAL CONSULTATION

Patient: RUSH, Ralph O.
Case: #17904
Room: #108-B
Phys: L. Lonn, M. D.
Cons: A. Storment, M. D.
Date: 1/7/74

The consultation was requested by Doctor L. Lonn.

Reason for consultation: Medical clearance prior to surgery on his eye.

Present Illness: In August of 1973, the patient was injured at work with a piece of steel in his eye and he has had considerable difficulty with his eye since that time including cataract operation and subsequent diminution of vision following the cataract surgery. He denies any other symptoms for physical complaints with the exception of smoking up to two packs of cigarettes a day and some shortness of breath because of this.

Past history: He had a herniorrhaphy in Venauela about ten years ago with no difficulty. He denies any serious illnesses. He denies use of alcohol or drugs with the exception of Valium for his nervousness. The nervousness is secondary to his difficulty with the Nevada Industrial Commission in trying to get his eye cared for.

Review of systems: His appetite is good. His bowel movements are normal. There is no indigestion.
CR: He has no cough or chest pain. However, he is moderately dyspneic on exdrtion.
GU: Unremarkable.

Physical examination:
Height: 6' 1".
Weight: 156 pounds.
Temperature: 99.
Pulse: 106.
Blood pressure: 130/98. He has patches on both eyes.
Neck: Unremarkable. The carotids are equally palpable. There is no goiter and the neck veins are flat.
Chest: Moderately barrel shaped.
Lungs: Clear.
Heart: Not enlarged. The sounds are of good quality. There are no gallops, murmurs or rubs.
Abdomen: Soft and nontender. No organs or masses are felt.
Genitalia & rectum: Not examined.
Extremities: There is no edema, cyanosis or clubbing. There are moderate varices and the dorsalis pedis arteries are palpable bilaterally.

Electrocardiogram reveals poor progression of the R-wave from V1 to V3 and is suggestive of an old anteroseptal myocardial infarction. There are

acute changes noted. Urinalysis is unremarkable and the CBC is negative.

Impressions: 1) Detached retina per Doctor Wong.

2) Smokes too much, mild emphysema.

Electrocardiogram suggests an old anteroseptal myocardial infarction but there are no acute changes and no evidence for angina pectoris or congestive heart failure.

Recommendations: I see no contraindications to proposed surgery in this patient.

A. Storment, M. D.

AS:jad
CC: L. Lonn, M. D.

1/8/74 - Franklin Hospital

October 7, 1975
Carson City, Nevada

C L A I M S L E V E L H E A R I N G

CLAIMANT: Ralph O. Rush
CLAIM: 74-1492

CHRONOLOGICAL HISTORY: Your attention is directed to previous Hearing Comments dated 7-8-75 for a history and sequence of therapeutic events in this claim.

In essence, the claim was carried on for further medical attention and rehab services.

On 7-11-75, Dr. Gilmore reported, "His psychiatric status remains satisfactory... I am certain that he will be able to maintain his psychiatric status satisfactorily unless some unforeseen event occurs." On 7-22-75, Dr. Gilmore reported, "Mr Rush has some ambivalence regarding his ability to work part time as a part of his rehabilitation." On 8-25-75, he reported, "...Mr. Rush is being released by me from active treatment."

On 9-8-75, the claimant was started on Rehab maintenance.

The claimantis now being called in for a discussion and an evaluation of his claim.

COMMENT: Mr. Rush returns for another claims hearing at this time. He has been discharged from care by Dr. Gilmore. Mr. Rush expresses at the hearing today that he is feeling fine, much better than he has before. His outlook is no longer depressed. He is back at work for a portion of each day and in the process of that working experience being increased gradually as much as possible. He has been helped during this process by the Rehabilitation Service to take up the slack in the necessary income arrangements. His eye produces no symptoms. He says that he is not aware that he has an artificial eye. He has no complaints concerning his vision in the other eye.

CONCLUSION: It is my recommendation that this claim be closed at this time. In order to do so and to assess visual impairment, it is necessary that we have a current examination of the remaining functioning eye with the qualities of distant vision, close vision and visual field impairment expressed numerically by an appropriate opthalmologist. Arrangements are suggested and will be set up for this examination. At the reception of the information the claim may be closed and permanent partial medical impairment calculated.

Richard E. Hall M.D.

RICHARD HALL, M.D.
Medical Advisor

RH:rt39

Nevada Industrial Commission
Form G2L

INTEROFFICE MEMORANDUM 1781

TO File

FROM Sylvia

ACCOUNT NO.

CLAIM NO. 74-1492

SUBJECT Ralph O. Rush

DATE 12-5, 1975

EXPENDITURES AS OF 12-5-75

MEDICAL	-	13,850.76
COMP.	-	11,121.33
REHAB.	-	4,518.80
1ST INS. AWARD	-	1,051.28
TOTAL		$30,542.17

AFFIDAVIT OF DONALD L. BREIGHNER

STATE OF NEVADA)
: ss.
CARSON CITY)

DONALD L. BREIGHNER, being first duly sworn, deposes and says:

1. That affiant worked for the Nevada Industrial Commission as a Senior Claims Examiner commencing on August 8, 1973 and left the Nevada Industrial Commission on February 7, 1975.

2. That affiant was the claims examiner that handled the claim of Ralph O. Rush, Claim No. 74-1492 from approximately the latter part of November 1973 to February 7, 1975, the date affiant left the services of the Nevada Industrial Commission.

3. That affiant does not have any independent recollection of talking with Ralph Rush or Dr. Sellyei over the telephone during the months of November or December of 1973; that affiant has reviewed the claims file of Ralph O. Rush and that there is nothing in the file to indicate that affiant talked to either Ralph O. Rush or Dr. Sellyei during November and/or December 1973.

4. That affiant has never told any claimant in the course of handling any industrial claims to "go to hell" and that affiant specifically remembers that he at no time ever told Ralph O. Rush that Mr. Rush could "go to San Francisco, go to hell, or go to any other place and that the Nevada Industrial Commission would not accept liability therefor."

DATED: March 28, 1977.

Donald L. Breighner
DONALD L. BREIGHNER

SUBSCRIBED and SWORN to before me
this 28th day of March, 1977.

Shirley Stodieck
NOTARY PUBLIC

(SEAL)

SHIRLEY STODIECK
Notary Public — State of Nevada
Carson City

THOMAS R. C. WILSON
SENATOR
ASSISTANT MAJORITY LEADER
241 RIDGE STREET
RENO, NEVADA 89501
TELEPHONE
OFFICE (702) 322-0635
HOME (702) 329-5816

COMMITTEES
CHAIRMAN
COMMERCE AND LABOR
MEMBER
FINANCE
LEGISLATIVE FUNCTIONS

Nevada Legislature

SENATE

FIFTY-NINTH SESSION

April 6, 1977

Senator Floyd Lamb, Chairman
Senate Finance Committee
Nevada Legislature
Carson City, Nevada

Reference: Senate Bill 348 - Providing for establishment of branch office of real estate division of Department of Commerce under direction of deputy real estate commissioner (BDR 54-1177)

Dear Senator Lamb:

Please be advised that on March 25, 1977, the above referenced bill was heard in the Senate Commerce and Labor Committee. Immediately following that hearing, an administrative meeting was held, and this bill was killed. However, it was the expressed desire of the Committee to contact you, recommending that your group fund an unclassified employee to administer the southern office of the real estate division. This recommendation comes to you by a unanimous vote of this Committee and we will appreciate your consideration of this request.

Sincerely,

Senator Thomas R. C. Wilson
Chairman, Senate Commerce & Labor
Committee

TW/llp