IN THE SUPREME COURT OF THE STATE OF NEVADA

INTERSTATE BRANDS CORP.,
Appellant,
vs.
JOHN FLEISCHMANN,
Respondent.

No. 39677

FILED

DEC 0 8 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order affirming an administrative appeals officer's determination that John Fleischmann is entitled to workers' compensation benefits.

Fleischmann, a salaried sales representative for Interstate Brands Corp., was seriously injured in an automobile accident. He remained in a coma for three months. It was unclear whether Fleischmann was working when the accident occurred. Fleischmann's wife filed a workers' compensation claim when she learned that Fleischmann may have been on a call back for Albertsons' Mae Ann store when he was injured. Interstate denied the claim, stating that it was untimely and that Fleischmann was not working when the accident occurred. Fleischmann appealed. The parties agreed to have the matter heard before an appeals officer. The appeals officer reversed the claim denial because she found that the claim was timely and that Fleischmann was acting within the scope of his employment. Interstate petitioned for district court review. The district court affirmed the appeals officer's decision.



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"We must determine whether the appeals officer's final decision was based on substantial evidence."[1] We review questions of law de novo.[2] "[A]n injured employee must file both a notice of injury and a claim for compensation in order to receive benefits."[3] The notice of injury must be filed within seven days after the accident.[4] The claim for compensation must be filed within ninety days after the accident.[5] An injured employee or his dependent is barred from receiving compensation if the employee fails to file a timely notice of injury or claim for compensation.[6] However, the Legislature has carved out several exceptions to this rule.[7]

Interstate argues that the appeals officer erred when she determined that Fleischmann's claim was timely filed. Interstate concedes that Fleischmann was unable to file a claim within the statutory timeframe since he was in coma. Rather, Interstate argues that Fleischmann's wife was required to file a timely claim on her husband's behalf.

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[1]McClanahan v. Raley's Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001).

[2]SIIS v. Giles, 110 Nev. 216, 218, 871 P.2d 920, 921 (1994).

[3]Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 546, 2 P.3d 850, 853 (2000) (emphasis omitted); NRS 616C.025(1).

[4]NRS 616C.015(1).

[5]NRS 616C.020(1).

[6]NRS 616C.025(1); NRS 616C.030.

[7]NRS 616C.025(2).

We conclude that the appeals officer's decision is not affected by an error of law and is based on substantial evidence. Fleischmann was clearly excused from filing a timely notice of injury or compensation claim because he remained in a coma for three months after his accident.[8] Fleischmann's wife had no statutory duty to notify Interstate that his accident may have been work-related or file a compensation claim on his behalf.[9] Despite not having a duty, Fleischmann's wife hired an attorney and requested that Interstate open a workers' compensation case after she discovered that Fleischmann may have been working when the accident occurred. Interstate also received notice within the ninety-day statutory timeframe that Fleischmann's wife was seeking workers' compensation benefits on his behalf. However, Interstate failed to respond or notify Fleischmann's wife that she needed to complete a compensation form.

We will uphold an administrative agency's decision if supported by substantial evidence.[10] Appellate review is limited to the record before the agency.[11] "'Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion.'"[12]

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[8]See NRS 616C.025(2)(a),(c).

[9]See NRS 616C.015 and NRS 616C.020 (neither statute imposes an affirmative duty on an injured employee's spouse to file a workers' compensation claim).

[10]Ayala v. Caesars Palace, 119 Nev. ___, ___, 71 P.3d 490, 491 (2003).

[11]Id.

[12]Id. at ___, 71 P.3d at 491-92 (quoting SIIS v. Montoya, 109 Nev. 1029, 1032, 862 P.2d 1197, 1199 (1993)).

Interstate argues that substantial evidence does not support the finding that Fleischmann was driving to Albertsons' Mae Ann store to perform a call back when he was injured. We conclude that Interstate's assertion lacks merit.

During Fleischmann's morning delivery, Thomas Washington, the director of Albertsons' Mae Ann store, asked Fleischmann to deliver additional bread products to his store. Fleishmann said that he would attempt to locate additional products. Washington and other Albertsons employees testified that Fleishmann was very reliable, trustworthy and responsive to their product needs. When Fleischmann attempted to acquire additional products for a client store, his normal habit was to physically return to the store and either deliver the requested products or inform the store's management that he was unable to acquire more products. Fleischmann habitually performed call backs after he completed his morning deliveries if a store requested additional products. He wore his Wonder Bread uniform when he performed call backs so that people would know he was a sales representative. On days without call backs, Fleischmann would change out of his uniform and into workout clothing before he left the depot. He would then proceed to a nearby gym and exercise for two hours. He was unable to perform a call back and exercise in the same day because he picked up one of his children from school at 2 p.m.

Charlotte Balzar, the receiving clerk for Albertsons' Oddie store, testified that Fleischmann went to her store around noon on the day of the accident. She remembered that it was around noon because she left the store at 12:30 p.m. The Albertsons' Oddie store is located not far from the depot. Fleischmann was dressed in his Wonder Bread uniform and

driving westbound on Interstate 80 toward Albertsons' Mae Ann store when the accident occurred. Substantial evidence supports the appeals officer's finding that Fleishmann was driving to Albertsons' Mae Ann store to perform a call back when he was injured.

"An exception exists [to the going and coming rule] whereby an employee on some 'special errand,' although not during usual working hours, may nevertheless be considered within his scope of employment and under control of the employer."[13]

Interstate claims Fleischmann should be precluded from recovery because his accident occurred after he had "clocked out" for the day and the special errand exception does not apply. We conclude that Interstate's argument lacks merit.

As a salaried service representative, Fleischmann often performed call backs after his regular work shift, on his days off, and on holidays. He performed call backs to keep his store clients satisfied, which ultimately benefited Interstate. Although Fleischmann's bargaining unit contract stated that service representatives must work five days per week only, the record indicates that call backs are a common industry practice. Interstate knew that Fleischmann performed call backs and did not discourage him from doing so. In fact, Interstate allows service representatives to use its delivery trucks to perform call backs. Interstate was also aware that service representatives usually perform call backs in their personal vehicles. The record includes sufficient evidence for the

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[13]National Convenience Stores v. Fantauzzi, 94 Nev. 655, 658, 584 P.2d 689, 692 (1978) (quoting Boynton v. McKales, 294 P.2d 733, 740 (Cal. App. 1956)).

appeals officer to conclude that Fleischmann's accident occurred during a special errand for Interstate.[14]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Kay Ellen Armstrong
Carson City Clerk

[14]See id.