IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL PINA-SORIA,
Appellant,
vs.
CMS FACILITIES MAINTENANCE, INC. AND S & C CLAIMS SERVICES, INC.,
Respondents.

No. 55415

FILED

JUL 01 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant Miguel Pina-Soria, was a salaried employee of respondent CMS Facilities Maintenance, Inc., a mobile cleaning service company. Prior to the start of his 6 p.m. shift, Pina-Soria picked up work supplies at his employer's place of business and then went to exercise at a gym. After leaving the gym, Pina-Soria drove his personal vehicle towards a client's building, but was re-directed to another client's building by his supervisor, who contacted him on his company cell phone. Subsequently, before reaching the designated building, Pina-Soria sustained an injury in an automobile accident.

Pina-Soria sought workers' compensation benefits through CMS, but respondent S & C Claims Services, Inc., a third party claims administrator, denied Pina-Soria's claim under NRS 616C.150, which provides that "[c]ompensation is prohibited unless [a] preponderance of evidence establishes that injury arose out of and in [the] course of employment." Pina-Soria appealed to a hearing officer, who reversed the administrator by deciding that Pina-Soria met the preponderance of

evidence standard and by noting that an activity is related to employment if it carries out the employer's purposes or advances his interests directly or indirectly. The administrator then appealed to an appeals officer, who reversed the hearing officer by concluding that Pina-Soria did not meet the preponderance of evidence burden of proof that he was in the course and scope of his employment when the accident occurred. Pina-Soria petitioned for judicial review, but a district court denied the petition after concluding that Pina-Soria's memorandum of points and authorities was untimely and that Nevada's "going and coming rule" excluded Pina-Soria's claim because Pina-Soria was travelling to work when the accident occurred, and thus his injuries sustained in the accident neither arose out of nor occurred during the course of Pina-Soria's employment with CMS.

Pina-Soria now argues on appeal that the accident occurred within the scope of his employment with CMS, entitling him to workers' compensation. Pina-Soria urges this court to reverse the district court's denial of his petition for judicial review and to conclude that he is entitled to workers' compensation benefits. Because we conclude that Pina-Soria was not in the course and scope of his employment at the time of his accident, that the going and coming rule bars Pina-Soria's request for workers' compensation, and that no exception to the rule applies to Pina-Soria's claim, we affirm the district court's denial of his petition for judicial review.[1] The parties are familiar with the facts, and we do not recount them further here except as is necessary for our disposition.

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[1]CMS also suggests that NRS 233B.133 required the district court to deny Pina-Soria's petition for judicial review because Pina-Soria untimely filed his memorandum of points of authorities. This argument lacks merit

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DISCUSSION

Standard of review

When reviewing an administrative decision, "this court's role is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." Bob Allyn Masonry v. Murphy, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) (internal quotations omitted). This court limits its review to the record before the agency and does not substitute its judgment for that of the agency on issues regarding the weight of evidence on questions of fact. Id. This court reviews questions of law de novo. Id. Although pure legal questions may be decided "without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." Jourdan v. SIIS, 109 Nev. 497, 499, 853 P.2d 99, 101 (1993). "Substantial evidence is that quantity and quality of evidence which a reasonable

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. . . continued

because the district court has discretion to hear the petition despite Pina-Soria's failure to timely file his memorandum of points and authorities. See Fitzpatrick v. State, Dep't of Commerce, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) (stating that "if the petition for judicial review is timely filed, NRS 233B.133 allows the district court to accept a tardy memorandum of points and authorities in support of the petition"). We decline to resolve this appeal on procedural grounds, and instead elect to reach the merits of Pina-Soria's petition. See State, Dep't of Mtr. Vehicles v. Moss, 106 Nev. 866, 868, 802 P.2d 627, 628 (1990) (stating that "[p]olicy strongly favors deciding cases on their merits").

[person] could accept as adequate to support a conclusion." Id. (alteration in original) (internal quotations omitted).

Pina-Soria was not injured in the course and scope of his employment

Pina-Soria argues that his injury arose in the course and scope of his employment with CMS. We disagree.

NRS 616C.150(1) provides that "[a]n injured employee . . . [is] not entitled to receive compensation pursuant to [Nevada's Industrial Insurance Act] . . . unless the employee . . . establish[es] by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment." When determining whether an injury arose in the course of employment when it is sustained outside of the period of employment or off of the employer's premises, we consider whether the employee was in the employer's control. Bob Allyn, 124 Nev. at 286, 183 P.3d at 131.

In order "[t]o ensure that employers are not held liable for injuries sustained when an employee is outside of the employer's control, this court adopted the going and coming rule," which excludes "compensation for most employee injuries that occur during travel to or from work." Id. at 286-87, 183 P.3d at 131 (internal quotations omitted). This court recognizes multiple exceptions to this rule. Id. at 287, 183 P.3d 131. Specifically, under the special errand exception, injuries that are normally exempted from workers' compensation coverage because they did not arise in the course of employment "are brought within the scope of coverage if they occur while the employee is in transit to or from the performance of an errand outside the employee's normal job responsibilities." Id. Another exception exists where the employee is

conferring a distinct benefit on the employer. Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 635-36, 877 P.2d 1032, 1035 (1994).

Pina-Soria argues that his accident took place in the course and scope of his employment because (1) he was on call, (2) he carried a CMS cell phone, (3) he had often been called in the past to attend meetings and pick up supplies prior to work, and (4) CMS directed him to a different store by calling his CMS cell phone. Pina-Soria contends that he sustained his injury in the course of his work responsibilities and for the benefit of CMS. Pina-Soria asserts that the crux of the issue is whether CMS's call to Pina-Soria on his CMS cell phone, which required him to deviate from his route for the benefit of CMS, falls under an exception to the going and coming rule. Pina-Soria submits that this order constituted a special mission errand.

However, (1) Pina-Soria was not expected to work until he arrived at his job site, (2) his shift did not begin until 6 p.m., (3) Pina-Soria was driving from the gym to his first job site, (4) he was not paid compensation for his travel expenses, (5) he was not driving a company vehicle, and (6) it was his job to service different buildings as directed by CMS. Other than directing Pina-Soria to the building he was to clean, CMS exercised no control over Pina-Soria while he was travelling to and from work. We conclude that substantial evidence supports the determination that Pina-Soria was not in the course of his employment when he suffered an injury in the automobile accident on the way to work and that the going and coming rule barred Pina-Soria's claim for compensation. See Jourdan v. SIIS, 109 Nev. 497, 499-02, 853 P.2d 99, 101-03 (1993). For the same reasons, we also conclude that Pina-Soria meets no exception to the going and coming rule, because CMS did not

significantly control Pina-Soria at the time of the accident, Pina-Soria did not confer a special benefit on CMS by driving to the directed work site, CMS did not compensate Pina-Soria for his travel expenses, and the re-directed work site did not constitute a special mission. See Bob Allyn, 124 Nev. at 286-87, 183 P.3d at 131; Tighe, 110 Nev. at 635-36, 877 P.2d at 1034-35; Jourdan, 109 Nev. at 500-02, 853 P.2d at 101-03. We hold that the district court did not abuse its discretion in denying Pina-Soria's petition for judicial review. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Linda Marie Bell, District Judge
Persi J. Mishel, Settlement Judge
Benson, Bertoldo, Baker & Carter, Chtd.
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk