

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MCCORMICK BARSTOW, LLP,
Appellant,
vs.
IRENE DUBINSKY,
Respondent.

No. 65871

FILED

SEP 16 2015

TRACIE K. LINDEMAN
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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; J. Charles Thompson, Judge.

Respondent Irene Dubinsky worked as a legal secretary for appellant McCormick Barstow, LLP. When returning to her desk after making photocopies one day, Dubinsky tripped over a banker's box that was on the floor next to her desk and injured her ankle. The box was not flush against her desk, but rather, was pushed out so that one corner was sticking out into the walkway between her desk and the desk area adjacent to hers. Dubinsky stated that she did not see the box prior to tripping over it because she was coughing as a result of a lingering illness. Dubinsky later filed a claim for workers' compensation, which McCormick Barstow denied.

Dubinsky appealed the denial of her claim to a workers' compensation hearing officer, but the denial was affirmed. Dubinsky again appealed, and an appeals officer overturned the hearing officer's decision, determining that Dubinsky's injury was compensable because she had established, by a preponderance of the evidence, that her injury

arose out of and in the course of her employment. Specifically, the appeals officer found that the presence of the box was a work-related risk, that if the box had not been on the floor, Dubinsky would not have tripped over it—"cough or no cough"—and that Dubinsky was working in her capacity as a legal secretary at the time she tripped. McCormick Barstow timely filed a petition for judicial review of the appeals officer's decision. The district court denied McCormick Barstow's petition, finding that the appeals officer's decision was supported by substantial evidence, and this appeal followed.

In reviewing administrative decisions, this court's primary function is to determine whether the appeals officer's decision was arbitrary or capricious and thus an abuse of discretion. NRS 233B.135(3); *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993). We review an administrative officer's factual findings for clear error or arbitrary abuse of discretion and will not overturn findings supported by substantial evidence. *City of N. Las Vegas v. Warburton*, 127 Nev. ___, ___, 262 P.3d 715, 718 (2011). Substantial evidence is that which a reasonable person may accept as adequate to support an appeals officer's decision. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009).

On appeal, McCormick Barstow contends that it was Dubinsky's cough that caused the fall, not the box, and thus asserts that Dubinsky failed to meet her burden of proving that her injury "arose out of and in the course of . . . her employment." NRS 616C.150(1) (describing when an employee is entitled to receive workers' compensation for her injury). McCormick Barstow argues that the cough was personal to Dubinsky, and not a workplace defect, and thus her injury is not

compensable. Dubinsky responds that the box, not the cough, caused her injury, and that substantial evidence supports the appeals officer's decision. The parties do not dispute that the injury occurred during the course of Dubinsky's employment, and thus, we must only address whether the injury arose out of her employment. *See id.*

We conclude that substantial evidence supports the appeals officer's decision that Dubinsky's injuries were caused by a work-related risk. *See Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2010) (“[D]etermining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment.”). Here, the record provides uncontroverted evidence that there was a box on the floor sticking out from next to Dubinsky's desk into an area she walked through regularly and that Dubinsky tripped over that box. As the *Phillips* court pointed out, “[s]lips and falls that are due to employment risks ‘include tripping on a defect at employer's premises.’” *Id.* at 351, 240 P.3d at 5 (quoting *Ill. Consol. Tel. Co. v. Indus. Comm'n*, 732 N.E.2d 49, 53 (Ill. App. Ct. 2000) (Rakowski, J., specially concurring)).


Thus, the appeals officer properly determined that the box constituted a work-related risk. *Id.* And because the injury was caused by a work-related risk, the appeals officer correctly found Dubinsky's injury to be compensable under NRS 616C.150(1). *See Phillips*, 126 Nev. at 351, 240 P.3d at 5 (providing that injuries caused by work-related risks that are found to arise out of employment are generally compensable).


McCormick Barstow is correct in asserting that Dubinsky was coughing at the time she tripped and that coughing could be viewed as a non-compensable, personal risk that ultimately caused her injury. *See id.*


(recognizing that injuries caused by personal risks, such as a bad knee or multiple sclerosis, are not compensable). But the appeals officer weighed the evidence presented and determined that, regardless of whether she was coughing or not, Dubinsky would not have tripped if the box had not been sticking out from the area next to her desk. And on appeal, we will not substitute our judgment for that of the appeals officer as to questions of fact. *See Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1088 (2008) (“[The appellate court] may not substitute [its] judgment for that of the appeals officer as to the weight of the evidence on a question of fact.”).

Based on the forgoing analysis, we conclude that the appeals officer’s decision was not arbitrary or capricious and thus does not constitute an abuse of discretion. NRS 233B.135(3); *United Exposition Serv.*, 109 Nev. at 423, 851 P.2d at 424. Accordingly, we conclude that the district court properly denied the petition for judicial review, and we therefore affirm that determination.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Richard A. Harris, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Greenman Goldberg Raby & Martinez
Eighth District Court Clerk