IN THE SUPREME COURT OF THE STATE OF NEVADA

FITZGERALDS CASINO/HOTEL; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Appellants,
vs.
GARY MOGG,
Respondent.

No. 55818

FILED

NOV 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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 action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Respondent Gary Mogg was injured when he fell over in his chair as he attempted to put his feet on his desk while working. Appellants Fitzgeralds Casino/Hotel and Cannon Cochran Management Services denied respondent's workers' compensation claim. The appeals officer reversed the denial and the district court denied appellants' petition for judicial review. This appeal followed. On appeal, appellants raise two primary issues: whether respondent's injuries arose out of and in the scope of his employment, and whether respondent's conduct was barred by an implied prohibition against such conduct so as to avoid the application of the personal comfort doctrine.

Standard of review

This court, like the district court, reviews an administrative decision to determine whether it was arbitrary or capricious, and thus, an abuse of discretion. Rio All Suite Hotel & Casino v. Phillips, 126 Nev. ___, ___, 240 P.3d 2, 4 (2010). An agency's factual findings will be upheld when they are supported by substantial evidence. Id. "Substantial evidence is that which a reasonable mind might accept as adequate to support a

conclusion." Desert Valley Constr. v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, 741 (2004) (internal quotations omitted). This court cannot substitute its judgment for that of the agency for the proper weight to be given particular evidence regarding a question of fact. Bob Allyn Masonry v. Murphy, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008). Questions of law are reviewed de novo. Id.

Category of risk

Appellants contend that the appeals officer's determination that respondent's injuries arose out of and in the course of employment was not supported by substantial evidence under Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005), because respondent did not establish a link between workplace conditions and how those conditions caused the injury. See id. at 181-82, 111 P.3d at 1105-06. Appellants also argue that under this court's decision in Phillips, 126 Nev. at ___, 240 P.3d at 4-6, issued after the underlying administrative hearing and petition for judicial review, respondent was not placed at increased risk and that his own conduct caused the accident, mandating a conclusion that respondent cannot demonstrate his injuries arose out of his employment in the context of NRS 616C.150(1).[1]

Respondent counters that the appeals officer's decision is correct under Phillips, in that the risk of falling out of an employer-supplied chair is an inherently employment-related risk, or, if a neutral

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[1]NRS 616C.150(1) provides that an injured employee or employee's dependents are not entitled to receive compensation under NRS Chapters 616A to 616D, inclusive, unless the employee or dependents establish by a preponderance of the evidence that the employee's injury arose out of and in the course of the employee's employment.

risk, that respondent faced an increased risk of injury. Respondent also argues that under a neutral risk analysis, he faced an increased risk of injury because his work conditions and job duties required him to be seated in his employer provided chair for extended periods of time.

In Phillips, 126 Nev. at ___, 240 P.3d at 5, this court recognized that

> determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of [the employee's] employment. . . . Injuries resulting from employment-related risks are 'all the obvious kinds of injur[ies] that one thinks of at once as industrial injur[ies]' . . . . Slips and falls that are due to employment risks include tripping on a defect at employer's premises or falling on uneven or slippery ground at the work site.

(Internal quotations and citations omitted). These types of injuries are typically compensable. Id. Where an injury is caused by a condition personal to the employee, however, such as a bad knee, epilepsy, multiple sclerosis or the like, compensation for such an injury is generally unavailable. Id.; see also Mitchell, 121 Nev. at 181 n.7, 111 P.3d at 1106 n.7; Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 604-05, 939 P.2d 1043, 1046 (1997).

Here, there was no evidence before the appeals officer that the chair used by respondent was defective, and falling over in a nondefective chair while one attempts to reposition oneself is not an obvious kind of injury that brings to mind an industrial injury. Phillips, 126 Nev. ___, 240 P.3d at 5. Moreover, the record shows that there was no evidence before the appeals officer that respondent's fall was caused by any personal condition. Thus, respondent's injury appears to have arisen from "an unexplained fall, originating neither from employment conditions nor from

conditions personal to the [employee]." Mitchell, 121 Nev. at 181 n.7, 111 P.3d at 1106 n.7. If respondent was not at increased risk of falling over in a nondefective chair relative to the risk the general public faces of falling out of nondefective chairs, then under Phillips the injury is noncompensable and the inquiry ends. Phillips, 126 Nev. at ___, 240 P.3d at 7. If respondent faced an increased risk, then the injury is compensable unless recovery is otherwise barred. Id.

Because the appeals officer failed to expressly make findings regarding the category of risk, substantial evidence does not support the appeals officer's decision. Moreover, resolving this issue requires factual findings, which are best left to the sound discretion of the appeals officer on remand. Thus, we reverse the district court's order denying judicial review on this basis.

Personal comfort doctrine and implied prohibition

Also relevant to this court's consideration is the personal comfort doctrine. Nevada has adopted the common-law personal comfort doctrine, which permits compensation under a workers' compensation scheme when an employee is injured while engaging in a reasonable activity designed for personal comfort, such a stretching or using the restroom. See Costley v. Nevada Ind. Ins. Com., 53 Nev. 219, 296 P. 1011 (1931) (holding that a miner's injuries sustained while erecting a tent on the employer's premises the day before commencing work arose out of and in the course and scope of employment); Dixon v. SIIS, 111 Nev. 994, 899 P.2d 571 (1995) (affirming workers' compensation benefits provided by employer for a worker injured on a lunch break while exercising on a bicycle). Incidental activities, such as those undertaken for personal comfort, are not compensable if they are unreasonable or extraordinary deviations. See Arp v. Parkdale Mills, Inc., 563 S.E.2d 62, 69-71 (N.C. Ct.

App. 2002) (Tyson, J. dissenting) (citing 2 Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law § 21.08, 21-43), rev'd, Arp v. Parkdale Mills, Inc., 576 S.E.2d 326 (N.C. 2003) (resting reversal on reasons set forth in the court of appeals dissent).

Appellants argue that respondent's conduct was barred by an implied prohibition against surveillance officers placing their feet on work desks, and as such, the personal comfort doctrine does not permit respondent to recover. Respondent contends that his action of stretching comes within the ambit of the personal comfort doctrine, and thus, his resulting injuries are compensable.

In the administrative proceeding, appellants produced several written statements from surveillance officers that generally stated that the act of putting ones feet on a desk while working was incompatible with the job duties of a surveillance officer. Conduct that is prohibited, expressly or impliedly is unreasonable and not within the course and scope of employment. Cf. id. The appeals officer's order states that there was no written policy prohibiting respondents conduct and that hence, the written statements were not found to be relevant or persuasive.

Appellants contend that the appeals officer erred in concluding that the lack of a written prohibition against placing feet on a desk was dispositive as to whether that conduct was prohibited and thus erroneously concluded that respondent's conduct could be considered part of respondent's work duties. Respondent argues that the appeals officer reached this conclusion within her discretion after weighing the statements against the lack of a written policy to determine whether an implied prohibition existed as a matter of fact. See Bob Allyn Masonry v. Murphy, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) (holding that findings of fact reviewed for substantial evidence).

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In its decision, the appeals officer does not reveal whether she concluded that the written statements were relevant or persuasive. The written statements are relevant, however, as to whether there was an implied prohibition against surveillance officers placing their feet on their work desk while on duty at the time of the underlying accident. NRS 48.015 (providing that evidence is relevant if it tends to make the existence of any fact more or less probable). If, in fact, such an implied prohibition existed, then as a matter of law, respondent's conduct that precipitated his injuries was unreasonable and outside of the course and scope of his employment, the injuries did not arise out of his employment, and they are not compensable. See Arp, 563 S.E.2d at 69-71; see also 2 Larson & Larson, supra, § 21.08, 21-53 to 21-56.

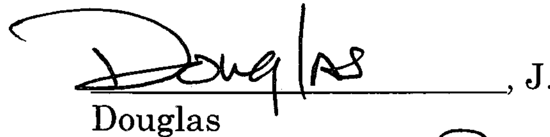
Because we cannot determine whether the appeals officer considered the written statements and found that they did not establish the existence of an implied prohibition, or disregarded them outright as irrelevant, we are unable to determine whether the appeal officer's finding that respondent's conduct was not barred by an implied prohibition was supported by substantial evidence. See Desert Valley Constr. v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, 741 (2004) (defining substantial evidence).

CONCLUSION

In the absence of factual findings demonstrating that the appeals officer properly considered the written statements, we conclude the appeals officer abused her discretion in reaching the conclusion that respondent's conduct was within the course and scope of his employment and that the injuries arose out of his employment. Accordingly, we reverse the district court's order denying judicial review, and we remand this matter with instructions that the district court, in turn, remand the matter to the appeals officer. On remand, the appeals officer shall

determine whether respondent faced an increased risk under Phillips, and if so, whether respondent's conduct was covered by an implied prohibition.[2]

It is so ORDERED.



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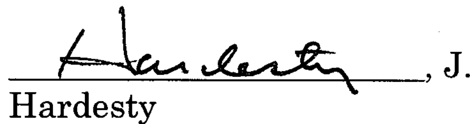

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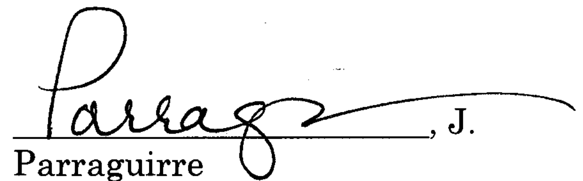

_________________________, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Carolyn Worrell, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Nevada Attorney for Injured Workers/Las Vegas
Eighth District Court Clerk

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[2]Because we conclude that reversal is warranted, we do not address appellants' remaining arguments.