IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS,
Appellant,
vs.
MALLORY WARBURTON,
Respondent.

No. 55883

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Timothy C. Williams, Judge.

This case arose from a workers' compensation claim filed by respondent Mallory Warburton after she was involved in a car accident. Warburton was working for appellant, the City of North Las Vegas (the City), as a pool manager of Walker Pool. Due to vandalism and break-ins at some of the City's pools, Warburton's supervisor asked her and other City employees to check on their pools when they were off duty. On the day of the accident, Warburton left Walker Pool to pick up new work uniforms and her paycheck at Hartke Pool, another City pool. After leaving Hartke Pool, Warburton was involved in a car accident. Although Warburton's memory of what happened after she left Hartke Pool is vague due to the seriousness of the car accident, she testified that she was "extremely confident" that she was going to check on Walker Pool before traveling home because if she was going straight home, she would have taken a different route. While traveling from Hartke Pool to check on Walker Pool, another driver crossed into Warburton's lane of travel going the wrong direction, and hit Warburton head-on. Warburton suffered numerous injuries, including the amputation of her foot at the ankle.

When the City refused Warburton's workers' compensation claim alleging that her injuries did not arise out of and in the course of her employment under NRS 616C.150(1), Warburton filed an administrative appeal pursuant to the Nevada Administrative Procedure Act, codified in NRS Chapter 233B. Although the hearing officer affirmed the City's decision, an appeals officer reversed, and directed the City to compensate Warburton for her injuries. The City then filed a petition for judicial review with the district court, which the district court denied. This appeal followed.

When deciding an appeal from an administrative decision, this court must "review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." Jourdan v. SIIS, 109 Nev. 497, 499, 853 P.2d 99, 101 (1993). Although legal questions are reviewed de novo, "an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." Id. "Substantial evidence is that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Id. (alteration in original) (quotation omitted). Because the administrative appeals officer's determination that Warburton's injuries arose out of and in the course of her employment is a conclusion of law closely related to the facts of the case, that decision is entitled to deference. Based on that deference, and because substantial evidence supports the appeals officer's decision, we affirm the district court's denial of the City's petition for judicial review.

NRS 616C.150(1) requires an injured employee's employer to compensate the employee so long as the employee can "establish by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment." (Emphases added.) Whether an injury "arose out of" and "in the course of" employment are two distinct requirements, and the employee must prove each. See MGM Mirage v. Cotton, 121 Nev. 396, 400-01, 116 P.3d 56, 58 (2005).

Warburton's injuries "arose out of" her employment

To show that an injury "arose out of" employment, an employee "must demonstrate 'a causal connection between the injury and the employee's work' in which 'the origin of the injury is related to some risk involved within the scope of employment.'" Bob Allyn Masonry v. Murphy, 124 Nev. 279, 283, 183 P.3d 126, 129 (2008) (quoting Mitchell v. Clark County Sch. Dist., 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). Additionally, Nevada has adopted a "street-risk rule": "when an employee is required to use streets and highways to carry out employment duties, those streets and highways are considered the workplace. Thus, if an employee's injuries are caused by a risk associated with traveling the streets and highways, those injuries 'arise out of' employment." Bob Allyn, 124 Nev. at 284, 183 P.3d at 129-30 (citation omitted). Under the "street-risk rule," "an injury is compensable so long as '(1) the employee's duties . . . require . . . [a] . . . presence upon the public streets,' and (2) the 'injury arose from an actual risk of that presence upon the streets.'" Id. at 285, 183 P.3d at 130 (alterations in original) (quoting Marketing Profiles, Inc. v. Hill, 425 S.E.2d 546, 548 (Va. Ct. App. 1993)).

In this case, the evidence demonstrates that Warburton's supervisor asked employees to check on their pools when they were nearby to make sure the pools were secure, which would require Warburton's

presence upon the public streets. See id. Additionally, a car accident is an actual risk of the employee's presence on the streets.[1] Id. Therefore, substantial evidence supports the appeals officer's decision that Warburton's injuries arose out of her employment with the City.

Warburton's injuries arose "in the course of" her employment

When an employee sustains an injury outside of his or her work hours or off the employer's premises, "Nevada looks to whether the employee is in the employer's control in order to determine whether an employee is acting within the scope of employment." MGM Mirage, 121 Nev. at 399, 116 P.3d at 58; see also Bob Allyn, 124 Nev. at 286, 183 P.3d at 131. This equates to "a 'going and coming' rule, precluding compensation for most employee injuries that occur during travel to or from work." MGM Mirage, 121 Nev. at 399, 116 P.3d at 58. However, Nevada has recognized exceptions to the going and coming rule. Bob Allyn, 124 Nev. at 287, 183 P.3d at 131. In this case, the district court did not specify what exception to the going and coming rule applied, but we conclude that three exceptions apply and, therefore, substantial evidence supported the appeals officer's determination that Warburton's injuries arose in the course of her employment. We will discuss each exception in turn.

---

[1]An example of what would not constitute an "actual risk" of driving on the streets and highways would be if the employee had a medical condition that suddenly interfered with the employee's ability to drive. See Bob Allyn Masonry v. Murphy, 124 Nev. 279, 286 & n.25, 183 P.3d 126, 131 & n.25 (2008).

The special errand exception

The first exception to the going and coming rule that applies in this case is the special errand exception.

> Under the special errand exception, injuries that are normally exempted from coverage on the ground that they did not arise in the course of employment are brought within the scope of coverage if they occur while the employee is in transit to or from the performance of an errand outside the employee's normal job responsibilities.

Bob Allyn, 124 Nev. at 287, 183 P.3d at 131; see also National Convenience Stores v. Fantauzzi, 94 Nev. 655, 658, 584 P.2d 689, 692 (1978). In this case, Warburton, other employees, and a supervisor testified that City employees were asked to check on the pools when they were nearby. Additionally, the route Warburton took demonstrated her intent to check on Walker Pool, rather than drive directly home after leaving Hartke Pool.[2] Therefore, substantial evidence supports the conclusion that Warburton was on a special errand, making her injuries compensable.

---

[2]This court cannot substitute its judgment regarding an agency's findings of fact "'absent a showing that [the findings] are against the manifest weight of the evidence.'" Jourdan v. SIIS, 109 Nev. 497, 499, 853 P.2d 99, 101 (1993) (quoting Southwest Gas v. Woods, 108 Nev. 11, 15, 823 P.2d 288, 290 (1992)). Because a map was submitted into the record that supports Warburton's claim that she would not have driven past Walker Pool if she was traveling straight home from Hartke Pool, the appeals officer's and the district court's finding that Warburton was driving past Walker Pool to check on it when the accident occurred was not against the manifest weight of the evidence, and we will not disturb it.

The distinct benefit exception

Another exception to the going and coming rule is the distinct benefit exception,[3] which provides that an employee may still recover for injuries sustained during travel to and from work if the employee "was subject to his employer's control and was furthering his employer's business." Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 635, 877 P.2d 1032, 1035 (1994). There is substantial evidence that Warburton's supervisor requested that she drive by and check on Walker Pool when she was not working, evincing employer control. Additionally, checking on the pool is a benefit only to the City, and not to Warburton. Therefore, the distinct benefit exception applies and is a valid basis for the appeals officer's decision.

The dual-purpose journey exception

The third exception that is applicable is the dual-purpose journey exception, which requires the employee to show "that the business nature of an excursion be bona fide." D & C Builders v. Cullinane, 98 Nev. 67, 70, 639 P.2d 544, 546 (1982). Substantial evidence shows that Warburton's supervisor asked her and other employees to check on their pools when they were nearby, demonstrating the bona fide business nature of Warburton's trip from Hartke Pool to Walker Pool.

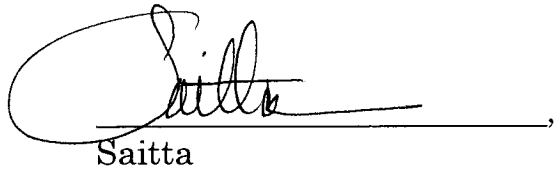
Based on the above, we conclude that substantial evidence supports the appeals officer's decision to reverse the hearing officer's

---

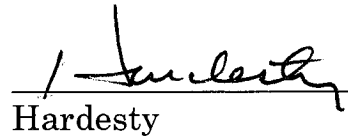
[3]In the appeals officer's decision, one of the findings stated that "[t]he Employer received a distinct benefit from having its Pool Managers check on the swimming facilities after hours."

denial of Warburton's workers' compensation claim.[4] Therefore, the district court did not err in denying the City's petition for judicial review. Accordingly, we

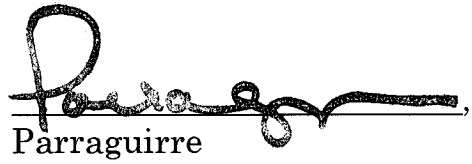
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Timothy C. Williams, District Judge
Janet Trost, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Law Office of James R. Cox
Eighth District Court Clerk

[4]The City also argues that Warburton failed to prove her case. This is the same argument as whether substantial evidence supported the appeals officer's decision, and thus we conclude that Warburton did prove her case.