

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAREY KAPLAN,  
Appellant,  
vs.  
HYATT REGENCY AND GALLAGHER  
BASSETT SERVICES, INC.,  
Respondents.

No. 46711

FILED

FEB 08 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation matter.<sup>1</sup> Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Carey Kaplan was a massage therapist. While working for respondent Hyatt Regency, Kaplan was performing a massage, applying pressure with both hands, when she attempted to rub an itch on her face with her left shoulder, dislocating that shoulder. Asserting that Kaplan's shoulder dislocation was not sufficiently work-related, Hyatt Regency denied her ensuing workers' compensation claim. An appeals officer affirmed Hyatt Regency's claim denial, determining that Kaplan had not shown that her injury "arose out of" her employment, since she was not injured while massaging, but while attempting to scratch her nose. The district court denied Kaplan's subsequent petition for judicial review, and Kaplan appeals.

Like the district court, this court reviews an appeals officer's decision for clear error or an arbitrary abuse of discretion.<sup>2</sup> Although an

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<sup>1</sup>Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this case.

appeals officer's pure legal determinations are independently reviewed, the appeals officer's fact-based conclusions of law are entitled to deference, and they will not be disturbed if supported by substantial evidence.<sup>3</sup> Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion.<sup>4</sup> We may not substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact,<sup>5</sup> and our review is limited to the record before the appeals officer.<sup>6</sup>

Under NRS 616C.150(1), an injured employee is entitled to receive workers' compensation if the employee shows by a preponderance of the evidence that the injury "arose out of and in the course of [her] employment."<sup>7</sup> At issue here, an injury arises out of employment if "a causal connection between the injury and the employee's work," is established, showing that "the origin of the injury is related to some risk involved within the scope of employment."<sup>8</sup> Thus, a workers'

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... continued

<sup>2</sup>Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003).

<sup>3</sup>Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003).

<sup>4</sup>Id. at 235, 71 P.3d at 491-92.

<sup>5</sup>Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997).

<sup>6</sup>Id. at 536, 936 P.2d at 842.

<sup>7</sup>See also Mitchell v. Clark County Sch. Dist., 121 Nev. 179, 181, 111 P.3d 1104, 1105 (2005).

<sup>8</sup>Mitchell, 121 Nev. at 182, 111 P.3d at 1106 (quoting Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 604, 939 P.2d 1043, 1046 (1997)).

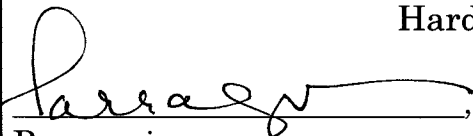
compensation claimant must “establish more than merely being at work and suffering an injury in order to recover.”<sup>9</sup>

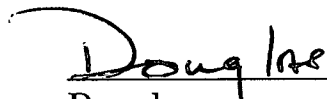
Here, Kaplan asserted that her shoulder dislocated while performing a massage, when she shifted positions to scratch her face. This alleged origin of the dislocation was inherently interconnected with a risk involved within the scope of her massage work—the risk of shifting positions while massaging and thereby incurring an injury. Accordingly, the appeals officer’s determination that the asserted cause of the dislocation—attempting to scratch a facial itch while performing massage—did not arise out of employment is clearly erroneous.

Because this erroneous conclusion forms the basis of the appeals officer’s determination, it is unclear whether Kaplan otherwise met her burden to show, medically, that her dislocated shoulder was caused by an employment risk, such as her position shifting. Therefore, we reverse the district court’s order denying judicial review, and we remand this matter to the district court so that it may then remand this matter to the appeals officer for further proceedings on the causal connection issue.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>9</sup>Id. (quoting Gorsky, 113 Nev. at 605, 939 P.2d at 1046).

cc: Hon. Douglas W. Herndon, District Judge  
William C. Turner, Settlement Judge  
Clark & Richards  
Santoro, Driggs, Walch, Kearney, Johnson & Thompson  
Eighth District Court Clerk