IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES SAMUEL,
Appellant,
vs.
COX COMMUNICATIONS; AND BROADSPIRE SERVICES,
Respondents.

No. 66216

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

In this case we must determine whether substantial evidence supports an appeals officer's denial of a claim for workers' compensation where an employee of respondent Cox Communications was injured in a car accident that occurred on an access road adjacent to Cox's employee parking lot. Appellant James Samuel was travelling to work at Cox's call center facility as a passenger in a co-worker's car. Samuel sustained bodily injury when a third-party's car struck the co-worker's car. Samuel was not on the clock when he was injured; however, he was wearing his work uniform and ID badge. The accident report stated both drivers were at fault; the customer failed to yield right of way, and the co-worker was driving too fast under the conditions.

Respondent insurer Broadspire Services denied Samuel's workers' compensation claim. A hearing officer affirmed the denial and an appeals officer affirmed the hearing officer's decision. The appeals officer

relied on the "going and coming" rule to deny the claim, and concluded: (1) Samuel was not on Cox's premises at the time of the accident; (2) Cox had no control over Samuel at the time of the accident; and (3) Cox had no control over the driver of either vehicle at the time of the accident. The district court summarily denied Samuel's petition for judicial review.

Samuel now appeals the district court's decision. On appeal, Samuel argues substantial evidence does not support the appeals officer's decision and that because he was acting under Cox's control and conferring a benefit on Cox when he was injured, his injury falls under an exception to the going and coming rule. We disagree.

This court reviews an administrative agency's decision to determine whether the agency acted arbitrarily or capriciously and thus abused its discretion. *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008). The threshold question we address is whether the agency's decision is based on substantial evidence. *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993). This court will not substitute its judgment for that of an administrative agency's decision regarding questions of fact; however, we review questions of law de novo. *Murphy*, 124 Nev. at 282, 183 P.3d at 128.

Pursuant to NRS 616C.150(1), an employee must show "by a preponderance of the evidence that the employee's injury arose out of and

in the course of his or her employment" to receive workers' compensation. The Nevada Supreme Court has embraced the going and coming rule, whereby "'injuries sustained by employees while going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment,' unless the injuries fall under an exception to the rule." *MGM Mirage v. Cotton*, 121 Nev. 396, 399, 116 P.3d 56, 57-58 (2005) (quoting *Nev. Indus. Comm'n v. Dixon*, 77 Nev. 296, 298, 362 P.2d 577, 578 (1961)).

Since the parties do not dispute that Samuel was injured on the access road outside Cox's employee parking lot, we conclude Samuel was injured while traveling to work. Therefore, the general going and coming rule applies. *See MGM Mirage*, 121 Nev. at 396, 116 P.3d at 57-58. However, Samuel asserts his injury falls within an exception to the rule.

Samuel relies on the exception to the going and coming rule discussed in *Evans v. Southwest Gas Corp.*, 108 Nev. 1002, 842 P.2d 719 (1992). In *Evans*, the court reviewed a school bus driver's injury caused by an on-call service technician while the technician was driving home in an employer-owned vehicle. *Evans*, 108 Nev. at 1006, 842 P.2d at 721. The court concluded the technician was within the course of employment because he was under the employer's control and was conferring a benefit by responding to customers' emergencies and providing security of the vehicle. *Id.*

However, Samuel's reliance on *Evans* is misplaced. The exception in *Evans* does not apply in this case because Samuel was not acting under Cox's control or conferring a benefit on Cox when he sustained his injuries. Unlike the employee in *Evans*, who was an on-call and tasked with responding to emergencies, Samuel owed no responsibilities to Cox while traveling to work. Simply because Samuel was dressed in his work clothes and wearing his ID badge does not suggest the type of employer control contemplated by *Evans*. Therefore, Samuel's injury does not fall within this exception.[1]

Samuel also relies on *Murphy* to contend his injury falls within the "actual street-risk" exception to the going and coming rule. Samuel's reliance on *Murphy* is also misplaced. In *Murphy*, the court adopted the actual street risk exception and stated "[w]hen an employee is required to use the streets and highways to carry out his employment obligations, the risks of those streets and highways are thereby converted to risks of employment." 124 Nev. at 286, 183 P.3d at 130. In contrast to *Murphy*, Cox did not task Samuel with a duty requiring him to use the streets and highways; instead, Samuel's employment duties were carried

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[1]Samuel also misapplies *Tighe v. Las Vegas Metro. Police Dep't.*, 110 Nev. 632, 635-36, 877 P.2d 1032, 1035-36 (1994) (holding the exception in *Evans* applied to law enforcement officers where an undercover narcotics officer was injured while driving home in a police vehicle because the officer was under the department's control and was prepared to respond to emergencies).

out entirely within Cox's call center facility. Therefore, this exception does not apply.

Finally, Samuel relies on *McTaggart v. Time Warner Cable*, 16 P.3d 1154 (Or. App. Ct. 2000) to assert the parking lot rule adopted in *MGM Mirage* should be extended to include an area over which the employer exercises control. 16 P.3d at 1157. In *Mctaggart*, the court concluded the employer exercised such control over a slope outside its premises that the parking lot rule should be extended to encompass the slope as well. *Id.* at 1157. However, the appeals officer's finding that Cox did not exercise control over the access road is supported by substantial evidence in the record. Therefore, we decline to extend the parking lot rule.

Accordingly, we conclude substantial evidence supports the appeals officer's application of the going and coming rule, and, as a result, the district court properly denied judicial review. Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Valorie J. Vega, District Judge
Janet Trost, Settlement Judge
Benson, Bertoldo, Baker & Carter, Chtd.
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk