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Summary of Rio All Suite Hotel & Casino v. Phillips, 126 Nev. Adv. Op. No. 34

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Rio All Suite Hotel & Casino v. Phillips, 126 Nev. Adv. Op. No. 34
(Sept. 30, 2010)[1]
WORKERS' COMPENSATION

Summary

Rio All Suite Hotel & Casino ("Rio") and a third-party administrator appealed to district court a finding that Kathryn Phillips ("Phillips"), a Rio employee who fractured her ankle on a staircase during the course of her employment, was entitled to workers' compensation. The district court entered an order denying Rio's petition for judicial review. At issue is the standard applied to determine whether an employee seeking workers' compensation benefits has demonstrated that her injury "arose out of" her employment under NRS 616C.150(1) when her injury was caused by a neutral risk.

Disposition/Outcome

In situations in which an employee's injury is caused by a neutral risk – that is, a risk that is neither personal to the employee nor solely employment-related – the Supreme Court adopts the increased-risk test, which evaluates whether the employee was exposed to a risk greater than that faced by the general public. In the instant case, because the frequency with which Phillips was required to use the stairs subjected her to a greater risk of injury than the risk faced by the general public, the Supreme Court affirmed the district court's order.

Factual and Procedural History

Phillips worked at Rio as a poker and blackjack dealer. In October 2006, whilst taking a mandatory 20-minute break during her usual eight-hour shift, Phillips injured her ankle when walking down the stairs to the employees' break room. She did not slip or fall down the stairs; Phillips merely "twisted over" and fractured her ankle on her descent. Phillips did not allege the stairs were defective or cluttered with debris. She filled out a workers' compensation form the next day.

In November 2006, Rio's third-party administrator denied Phillips' claim because she did not prove by a preponderance of the evidence that her injury arose out of the course of her employment, pursuant to NRS 616C.150(1). Phillips requested a hearing from the Nevada Department of Administration, Hearings Division. The hearing officer affirmed Rio's third-party administrator, citing the Nevada Supreme Court decision in *Mitchell v. Clark County Sch. Dist.*[2] Phillips appealed that decision and the appeals officer reversed it. The appeals officer distinguished *Mitchell* from Phillips' action because Phillips' injury did not result from an unexplained fall.

Rio and its third-party administrator petitioned for judicial review of the appeals officer's decision. The district court denied the petition for judicial review because the appeals officer's

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[2] 121 Nev. 179, 111 P.3d 1104 (2005).

decision did not violate NRS 233B.135(3). Rio and its third-party administrator appealed that decision to the Nevada Supreme Court.

Discussion

Under NRS § 616C.150(1), an 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." Rio disputes that Phillips' injury "arose out of" her employment.

The Court first interpreted the phrase "arose out of" in *Rio Suite Hotel & Casino v. Gorsky*.[3] In *Gorsky*, a casino employee fell while walking on a flat surface that was clear of debris. The Court concluded that the employee's injury failed the "arose out of" prong of NRS 616C.150(1) because his fall was the result of his multiple sclerosis. The Court held that "the Nevada Industrial Insurance Act is not a mechanism which makes employers absolutely liable for injuries suffered by employees who are 'on the job.'"[4] An employee must demonstrate a link "between the workplace conditions and how those conditions caused the injury.[5] Subsequently, in *Mitchell v. Clark County Sch. Dist.*, the Court affirmed *Gorsky*, finding no causal connection for Mitchell's injury when she could not explain how the conditions of her employment caused her to fall on a flat surface.[6]

The Court then categorized the three types of risk that an employee may encounter during employment: (1) those that are solely employment related; (2) those that are purely personal; and (3) those that are neutral.[7] Injuries resulting from employment related risks are the obvious kinds of work related injuries – such as falling on slippery grounds at a work site – and are generally compensable. Injuries that are purely personal are those that cannot possibly be attributed to the employment, such as those seen, *supra,* in *Gorsky* and *Mitchell*. Neutral risks are neither distinctly employment nor distinctly personal in nature. Here, Phillips injury falls within the neutral risk category.

To determine whether an injury from a neutral risk "arose out of" the employment, the Court analyzed three different tests used by courts in sister states. The first two tests, the actual-risk test and the positional-risk test, were quickly rejected. The Court reasoned that these two tests were very similar in language and application and resulted in outcomes inconsistent with the neutral construction of the Nevada Industrial Insurance Act by favoring employees and reducing the analysis of NRS § 616C.150(1) to a "but for" test.

Instead, the Court adopted the increased-risk test. This test allows an employee to recover if she proves her injury resulted from a risk "greater than that to which the general public [is] exposed."[8] Under this test, an injury resulting from a common risk may be compensable if the employee was exposed to this common risk more frequently than the general public. The

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[3] 113 Nev. 600, 939 P.2d 1043 (1997).
[4] *Id.* at 605, 939 P.2d at 1046
[5] *Id.* at 604, 939 P.2d at 1046.
[6] 121 Nev. at 182, 111 P.3d at 1106. (In *Mitchell*, an employee fell on a flat surface while walking toward a staircase, but could not explain the reason for her fall).
[7] Citing to K-Mart Corp. v. Herring, 188 P.3d 140, 146 (Okla. 2008).
[8] *Id.*

Court also noted that under this test, it does not matter whether the fall is explained or unexplained as long as the employee can show that she faced a greater risk than the general public. The Court found that this test balanced the rights of workers and the rights of employers and maintained neutrality in evaluating NRS § 616C.150(1).

Conclusion

Under the increased-risk test, Phillips injury "arose out of" the course of her employment. Phillips was required to take six periodic breaks during her eight-hour shifts. The only means of accessing the employee breakroom during these mandatory breaks required that Phillips traverse two-flights of stairs. Thus, while traversing stairs is not a particularly risky action, Phillips was subjected to the risk at a much higher frequency than the general public, and therefore her injury "arose out of" the course of her employment.