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Buma v. Providence Porp. Dev., 135 Nev. Adv. Op. 60 (Dec. 12, 2019)

E. Sebastian Cate-Cribari

Buma v. Providence Porp. Dev., 135 Nev. Adv. Op. 60 (Dec. 12, 2019)[1]

WORKERS COMPENSATION: TRAVELING EMPLOYEES

Summary

The court determined that the Nevada Industrial Insurance Act (NIIA) extends workers' compensation protections to traveling employees while they are on work trips. The court held that traveling employee cases will use a categorical approach, where workers' compensation is extended to traveling employees for injuries sustained during activity that can be considered an employment risk or a neutral risk which passes the increased risk test, but not to activities which are considered a personal risk. Activities considered a personal risk fall under the "distinct departure" exception, which requires that no compensation be given for injuries sustained during "personally motivated activities that take the traveling employee on a material deviation in time or space from carrying out the trip's employment-related objectives."

Background

Miller Heiman (Employer) employed Jason Buma (Employee) as VP of sales. Employer required the out of state travel, including annual trips to Texas. While in Texas, Employee stayed on a ranch owned by Michael O'Callaghan (Rancher), a friend and independent affiliate of Employer who worked with Employee on presentations for Employer's company. On his latest trip, Employee flew to Texas and drove to Rancher's ranch on a Sunday. Employee and Rancher had several presentations to prepare for, the first of which was the next morning. After 5:00 p.m. on Sunday, Employee and Rancher went on an ATV ride, as they had on past trips. While on this ride, Employee rolled his ATV and died at the scene.

Employee's survivors filed a workers' compensation claim for death benefits. Employer's third-party administrator investigated the incident and denied the claim. Employee's survivors appealed, but the hearing officer affirmed that the death occurred during activities not part of work duties. After a hearing officer affirmed the denial, Employee's survivors petitioned for judicial review. They now appeal the district court's denial of that request.

Discussion

II.

To gain workers' compensation under the NIIA, a party must show two things; "that the employee's injury arose out of and in the course of his or her employment."[2] First, they must show that the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties," then they must show that the injury arose "in the course of employment".[3] "An injury arises out of the employment 'when there is a causal connection between the employee's injury and the nature of the work or workplace.'"[4] Judicial review of

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[1] By E. Sebastian Cate-Cribari

[2] NRS 616C.150(1); *see* MGM Mirage v. Cotton, 121 Nev. 396, 400 (2005).

[3] NRS 616C.150(1); Baiguen v. Harrah's Las Vegas, LLC, 134 Nev. 597, 599 (2018) (quoting Wood v. Safeway, Inc., 121 Nev. 724, 733 (2005)).

[4] Baiguen, 134 Nev. 597, at 600.

this case is limited to the appeals officer's final written decision.[5] The court must affirm if the law was correctly applied and if the facts reasonably support the appealed decision.[6] The court reviews the appeals officer's view of the facts deferentially,[7] but decided questions of law, including statutory interpretations, de novo.[8]

In determining that Employee's injury occurred outside of the employment, the appeals officer applied the "going and coming rule", which precludes compensation for injuries that occur away from the workplace.[9] That general rule does not apply to traveling employees who necessarily work by traveling away from the workplace.[10] Under Larson's rule, traveling employees are under the course of employment during the entire trip, unless a "distinct departure on a personal errand is shown."[11] Employee's survivors argue that Employee's death occurred during his work mandated travel, and the ATV ride itself was not an unreasonable departure from his work. Employer argues that the ATV ride did not arise out of Employee's employment.

A.

NRS 616B612(3) does create a traveling employee rule. This rule highlights the rationale of workers compensation law: "that when travel is an essential part of employment, the risks associated with the necessity of … ministering to personal needs away from home are incident of the employment even though the employee is not actually working."[12] This rational can be reasonably extended to show that when employees are forced to be away from home, they must tend to personal needs like sleeping, eating, and reasonably entertaining themselves.[13]

The traveling employee doctrine cannot be extended to every injury that occurs on a work trip.[14] Several courts have reasoned that the traveling-employee question to that of general reasonableness.[15] However, this court has consistently held that, in order to recover workers' compensation under NIIA, an employee must show more than just being at work and suffering an injury.[16] Essentially, Larson's "distinct departure" exception is in line with Nevada's workers' compensation view on traveling employees.[17]

1.

To determine if an employee distinctly departed on a personal errand, the court must consider whether the employee was; "tending reasonably to the needs of personal comfort, or encountering hazards necessarily incidental to the travel or work" or, instead, "pursuing … strictly

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[5] NEV REV STAT. 616C.370(2).
[6] *See* NEV REV STAT. 233B.135; Bob Allyn Masonry v. Murphy, 124 Nev. 279, 282 (2008).
[7] NEV REV STAT. 233B.135(3).
[8] Star Ins. Co. v. Neighbors, 122 Nev. 773, 776 (2006).
[9] *See* Bob Allyn, 124 Nev. at 287 (alteration in original) (quoting MGM Mirage v. Cotton, 121 Nev. 396, at 399).
[10] 2 Arthur Larson et al., *Larson's Workers' Compensation Law* § 25.01, at 25–2 (2019).
[11] *Id.*
[12] Ball-Foster Glass Container Co. v. Giovanelli, 177 P.3d 692, 696 (Wash. 2008).
[13] *Id.* at 701; *see also*, 2 Arthur Larson et al., *Larson's Workers' Compensation Law* § 25.01, at 25–4 n.12 ("A motel is the place of employment of a traveling employee.") (internal quotation marks omitted).
[14] *See* Ball-Foster, 177 P.3d at 697.
[15] *See, e.g.*, Bagcraft Corp. v. Indus. Comm'n, 705 N.E.2d 919, 921 (Ill. App. Ct. 1998) (applying rule covering employees under workers' compensation throughout their work trips for all reasonable and foreseeable activities).
[16] *See* Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005).
[17] 2 Arthur Larson et al., *Larson's Workers' Compensation Law* § 25.01, at 25–2 (2019); *see* NEV REV STAT. 616B.612(3).

personal amusement ventures."[18] These considerations don't focus on the employee's travel status, but rather the nature of the activity causing injury and the purpose of the activity within the context of the trip.[19]

"The cases of distinct departures on personal errands tend to involve a personally motivated activity that takes the traveling employee on a material deviation in time or space from carrying out the trip's employment-related objectives." Thus, personal comfort activities only trigger the "distinct departure" exception when they are "so unusual and unreasonable that the act cannot be considered incidental to the course of employment."[20] An employee is not restricted to basic activities, like eating, resting, and seeking fresh air, to remain within the protection of the traveling employee rule.[21] However, if the activity is unreasonable under the totality of the circumstances, it may be considered a distinct departure on a personal errand.

2.

The Court determined that there are three categories of risk for all employee injuries under Nevada case law; employment risk, personal risk, and neutral risk.[22] Injuries that are sustained due to personal risks generally do not arise out of employment.[23] This court holds that this approach also applies to traveling employees, but risks necessitated by travel are to be considered employment risks. Neutral risks encountered by employees are compensable if they pass the increased risk test.[24]

Conclusion

The determinative question in this case was "whether [Employee]'s ATV outing *with his business associate/co-presented while on a business trip* amounted to a 'distinct personal departure on a personal errand.'" While the appeals officer did determine that the ATV ride was "clearly a distinct departure on a personal errand", that conclusion was influenced by ignorance that employees are under their employer's control for the duration of their business trip.[25]

While the appeals officer's decision might be proper, the case requires a full and fair proceeding using the correct application of law. Because it appears that incorrect legal principles guided the inquiry, this Court vacates the district court's order with instructions to remand the matter to a hearing for additional fact-finding, guided by the traveling employee rule and the distinct personal errands exception.

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[18] Ball-Foster, 177 P.3d at 697.

[19] LaTourette v. Workers' Comp. Appeals Bd., 951 P.2d 1184, 1188 (Cal. 1998).

[20] Ball-Foster, 177 P.3d at 700.

[21] *See e.g.*, CBS, Inc. v. Labor & Indus. Review Comm'n, 579 N.W.2d 668 (Wis. 1998) (Traveling employee entitled to compensation for injury sustained while skiing on his day off during a work trip to cover the Winter Olympic Games); Gravette v. Visual Aids Elecs., 90 A.3d 483 (MD. Ct. Spec. App. 2014) (Off-duty traveling employee entitled to compensation for injury sustained while dancing in a nightclub located in a hotel the employee was staying at for his employer's benefit); Proctor v. SAIF Corp., 860 P.2d 828, 830–31 (Or. Ct. App. 1993) (traveling employee entitled to compensation for injury sustained while playing basketball at a gym fifteen miles from conference center).

[22] *See* Baiguen, 134 Nev. at 600, 426 P.3d at 590 (citing Rio All Suite Hotel & Casino v. Phillips, 126 Nev. 346, 351–53, 240 P.3d 2, 5–7 (2010)).

[23] *See id.*

[24] *Cf*. Baiguen, 134 Nev. at 601.

[25] NEV REV STAT. 616B.612(3).