IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK PALARDY,
Appellant,
vs.
SUNSET STATION/STATION CASINOS, INC.; AND YORK RISK SERVICES GROUP, INC.,
Respondents.

No. 65504

ORDER OF AFFIRMANCE

Appeal from a district court order granting a petition for judicial review in a worker's compensation matter. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

RELEVANT FACTS AND PROCEDURAL HISTORY

Respondent Sunset Station employed Palardy as an executive chef responsible for overseeing quality and enforcing cost controls at all food outlets within the Sunset Station Hotel and Casino. Palardy was a salaried employee and normally worked from approximately 9:00 a.m. to 10:30 or 11:00 p.m.

Toward the end of his shift on a Friday night, Palardy was conducting a business meeting in his office with Sean Cooper and Kenneth Baima, two other Sunset Station employees. Palardy's version of what transpired during that meeting differs from the description given by Cooper and Baima. According to Palardy, he was sitting at his desk when, for no apparent reason and without provocation, Cooper came around the desk and placed Palardy in a headlock. Palardy turned his body and tried to get out of the headlock, but was spun around until his body hit the back wall and a bookcase. The incident ended when Palardy tapped Cooper's arm and asked him to let go.

On the other hand, Baima and Cooper claim that during the meeting Palardy made a remark about the Marine Corps (of which Cooper is a former member), Cooper retorted, and the two started pushing each other. When Palardy "lunged" at Cooper, Cooper placed Palardy in a headlock. Once Palardy said he was done, Cooper released Palardy, the two hugged, and they returned to their seats and continued the meeting.

Cooper and Baima also recount a second incident, entirely denied by Palardy, that occurred a few minutes later when Baima and Palardy walked to another office to obtain P&L reports. Palardy allegedly made a comment to Baima about Baima's high food costs and gave Baima a nudge, to which Baima responded with a nudge of his own. Palardy then pushed Baima in the chest, and Baima pushed Palardy back. Cooper heard bickering from across the hall and went to the other office where he saw Palardy try to grab Baima's hips and Baima respond by taking a step back and putting Palardy in a headlock. While in the headlock, Palardy held Baima by the waist and pushed Baima into a bookcase. Cooper, who was now standing in the doorway near the bookcase, caught a framed picture that fell from the top of the bookcase. Cooper tapped both Palardy and Baima on the shoulder and told them to stop. Palardy and Baima broke apart, shook hands, and turned their attention back to the P&L reports.

Palardy did not report any incident to his supervisor before leaving to go home that night. Baima believes he told his supervisor about the alleged second incident the following day, but he did not file any kind of report.

All of the witnesses agree that the type of physical contact described by the three men was not a normal occurrence in their workplace, but there is no indication that the incidents were malicious.

When Palardy arrived home later that night, his wife noticed scratch marks on Palardy's jaw, neck, and side, as well as some bruises on his arm, ribs, and back. For the next two days, Palardy was sore, had headaches, and on at least one occasion experienced shortness of breath.[1] In the morning on the third day after the incident, Palardy collapsed while jogging and appeared to be having a stroke. Palardy was taken by ambulance to Southern Hills Hospital and then transferred that same day to Sunrise Hospital, where he was ultimately hospitalized and treated for an "acute right middle cerebral artery territory infarct secondary to embolus from a focal dissection of the right internal carotid artery, likely acquired secondary to traumatic injury to his neck while wrestling." Palardy would later testify that he had no prior history of stroke or other health conditions, such as high blood pressure or high cholesterol.

Unable to return to work, Palardy filed to obtain worker's compensation benefits for his injury. His claim was denied by Respondent York Risk Services Group, Inc., and Palardy appealed to an appeals officer. After a hearing, the appeals officer entered her Decision and Order reversing the claim denial, concluding that Palardy established by a preponderance of the evidence that his stroke was caused by the dissection

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[1]Although Palardy reported being tired and sore the morning after the incident, he went to work as scheduled and completed his shift. Palardy's direct supervisor thought he looked "hung-over," but Palardy otherwise seemed fine and appeared able to perform his normal duties. Palardy was not scheduled to work on the second or third days after the incident.

of his right internal carotid artery, that the headlock into which Palardy was placed caused the dissection, and that the injury arose out of and in the course of his employment.

Sunset Station and York (collectively, "Respondents") filed a Petition for Judicial Review with the district court, arguing that Palardy did not present sufficient evidence to establish that the dissection of his carotid artery arose from the horseplay incident, and, even if Palardy met his burden, the appeals officer erred as a matter of law by concluding that Palardy's injury arose out of and in the course of his employment. The district court granted Respondents' petition, finding that "there is insufficient evidence to support the appeals officer's Decision that [Palardy's] condition resulted from horseplay at work," and noted that "there was no reported injury on the day of the horseplay."[2] This appeal followed.

ANALYSIS

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. ___, ___, 312 P.3d 479, 482 (2013). Therefore, this court is limited to the record before the agency and cannot substitute its judgment for that of the agency on issues concerning the weight of the evidence on questions of fact. *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008). This court reviews an administrative agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence.

[2]Because the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

NRS 233B.135(3)(e), (f); *Elizondo v. Hood Mach., Inc.*, 129 Nev. at ___, 312 P.3d at 482. In addition, although this court reviews purely legal issues de novo, we will ordinarily defer to an agency's conclusions of law that are closely related to the facts if they are supported by substantial evidence. *Elizondo v. Hood Mach., Inc.*, 129 Nev. at ___, 312 P.3d at 482; *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005).

On appeal, Palardy argues that the district court erred by reversing the appeals officer's decision because: 1) the appeals officer's conclusion that Palardy's stroke was caused by the horseplay is supported by substantial evidence; and 2) the appeals officer correctly held that Palardy's injury arose out of and in the course of his employment. Although we agree that the appeals officer's conclusion that Palardy's stroke was caused by the horseplay is supported by substantial evidence, we conclude that the appeals officer erred in holding that Palardy's injury arose out of and in the course of his employment.[3] Thus, for the reasons set forth herein, we affirm the district court's order. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. ___, ___, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

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[3]Palardy asserts that this court should not consider whether the appeals officer erred by concluding that his injury arose out of and in the course of his employment because the district court granted Respondents' petition for judicial review based solely upon its finding that there was insufficient evidence to support the appeals officer's conclusion that Palardy's injury resulted from the horseplay. However, because this court is in the same position as the district court and we give no deference to the district court's decision, our review is not limited to those matters addressed in the district court's order. *See Elizondo v. Hood Mach., Inc.*, 129 Nev. at ___, 312 P.3d at 482.

The appeals officer's conclusion that there is a causal connection between the horseplay and Palardy's stroke is supported by substantial evidence.

"Substantial evidence is that evidence 'which a reasonable mind might accept as adequate to support a conclusion.'" *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 603-04, 939 P.2d 1043, 1045 (1997) (quoting *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). Thus, "[a]n award of compensation cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993). Instead, "[a] testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." *Id.*

For example, in *United Exposition Service Co. v. State Industrial Insurance System*, the Nevada Supreme Court held that the medical opinion of the employee's treating physician who, by letter, stated, "It is my belief that the accident (work-related) possibly could have been the precipitating factor in [the employee's] illness," was insufficient to support the hearing officer's conclusion that there was a causal connection between the industrial injury and the employee's need for heart surgery. 109 Nev. at 424, 851 P.2d at 423. On the other hand, in *McClanahan v. Raley's, Inc.*, the Nevada Supreme Court held that the appeals officer's decision was supported by substantial evidence where two doctors concluded that the employee's condition was idiopathic and not related to his industrial injury, but two other doctors concluded that the employee's condition was the result of his industrial injury. 117 Nev. 921, 925, 34 P.3d 573, 576 (2001). In short, "so long as the preponderance of the

evidence would lead a reasonable mind to conclude that a causal nexus exists, the evidence supporting an appeals officer's decision in Nevada need not be conclusive, and may even be conflicting." *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 562, 188 P.3d 1084, 1091 (2008).

Here, the appeals officer found that "the medical records from Southern Hills Hospital and Dr. Shao-Pow Lin establish by a preponderance of the evidence that Mr. Palardy's stroke was caused by a traumatic injury to his right internal carotid artery." Further, the appeals officer noted that, absent any evidence to support a finding that Palardy's stroke was caused by a pre-existing condition or that the stroke was caused by any other activities, "the doctor's conclusion regarding the 'likely' cause of the dissected internal carotid artery being the 'wrestling' activity that was described to them is sufficient to establish by a preponderance of the evidence that the headlock into which Mr. Palardy was placed on September 16, 2011 caused the dissection, which caused the eventual stroke on September 19, 2011." We conclude that the appeals officer's findings in this regard are supported by substantial evidence.

In particular, the appeals officer received evidence indicating that Dr. Lin concluded Palardy suffered an "acute right middle cerebral artery territory infarct secondary to embolus from a focal dissection of the right internal carotid artery, likely acquired secondary to traumatic injury to his neck while wrestling." Likewise, Dr. Milford wrote that "[i]t has been determined that the CVA that [Palardy] had was not predisposed, rather caused by dissection of the right MCA. It was not caused by a pre-existing condition." Moreover, Dr. Bangalore identified three possible causes, one of which was the dissection of Palardy's carotid artery as a result of trauma. There was no evidence presented at the hearing tending

to show that Palardy's stroke was caused by any pre-existing condition or that some other activity could have caused the internal carotid artery dissection.

Further, the only evidence presented to rebut Dr. Lin's conclusion is the Form C-4, in which Dr. Harrington — who briefly treated Palardy at Southern Hills Hospital before Palardy's transfer to Sunrise Hospital, and who did not have any information regarding the horseplay incident at the time of treatment — answered the question, "From information given by the employee, together with medical evidence, can you directly connect this injury or occupational disease as job incurred?" by checking the "No" box. Accordingly, the appeals officer's decision was not based "solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. at 424-25, 851 P.2d at 425. Therefore, the district court erred by reversing the appeals officer's decision on the ground that "there is insufficient evidence to support the Appeals Officer's Decision that [Palardy's] condition resulted from horseplay at work." *See* NRS 233B.135(3)(e), (f); *Bob Allyn Masonry v. Murphy*, 124 Nev. at 282, 183 P.3d at 128.

The appeals officer erred by concluding that Palardy's injury is compensable.

Under NRS 616C.150(1), an injured employee is not entitled to receive worker's compensation unless the employee establishes by a preponderance of the evidence that the injury "arose out of and in the course of his or her employment." "[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005). On

the other hand, "[a]n accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work." *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 604, 939 P.2d 1043, 1046 (1997). Therefore, the injured employee "must establish a link between the workplace conditions and how those conditions caused the injury," and "demonstrate that the origin of the injury is related to some risk involved within the scope of employment." *Id.* The focus is not on "whether conditions personal to the claimant caused an injury, but on whether the cause of an injury is sufficiently connected to a risk of employment." *Mitchell v. Clark Cty. School Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005). "If an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of the claimant's employment." *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046.

In analyzing whether an employee's injury arose out of his or her employment, the Nevada Supreme Court has held that courts must first determine the type of risk faced by the employee. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2010). "The types of risks that an employee may encounter during employment are categorized as those that are solely employment related, those that are purely personal, and those that are neutral." *Id.* at 351, 240 P.3d at 5 (internal quotation marks and citations omitted). Injuries arising from purely personal risks (i.e. those that are so clearly personal that they could not possibly be attributed to the employment) are not compensable, whereas injuries arising from employment-related risks (i.e. the obvious kinds of injuries that are clearly industrial, such as tripping on a defect at the employer's premises) are generally deemed to arise out of employment

and are, therefore, compensable. *Id.* When the injury arises from a neutral risk — a risk that is "of neither distinctly employment nor distinctly personal character" — the court applies the increased-risk test. *Id.* at 351, 353, 240 P.3d at 6-7.

> Under the increased-risk test, an employee may recover if she is subjected to a risk greater than that to which the general public is exposed. Even if a risk to which the employee is exposed is not *qualitatively* peculiar to the employment, the injury may be compensable as long as she faces an increased *quantity* of a risk. Thus, when an employee is exposed to a common risk more frequently than the general public, there may be an increased risk.

Id. at 353, 240 P.3d at 7 (internal citations and quotation marks omitted) (emphasis in original). "The key inquiry is whether the risk faced by the employee was greater than the risk faced by the general public." *Id.* at 354, 240 P.3d at 7.

Here, without applying the analysis required by *Phillips*, the appeals officer found that "there is a link between Mr. Palardy's workplace conditions and how those conditions caused his injury," and concluded that Palardy's injury arose out of and in the course of his employment. However, applying *Phillips*, we conclude that the appeals officer's determination is not supported by substantial evidence. *See Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. at 283, 112 P.3d at 1097 ("While we independently review purely legal determinations, the appeals officer's fact-based conclusions of law are entitled to deference and will not be disturbed if they are supported by substantial evidence"). Even assuming, *arguendo*, that Palardy was acting within the course of his employment and that the underlying horseplay incident is properly classified as a neutral risk (the best case scenario for Palardy), the appeals officer's

findings do not support a conclusion that the nature of Palardy's employment as an executive chef subjected him to an increased risk of injury from wrestling horseplay. In particular, with respect to Palardy's working conditions, the appeals officer found that Palardy's job duties required him to be at work for long, irregular hours in various locations on the Sunset Station property and to participate in meetings with co-workers regarding food and beverage service.[4] But the fact that Palardy was required to work long hours and participate in meetings with co-workers does not support a conclusion that Palardy's employment increased his risk of injury from wrestling horseplay. Because Palardy's injury is not fairly traceable to the nature of his employment or the workplace environment, we conclude that the appeals officer erred by holding that Palardy's injury is compensable under NRS 616C.150. *See Gorsky*, 113 Nev. at 604, 939 P.2d at 1046.[5]

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[4]The appeals officer also found that "there is no evidence to support a finding that the conduct in which Mr. Palardy, Mr. Cooper, and Mr. Baima were engaged was unusual"; however, this finding is not supported by substantial evidence, as both Baima and Palardy testified that such physical interactions were not a normal occurrence.

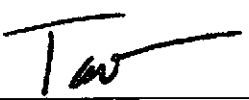
[5]Although many states have adopted one of the horseplay-specific approaches described in Professor Larson's worker's compensation treatise, *see* 2 Larson's Workers' Compensation Law § 23 (2014), the parties do not cite (and our own research does not reveal) any Nevada authority specifically addressing whether or under what circumstances an injury arising from horseplay at work is compensable.

CONCLUSION

Having considered the parties' arguments and reviewed the record on appeal, we conclude that the district court reached the correct result, albeit for the wrong reason. We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Janet Trost, Settlement Judge
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Eighth District Court Clerk