IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EPLICA CORPORATE SERVICES; AND BROADSPIRE SERVICES,
Appellants,
vs.
JOY LANGLEY,
Respondent.

No. 83563-COA

FILED

AUG 17 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Eplica Corporate Services and Broadspire Services appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

On June 7, 2018, Joy Langley was injured on the job while working as an employee of Eplica, a temporary staffing agency.[1] On that particular day, Langley was assigned to work at the Las Vegas Convention Center as a bus ambassador. As a bus ambassador, she greeted passengers, ensured that the conditions were safe for passengers to enter and exit the bus, and provided passengers with other visitor information. To fulfill her job duties, Langley had to walk up and down three to four steps each time she entered or exited a bus, which she did every time passengers entered or exited at their destination.[2] While climbing up the stairs of a bus on June 7, Langley's right foot slipped, and she felt her right knee twist. She sought

[1]We do not recount the facts except as necessary for our disposition.

[2]We note that our review of the record has revealed some inconsistency as to whether Langley greeted every bus as it arrived at the Las Vegas Convention Center, or whether she instead was stationed on a single bus and traveled with that bus from destination to destination.

medical treatment and was diagnosed with a right knee sprain. Approximately one week later, she was also diagnosed with a right hip sprain. Langley filed a workers' compensation claim for her injuries, but Eplica's third-party administrator, Broadspire Services, denied her claim. Langley appealed the denial of her claim, and a hearing officer reversed the administrator's determination. Thereafter, Eplica and Broadspire Services appealed the hearing officer's decision to the appeals officer.

At the hearing before the appeals officer, Langley testified about her duties as a bus ambassador and stated that she had filled in as a bus ambassador "dozens of times." Langley also explained what had occurred at the time of her slip. She testified that when she slipped, she was not holding any items in her hands and that she was holding a handrail. Langley also confirmed that all the passengers and the driver had to enter the bus using the same stairs that she was required to use. During closing argument, Langley's counsel argued that Langley had to use the bus stairs more frequently than the general public such that her injuries occurred directly as a result of her employment.[3] Eplica's attorney countered that the record failed to indicate how many times Langley worked as a bus ambassador or how many times Langley walked up and down the bus stairs during her shifts, facts critical to establishing that her use of the stairs placed her at greater risk for injury than the general public.

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[3]*See Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 240 P.3d 2 (2010) (discussing the analysis for determining whether an injury arose out of one's employment). As discussed in greater detail below, *Phillips* requires injuries resulting from neutral risks to be analyzed under the "increased-risk test," which compares the risk faced by the injured claimant to that faced by the general public.

The appeals officer affirmed the hearing officer's decision and awarded Langley workers' compensation benefits. In the order, the appeals officer concluded that "the instant action should not be analyzed under *Phillips*." Specifically, the appeals officer concluded the following:

> Regardless of the number of times the public got on and off the bus via the steps is of no consequence because climbing those steps was essential to Ms. Langley performing her job duties. In other words, but for her performing her job duties she would not have suffered the injury.

Further, the appeals officer concluded that under Nevada law, "if the employee is injured on stairs or steps and that injury occurred while the employee was performing the job duties, [then] the injury is compensable."[4]

Subsequently, appellants timely filed a petition for judicial review. The district court affirmed the appeals officer's decision, concluding that it was supported by substantial evidence and the correct legal standards were applied. This appeal followed.

On appeal, appellants contend that it was an error of law when the appeals officer (1) concluded an injury was compensable merely because an employee was injured on the stairs while performing his or her job duties; (2) concluded the increased-risk test described in *Phillips* was inapplicable; and (3) applied the positional-risk test.[5] Further, appellants argue that under the required increased-risk analysis, Langley has not met her burden demonstrating a compensable injury.

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[4]We note that the appeals officer failed to cite to any authority in support of this proposition.

[5]Specifically, appellants are referring to the portion of the appeals officer's decision and order that states "but for [Langley] performing her job duties she would not have suffered the injury."

In turn, Langley concedes that the appeals officer improperly deviated from the rules set forth in *Phillips* and that any reference to a positional-risk analysis constitutes legal error. Langley urges us to nevertheless affirm the appeals officer decision as it ultimately is the correct result, despite the fact the appeals officer incorrectly deviated from *Phillips*. Specifically, Langley argues that the appeals officer was presented with sufficient evidence to support a finding of compensability under the increased-risk test. We agree with appellants that the legal errors committed by the appeals officer warrant reversal, and on remand, the appeals officer must conduct the appropriate analysis in the first instance.

As a preliminary matter, "[w]e review an administrative agency's decision in the same manner as the district court." *Clark County v. Bean*, 136 Nev. 579, 581, 482 P.3d 1207, 1209 (2020) (*as amended* on December 30, 2020)). Factual findings are reviewed "for clear error or an arbitrary abuse of discretion, only overturning if they are not supported by substantial evidence." *Id.* Substantial evidence exists when "a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* (quoting *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013)). However, "[q]uestions of law, including the agency's interpretation of statutes, are reviewed de novo without deference to the agency's decision." *Id.*; *see also* NRS 233B.135 (providing standards and procedures for the judicial review of a final decision of an agency). Finally, in our review of an agency's decision, this court does "not give any deference to the district court decision." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

To receive workers' compensation benefits under the Nevada Industrial Insurance Act, an injured employee must "establish by a

preponderance of the evidence that the employee's injury arose out of *and* in the course of his or her employment." NRS 616C.150(1) (emphasis added). We need only address the first prong—*i.e.*, whether the appeals officer correctly analyzed whether Langley's injury arose out of her employment—as it is not contested on appeal that Langley's injury occurred in the course of her employment.

"An injury is said to arise out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005). "[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." *Phillips*, 126 Nev. at 350, 240 P.3d at 5 (emphasis added). There are four types of risk that an employee might encounter while at work: (1) employment-related risks; (2) personal risks; (3) neutral risks; and (4) mixed risks. *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600-01, 426 P.3d 586, 590-91 (2018) (defining the types of risks and providing examples).

Here, the appeals officer incorrectly determined that the instant action need not be analyzed under *Phillips*. We read the type of risk analysis under *Phillips* to be a necessary threshold inquiry in determining whether a risk is in fact compensable. *See Phillips*, 126 Nev. at 350, 240 P.3d at 5 (stating this analysis is an "important first step"); *see also Durst v. Silver State Cultivation, LLC*, No. 81393-COA, 2022 WL 500611, at *4 (Nev. Ct. App. Feb. 17, 2022) (Order of Reversal and Remand). Under the *Phillips* analysis, Langley faced a neutral risk, as the bus stairs were not defective, they did not have any kind of foreign substance on them, and Langley did not suffer from any known disease or internal weakness that

would cause her to fall. *See Phillips*, 126 Nev. at 351, 240 P.3d at 6 (defining neutral risks as "those that are of neither distinctly employment nor distinctly personal character" (internal quotation marks omitted)).

The appropriate analysis for determining whether an injury resulting from a neutral risk is compensable under Nevada's workers' compensation scheme is the increased-risk test under *Phillips*. *See id.* at 352, 240 P.3d at 6 (adopting the increased-risk test as the "single test to be applied when determining whether an injury caused by a neutral risk arose out of employment" (internal quotation marks omitted)). Under the increased-risk test, "[t]he 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. On remand, the appeals officer will be required to apply the increased-risk test, in the first instance, to determine whether Langley was at an increased risk of injuring herself on the bus steps compared to the risk encountered by the general public.[6]

To the extent that the appeals officer relied on the positional-risk test for determining compensability, any such reliance was made in

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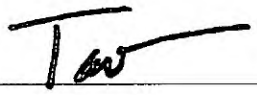
[6]We are not persuaded by Langley's argument that the appeals officer reached the correct result albeit for the wrong reason, based on her assertion that there was sufficient evidence to conclude her injury was compensable pursuant to the increased-risk analysis. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 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."). The factual record is too limited for us to make such a determination, due in part to an unintelligible transcript. Therefore, on remand, additional fact finding will likely need to be conducted to properly apply the increased-risk analysis, such as, inter alia, how frequently Langley works as a bus ambassador, the length of Langley's shifts, and the number of times Langley climbs up and down the bus stairs during a shift.

error.[7] The Nevada Supreme Court has made clear "that a positional-risk test is incompatible with the Nevada Industrial Insurance Act." *Mitchell*, 121 Nev. at 183, 111 P.3d at 1106-07 ("Because the positional-risk test reduces the claimant's burden and requires only a showing that the claimant sustained an injury on the job, it directly contravenes the language of NRS 616C.150."); *see also Phillips*, 126 Nev. at 352, 240 P.3d at 6 (expressly rejecting the positional-risk test).

Therefore, we conclude that the district court improperly denied appellants' petition for judicial review. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter with instructions that the district court, in turn, remand the matter to the appeals officer for further proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao

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[7]Under the positional-risk test, "the administrative tribunal must resolve whether the claimant would have been injured *but for* the fact that the conditions and obligations of the employment placed the claimant in the position where he was injured." *Mitchell v. Clark Cty. Sch. Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005) (internal quotation marks omitted). Here, the appeals officer concluded that "but for [Langley] performing her job duties she would not have suffered the injury." Such language is reminiscent of the disfavored positional-risk test.

cc: Hon. Tara D. Clark Newberry, District Judge
Janet Trost, Settlement Judge
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