IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VINCENT HAYNES,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND CCMSI,
Respondents.

No. 80384-COA

FILED

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Vincent Haynes appeals a district court order denying his petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Haynes is a police officer employed with the Las Vegas Metropolitan Police Department (LVMPD).[1] In October 2016, Haynes was participating in "MAC TAC training."[2] Haynes alleges that during this training he was running with his gun belt on when his holstered baton spun and dug into his left thigh. Ten days after the incident, Haynes went to a quick care clinic. Dr. Tran diagnosed Haynes with a left thigh contusion and directed modified work duty.

Haynes went back to the quick care clinic on two separate occasions. During the first visit, Haynes was seen by Dr. Karajohn, who also diagnosed Haynes with a left thigh contusion and directed modified work duty. During his second visit, Dr. Karajohn recommended an MRI

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[1]We recount the facts only as necessary for our disposition.

[2]MAC TAC training is described as training intended to drill officers on how to properly respond to dangerous situations like a terrorist attack or an active shooter.

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and an orthopedic referral for the injury. The doctor again directed modified work duty. Haynes filed a claim for workers' compensation.

The administrator later denied Haynes's workers' compensation claim, which Haynes then appealed. In a subsequent checkup, Dr. Harb commented that Haynes had a "[h]istory of trauma related neuropathic pain [on] his left side[;] the pain mainly in the anterior aspect but [Haynes] says it extends laterally, EMG study showed lateral femoral cutaneous nerve neuropathy in the left side." Dr. Harb noted that "P.T still going" and "[h]is pain is bad again, as if not treated."

This matter came on for hearing before the appeals officer. Haynes, his supervisor, Sergeant Ransom Beza, and a co-worker, Officer Ian Fouquet testified. Haynes testified that he was running toward cover when the baton spun on his belt and became vertical, which caused it to dig into his thigh.[3] Haynes did not identify any force that could have caused the baton to move in that manner.

Beza testified that the baton holder in question is standard issue and can be positioned at different angles on the belt. He explained that you have to use quite a bit of force to get it to move and in the twelve years that he has worn that utility belt, with a similarly situated baton, he had never had the baton rotate on its own. Fouquet testified that the baton is not easily clicked out of position and that he has "been in wrestling matches before and it hasn't moved around."

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[3]Haynes described the maneuver in question. He testified that he took a jab-step toward a small cover position located in front of him. He then began to run to a large cover position located on the left side of the training location. The baton swiveled and struck him after he took about four steps toward the large cover position.

Haynes also testified that when struck by the baton, he "immediately stopped." Haynes stated that the training instructor and Beza ran over to Haynes to ask if he was OK. However, Beza explicitly testified that Haynes's version of events did not happen. Beza stated that he observed the maneuver that Haynes described but claimed that no one approached Haynes nor did Haynes limp or stop during the maneuver. Beza testified that after Haynes completed the exercise, he appeared to take a limp step when jogging toward Beza's position off the course. At that point, Beza asked Haynes if he was okay and Haynes replied that he was. After that, Beza observed the training exercises but did not see Haynes limping. Additionally, Fouquet testified that he did not observe anything unusual about Haynes on the day of the alleged incident.

Beza testified that the first time he heard about the injury was after they all had completed training and returned to area command. It was at that point that Haynes texted Beza, informing him of his left leg pain. Haynes told Beza that he could no longer work that day because he hurt his leg with his baton while jogging. Beza completed the "Employer's Occupational Injury/Illness/Exposure Report." In it, he noted that "it is unknown how this could have happened" as "the baton on his belt does not interfere with the movement of his legs. The baton sits out of the way."

The appeals officer issued a written decision and order affirming the claim denial. The appeals officer found—after considering the testimony of the witnesses, the documentary evidence, and photographs—that Haynes had failed to establish that his left thigh injury occurred during the course and scope of his employment.

The appeals officer explained that the case came down to witness credibility. As such, the appeals officer determined that "(a) Sgt.

Beza was credible, (b) Officer Fouquet was credible and (c) the claimant's version of the facts was refuted by the credible testimony of the other officers. Thus, the appeals officer [found] that the claimant's version of how he was injured was unsupported by the credible evidence."

The appeals officer noted that Haynes's testimony, regarding Beza's response immediately after the incident, was inconsistent with the testimony of the other witnesses. Further, the evidence established that force was needed to rotate the holstered baton and there was no evidence that such a thing occurred. The evidence also established that the baton did not extend and the photographs showed that the baton was not long enough to reach the point of the alleged injury unless it was extended. The appeals officer concluded that the administrator's determination was supported by substantial evidence and denied Haynes's workers' compensation claim.

Haynes filed a motion for reconsideration that the LVMPD opposed and the appeals officer denied. Haynes then filed a petition for judicial review that the district court denied. Specifically, the court concluded that the appeals officer's decision was based on substantial evidence, there was no clear error, and there was no legal error. The court noted that a decision by an appeals officer based upon the credibility of the petitioner and other witnesses is not open to appellate review.

On appeal, Haynes contends that the district court erroneously affirmed the appeals officer's decision and order denying compensation because Haynes (1) satisfied the requirements for claim compensability under NRS 616C.150 and (2) testified credibly.

"Like the district court, we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion." *Law Offices*

of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008) (citations omitted). Purely legal issues are reviewed de novo, but "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." *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Substantial evidence is defined as "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4). "We may not substitute our judgment for that of the appeals officer as to credibility determinations or the weight of the evidence on a question of fact. Our review is limited to the record before the appeals officer." *Dickinson v. Am. Med. Response*, 124 Nev. 460, 466, 186 P.3d 878, 882 (2008).

In order for an injury to be compensable under workers' compensation, the injured employee must establish by a preponderance of the evidence that the injury arose out of and in the course of his or her employment. NRS 616C.150(1). This is a two-prong inquiry. *MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005). The first prong asks whether the injury occurred in the course of employment. *Id.* Generally, "whether an injury occurred in the course of employment refers merely to the time and place of employment, i.e., whether the injury occurs at work, during work hours, and while the employee is reasonably performing his or her duties."[4] *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032

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[4]Haynes argues that his injury occurred in the course of his employment. We do not separately address this issue as we conclude that the appeals officer relied upon substantial evidence in finding the "arising out of" prong was not met. Because the worker would need to satisfy both prongs, which are based upon the same facts in this case, a failure to meet one prong necessarily means the other prong was also not satisfied in this case.

(2005) (citing *Murphy v. Indus. Comm'n. of Ariz.*, 774 P.2d 221, 225 (Ariz. 1989)).

The second prong asks whether the injury arose out of employment. *MGM Mirage*, 121 Nev. at 400, 116 P.3d at 58. "An 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) (citing *Murphy*, 774 P.2d at 224). 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.* "[I]f 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." *Id.*

First, Haynes claims that the district court erroneously affirmed the appeals officer's decision because he satisfied the requirements for claim compensability pursuant to NRS 616C.150.[5] Under the second prong, Haynes argues that his injury arose out of an employment-related risk, specifically the holstered baton he was required to wear during MAC TAC training. Haynes claims that he has established a causal connection between the injury and his work because the mechanism of injury has been consistently described by Haynes and every examining physician.

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[5]The appeals officer found that Haynes had not met the requirements of NRS 616C.150 as he had failed to establish that his left thigh injury occurred during the course and scope of his employment. The appeals officer did not separately address both prongs. We interpret "course and scope" to mean that the appeals officer found that one or both of the "arising out of" and "course of employment" prongs were not met but we are addressing only the second prong in this order even when we state the combined finding of the appeals officer.

"An 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, 851 P.2d 423, 425 (1993). In order to show that an injury arose out of employment, "[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.* at 424-25, 851 P.2d at 425. In *United Exposition*, the appellant, in bringing his workers' compensation claim, relied on the medical opinion of his treating physician. *Id.* at 424, 851 P.2d at 425. In a letter, the physician provided the court with his medical opinion. *Id.* The letter stated, "[i]t is my belief that the accident (work-related) possibly could have been the precipitating factor in [appellant's] illness." *Id.* The supreme court concluded that this opinion was too speculative and held that the appellant had failed to present sufficient medical testimony or facts needed to support a determination that the injury arose out of his employment. *Id.* at 425, 851 P.2d at 425.

Here, Haynes points to several documents to support his claim that the holstered baton was the cause of his left leg contusion. In the forms generated from Haynes's November 2016 and July 2017 physician visits, the alleged incident is listed under the "HISTORY" heading. In the C-4 form from his October 2016 physician visit, the incident is listed under a section of the form that the patient himself filled out. These procedures suggest that these forms are stating the information Haynes provided to the physicians during his visits. There is no explicit statement of the physicians' opinions as to the cause of injury nor any mention of a reasonable medical probability. Thus, this medical evidence is insufficient

to establish that Haynes's injury arose out of any risk associated with his employment.

Further, Haynes has not provided sufficient facts to allow the trier of fact to reasonably conclude that Haynes's leg contusion was caused by the holstered baton in light of the credibility determinations. The evidence before the appeals officer actually showed that the injury probably did not arise from employment in the manner Haynes alleged. The appeals officer determined that Haynes's version of events and description of the mechanism of injury was refuted by the credible testimony of the other officers. *See Dickinson*, 124 Nev. at 466, 186 P.3d at 882 (stating we cannot substitute our judgment for that of the appeals officer as to credibility determinations).[6] She further determined that force was needed to rotate the holstered baton and that Haynes had failed to demonstrate that such a thing occurred. She also found, based on photographs of Haynes and his belt setup, that the baton could not reach the location of the injury since it did not extend. These determinations are supported by the evidence. Thus, substantial evidence supports the appeals officer's finding that Haynes's did not meet his burden to prove that the injury occurred during the course and scope of employment. *See Rio Suite Hotel & Casino*, 113 Nev. at 604, 939

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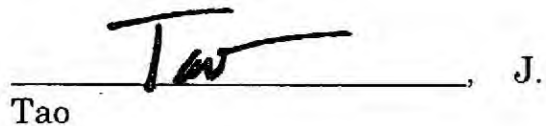
[6]In his reply brief, Haynes asserts that it was unnecessary to weigh witness credibility when he had satisfied the requirements for claim compensability. We need not consider this argument because it was raised for the first time in appellant's reply brief. *See Weaver v. State Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 199 (2005) (explaining that this court need not consider issues raised for the first time on appeal in appellant's reply brief). Nevertheless, we note that credibility determinations are vital in cases like this one, where there was no video of the incident and there was conflicting testimony.

P.2d at 1046 (providing there must be a causal connection between the injury and work).

Thus, the appeals officer's decision that Haynes was not injured in the course and scope of employment was based on substantial evidence, there was no clear error, and there was no abuse of discretion. Therefore, we conclude that the district court properly denied Haynes's petition for judicial review. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Gibbons, C.J.



Tao, J.

Bulla, J.

cc: Hon. Kenneth C. Cory, District Judge
Greenman Goldberg Raby & Martinez
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk