IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOEL DURST,
Appellant,
vs.
SILVER STATE CULTIVATION, LLC;
AND LIBERTY MUTUAL,
Respondents.

No. 81393-COA

ORDER OF REVERSAL AND REMAND

Joel Durst appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Durst, an employee of respondent Silver State Cultivation, LLC (Silver State),[1] was working his shift as a sales agent at Silver State Relief Cultivation, a cannabis dispensary, when he observed one of his coworkers seeking the assistance of their supervisor, Patrick Dolan, in handling an agitated customer.[2] The customer, Peter Lester, was upset about how a product was packaged and his voice was "getting louder and louder." Durst recalled that Lester was "being very, very boisterous," and that Dolan eventually told Lester, "[W]e can't help you and it's time for you to leave." Durst indicated that he believed "two people going out, to help a gentleman, to ask the gentleman to leave, [that] he would leave." Durst left his workstation and went to assist Dolan. At no point did Dolan instruct Durst

[1]We note that some of the documents in the record indicate that Durst's employer was Silver State Relief. For purposes of this order, we use the name of the company identified in the caption and refer to Durst's employer as Silver State.

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

to return to his workstation, or to allow Dolan to handle the customer himself. In a subsequent police report, Dolan stated "that we" escorted Lester from the premise, presumedly acknowledging Durst's involvement.

While Dolan and Durst were walking with Lester toward the exit, Lester in some way made physical contact with Dolan. Dolan proceeded to push Lester. Fearing for Dolan's safety, Durst placed Lester in a bear hug and together they moved toward a wall.[3] Lester used his legs to kick off from the wall, and both men fell backwards onto the floor. Immediately thereafter, it took four individuals—Dolan, another one of Durst's coworkers, and two customers—to drag Lester out of the dispensary. Durst was injured as a result of the fall, and he was transported to the hospital and underwent surgery the following day to repair a hip fracture. After investigation by law enforcement, no one was arrested, but a police report was forwarded to the Fernley City Attorney's office for review and consideration of charges of simple battery against Durst and Dolan. However, the record before us does not indicate that formal charges were ever filed against Durst and Dolan by the city attorney nor was anyone convicted.[4]

Durst timely filed a workers' compensation claim for his injuries, but Silver State's insurer Liberty Mutual denied his claim. Durst appealed the denial of his claim and a hearing officer reversed the insurer's

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[3]Our review of the surveillance video demonstrates that the time from Dolan pushing Lester to Durst beginning his bear hug was mere seconds.

[4]We note that the recommendation for a charge constitutes neither the existence of an actual charge, nor a conviction. *See generally* NRS 41.133. Further, following oral argument, we revisited the record and remain unable to confirm that Durst was actually charged with battery, despite respondents' arguments to the contrary.

determination because "[i]t appear[ed] the Claimant was assisting his supervisor with an irritated customer which ensued into an altercation wherein the Claimant was injured." Silver State and Liberty Mutual appealed the hearing officer's decision.

At the hearing before the appeals officer, Durst agreed, in response to a question, that he was "assisting [his] supervisor and getting the customer out of the store." Durst also testified that there were no security guards at his dispensary, unlike "every other dispensary [he has] been to in Northern Nevada." A one-page excerpt from the company policy contained a workplace violence prevention policy that provided, in part, "[i]f appropriate, call local law enforcement," and "[d]o not place yourself in peril." At the hearing, Durst confirmed that he was aware of a policy that required employees "to refrain from fighting, horseplay or other conduct that may be dangerous to others," that "conduct that threatens, intimidates or coerces another employee, a customer or member of the public" would not be tolerated, "[a]nd that all threats of actual violence, both direct and indirect should be reported as soon as possible" to one's supervisor.

The appeals officer issued a decision and order reversing the hearing officer's decision, thereby denying Durst's claim for industrial insurance benefits. The appeals officer provided several findings of fact in his order, including that (1) Durst "inserted himself into a situation with an unruly customer"; (2) Dolan was charged with simple battery; (3) Durst "escalated the situation from words into a physical altercation with the customer"; (4) Durst placed himself in peril when he grabbed Lester; and (5) "The weight of the evidence fails to support [Durst's] belief that the customer was about to punch Mr. Dolan. Nor was [Durst] required as part

of his work duties to render assistance had his belief that Mr. Dolan was about to be punched, been correct."

The appeals officer's findings in his conclusions of law section, following the overview of select applicable law, were brief:

> The Claimant's conduct, grabbing a customer and then placing that customer into a bear-hug was not with [sic] the Claimant's work duties. There is no evidence to support that Mr. Dolan was about to be punched, or that the Claimant was responsible for protecting Mr. Dolan, if his belief that Mr. Dolan was about to be punched was supported by the evidence.

The appeals officer ultimately concluded that Durst did not establish a compensable injury arising out of the incident. The appeals officer reversed the hearing officer's decision and affirmed Liberty Mutual's initial denial because Durst "failed to establish that he suffered an injury arising out of and in the course and scope of his employment on March 8, 2019." Durst timely filed his 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, Durst contends that the appeals officer made several errors of law or abused his discretion when he (1) misapplied the law for determining whether an injury "arose out of and in the course of" employment, NRS 616C.150(1); (2) inappropriately considered concepts such as fault, blame, and negligence; (3) mischaracterized evidence and made findings clearly not supported by the evidence; and (4) should not have admitted the one-page excerpt from the company policy on workplace violence prevention, as it was incomplete, unreliable, and lacked any foundation. Respondents argue that Durst's actions in grabbing Lester and

placing him in a bear hug were outside the course and scope of Durst's employment with Silver State, and therefore coverage for Durst's injury should be denied. Respondents also argue that it is not within the purview of this court to reweigh the evidence presented to the appeals officer and that the appeals officer properly applied the law. We agree with Durst that the appeals officer erred in applying the law in determining whether Durst's injury "arose out of" his employment with Silver State and whether he was acting "in the course of" his employment during the confrontation with Lester. We therefore reverse and remand with instructions that the district court remand the matter to the appeals officer for further proceedings.

As a preliminary matter, "[t]he standard for reviewing petitions for judicial review of administrative decisions is the same for [the appellate court] as it is for the district court." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). We review questions of law de novo, *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010), but we "shall not substitute [our] judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135(3). But we may reverse a final decision if the final decision of the agency was affected by an error of law, if it was "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," or if the decision was "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(e) & (f). Substantial evidence is "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4). Therefore, "[w]e defer to an agency's findings of fact as long as they are supported by substantial evidence." *Phillips*, 126 Nev. at 349, 240 P.3d at 4. In our review, this court does "not give any deference to the district court decision." *Warburton*, 127 Nev. at 686, 262 P.3d at 718.

To receive workers' compensation under the Nevada Industrial Insurance Act (NIIA), 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). "[T]he inquiry is two-fold." *MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) ("If an employee establishes that an injury occurred in the course of employment, she also must show that the injury 'arose out of' the employment."). Here, the appeals officer made the determination that Durst's injury did not satisfy the "arose out of" prong, after finding that Durst's conduct of "grabbing a customer and then placing that customer into a bear-hug" was not one of Durst's work duties and that no evidence supported Durst's belief that Dolan was about to be punched by Lester or that Durst was responsible for protecting his supervisor. The appeals officer summarily concluded that Durst had also not met his burden in establishing that his injury occurred "in the course of" his employment. We address each prong of the two-fold inquiry in turn.

"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). "[A] claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment." *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 604, 939 P.2d 1043, 1046 (1997). Thus, "if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of the claimant's employment," and "resolving whether an injury arose out of employment is examined by a totality of the circumstances." *Id.*

"[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 the employee might encounter while at work: (1) employment-related risks;[5] (2) personal risks;[6] (3) neutral risks;[7] and (4) mixed risks, which is when "a personal cause and an employment cause combin[e] to produce the harm." *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600-01, 426 P.3d 586, 590-91 (2018) (internal quotation marks omitted).

Employment-related risks are "generally compensable," whereas personal risks are not. *Phillips*, 126 Nev. at 351, 240 P.3d at 5. If the risk is neutral, courts should apply the increased-risk test, which asks "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. Finally, the "mixed risk arises out of the employment if the employment risk was a contributing factor in the injury." *Baiguen*, 134 Nev. at 601, 426 P.3d at 591. Thus, in this case, as a threshold matter, the appeals officer should have first identified the type of risk Durst faced when confronting Lester in order to determine

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[5]"Injuries resulting from employment-related risks are all the obvious kinds of injur[ies] that one thinks of at once as industrial injur[ies] . . . ." *Phillips*, 126 Nev. at 351, 240 P.3d at 5 (alterations in original) (internal quotation marks omitted).

[6]"Personal risks are those that are so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." *Phillips*, 126 Nev. at 351, 240 P.3d at 5 (internal quotation marks omitted).

[7]"[N]eutral risks are those that are of neither distinctly employment nor distinctly personal character." *Phillips*, 126 Nev. at 351, 240 P.3d at 6 (internal quotation marks omitted).

whether Durst's injury arose out of his employment. Despite the appeals officer's citation to *Phillips*, the appeals officer failed to identify the type of risk faced by Durst as required by *Phillips* in order to ascertain whether Durst's injury was compensable, a point respondents conceded at oral argument.[8]

Personal risks have included personal ailments, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis," *Phillips*, 126 Nev. at 351, 240 P.3d at 5, or "the employee has a mortal personal enemy," 1 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 4.02, at 4-2 (2021). It also cannot be said that what occurred here was a "private quarrel[ ] . . . imported from outside of the employment." *Temple v. Denali Princess Lodge*, 21 P.3d 813 (Alaska 2001) (internal quotation marks omitted) (quoting an earlier version of *Larson's* for the proposition that "[w]hen it is clear that the origin of the assault was purely private and personal, and that the employment contributed nothing to the episode, whether by engendering or exacerbating the quarrel or facilitating the assault, the assault should be held noncompensable"); *McColl v. Scherer*, 73 Nev. 226, 230, 315 P.2d 807, 809 (1957) (stating "that where an employee is assaulted and injury is inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he is assaulted when he is in the discharge of

[8]During oral argument, respondents acknowledged that "of the three separate tests set forth in the *Phillips* case, the appeals officer did not in the decision itself specifically address the three separate tests that were required."

his duties" (internal quotation marks omitted)).[9] Our review of the record in this case has not identified anything to suggest that Durst's injury "was the result of a personal grudge, animosity or other personal relation[ ] having nothing to do with . . . employment." *McColl*, 73 Nev. at 229, 315 P.2d at 808.

Respondents argue that "the origin of [Durst's] injury was not related to a risk involved with[in] the scope of his employment." Therefore, they argue that "no further risk analysis [was] needed." However, this contradicts *Phillips*' mandate "that determining the type of risk faced by the employee is an *important first step*." 126 Nev. at 350, 240 P.3d at 5 (emphasis added). We read *Phillips* as requiring a resolution of this necessary threshold inquiry in determining whether a risk is in fact compensable. We recognize that the "arose out of" prong requires consideration of whether the "origin of the of the injury [was] related to some risk involved within the scope of employment," but we also will not overlook that in resolving the "arose out of" prong the appeals officer is required to consider the totality of the circumstances, which the appeals officer in this case failed to do. *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046.

Durst may be eligible for compensation if the injury was either caused by or contributed to by an employment-related risk. *See Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991) (reasoning that "[t]he

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[9]We note that a dispute can be fairly traceable to the nature of employment. *See, e.g., Focus Framing v. Perez*, No. 79856-COA, 2020 WL 6197354 (Nev. Ct. App. Oct. 21, 2020) (Order of Affirmance). In *Focus Framing*, a worker was pushed off of a roof when the worker was a having a dispute with a crew leader about his paycheck being short. *Id.* at *1. We noted that the worker's "injury arose out of his employment because it occurred in the course of a paycheck dispute which is fairly traceable to the nature of employment." *Id.* at *3 (internal quotation marks omitted).

fact that a claimant may overreact to an adverse condition of employment, or that the overreaction may stem from some unusual quality of the claimant's personality, does not alter the fact that the subject of that reaction had an inherent connection with employment"). Further, employment-related risks are not limited to *actual* physical hazards present at the workplace. *See, e.g., Baiguen*, 134 Nev. at 602, 426 P.3d at 591. In *Baiguen*, the supreme court recognized that "inadequate policies, procedures, and training [were] conditions of the workplace akin to well-recognized physical hazards." *Id.*

Here, the appeals officer focused so narrowly on Durst's work-related duties that he failed to take into account the totality of the circumstances presented, such as the nature of Durst's employment at a cannabis dispensary or Silver State's workplace environment and workplace conditions.[10] *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046 (noting that injured worker failed to demonstrate that a fall was caused by either the duties related to being a poker dealer *or the work environment*). The appeals officer also failed to consider the actions taken by Dolan, the supervisor, including that Dolan potentially acquiesced in Durst's actions and even encouraged them, and how it was Dolan, and not Durst, who initially pushed Lester, which arguably is the point at which the

[10]For example, at oral argument respondents conceded that the supervisor on duty failed to follow the company's workplace violence prevention policy, which is one condition the appeals officer should have considered when addressing the totality of the circumstances related to the workplace environment. *Cf. Baiguen*, 134 Nev. at 602, 426 P.3d at 592 ("Thus, where an injury at work was exacerbated by the absence of (or failure to adhere to) a policy, procedure, or the necessary training to allow other employees to properly respond to such an injury, the workplace contributed to the injury and it arose out of the employment.").

confrontation between Lester and the dispensary employees escalated from words into physical contact.[11] Thus, Durst's work duties alone are not dispositive as to whether Durst's injury "arose out of" his employment, particularly when taking into consideration the totality of the circumstances as required.[12] Thus, we conclude that the appeals officer failed to properly analyze whether Durst's injury "arose out of" his employment at the cannabis dispensary when taking into account the totality of the circumstances.

Finally, on remand, the appeals officer must consider whether Durst's injury occurred "in the course of" his employment at the cannabis dispensary as Durst must satisfy both prongs of the statute to be eligible for workers' compensation. Here, the appeals officer summarily concluded that Durst failed to establish the injury he sustained was in the "course and scope" of his employment. Although we understand that Durst's conduct of grabbing the customer and placing him in a bear hug was not within his

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[11]We note that the appeals officer's factual findings state that "[i]t was the Claimant who escalated the situation from words into a physical altercation with the customer." To the extent that the appeals officer's legal conclusions were based on this factual determination, such conclusions are clearly erroneous, as the record indicates that Durst's bear hug was connected in some manner to Dolan's push, i.e., Durst's bear hug was reactionary after Dolan's push had already escalated the confrontation from words to physical contact.

[12]We recognize that it is possible the appeals officer, in focusing on Durst's duties, conflated the "arose out of" prong with the "in the course of" prong. Even so, work duties are not dispositive of whether an employee is injured in the course of his or her employment, which we discuss in more detail *infra*. *See Baiguen*, 134 Nev. at 599, 426 P.3d at 590.

stated job duties, under relevant Nevada law the appeals officer's analysis of "in the course of" his employment remains incomplete.[13]

"[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood*, 121 Nev. at 733, 121 P.3d at 1032. This includes compensating an employee who is injured engaging in activities incidental to employment. *See Black v. McDonald's of Layton*, 733 P.2d 154, 156 (Utah 1987) (providing "[t]he activity will be considered incidental to the employee's employment if it advances, directly or indirectly, his employer's interests"); *see also* 2 Larson, *supra*, Scope, at 12-1 ("An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto."). Here, the appeals officer focused solely on Durst's regular work duties, which is too narrow of a focus in analyzing "in the course" given the unique facts of this case. *See Baiguen*, 134 Nev. at 599, 426 P.3d at 590 (providing that "there is no requirement that the employee actually be capable of performing job duties or be actively engaged in those job duties at the time of the injury for it to occur in the course of employment"); 3 Larson, *supra*, § 27.01(1), at 27-2 ("The modern rule brings within the course of

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[13]The way in which the appeals officer's legal conclusions are drafted leave us uncertain as to whether his findings are solely meant to support his decision regarding the "arose out of" prong, or whether those findings were also intended to support the appeals officer's summary conclusion that Durst was not acting "in the course of" his employment when he was injured.

employment any activity undertaken in good faith by one employee to assist a co-employee in the latter's performance of his work.").

Notwithstanding the alleged policy prohibiting workplace violence and that placing a customer in a bear hug was not within Durst's stated job duties, critical factors overlooked by the appeals officer were whether Durst held a good faith belief that his actions would benefit his employer and the effect Dolan's conduct had on Durst as his supervisor by encouraging, acquiescing in, or approving of Durst's involvement in the confrontation. Absent these considerations, the appeals officer could not reasonably determine that Durst's actions precluded his injury from being considered to have occurred in the course of his employment.

Specifically, the appeals officer should determine whether Durst was acting in good faith to advance Silver State's interests or whether his actions were taken for his own personal benefit at the time of his physical interaction with Lester.[14] *See* 3 Larson, *supra*, § 27, Scope, at 27-

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[14]Durst's opening brief notes "that poor judgment or the mistaken belief that his supervisor was in imminent danger does not take his industrial injury out of the definition of accident under NRS 616A.030." Though not raised by the parties or the appeals officer, we note that elsewhere it has been recognized that "the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest." 3 Larson, *supra*, § 28.01(3), at 28-8 ("It is a well-established principle, even at common law, that the actor's judgment about the existence of an emergency and how to meet it should not be too severely judged in retrospect. The injured employee may get the benefit of the emergency doctrine even if the only emergency was imaginary, if the employee acted in good faith." (footnote omitted)). It is for the appeals officer to determine if such principles are applicable here. Additionally, we caution the appeals officer that the result of Durst's bear hug is much easier to ascertain post hoc, and that Lester's act of kicking off from the wall may

1 ("An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment.").

Further, Dolan's behavior, when taken into consideration, suggests that Dolan may have authorized Durst's assistance, including Durst's physical interaction with Lester. *See Douglas Aircraft Co. v. Indus. Accident Comm'n*, 306 P.2d 425, 426 (Cal. 1957) (stating the rule that "[w]here the employer or person in authority over a particular employee acquiesces in actions of the employee with knowledge of their character, a finding that the employee was within the scope and course of his employment at the time of an injury is sustained on the basis that the employer has impliedly authorized the employee's action"), *disapproved of on other grounds by LeVesque v. Workmen's Comp. Appeals Bd.*, 463 P.2d 432 (Cal. 1970). Additionally, prohibited conduct is not always an absolute bar to compensation. *See* 3 Larson, *supra*, § 27.01(4), at 27-6 (providing examples of exceptions for when the performance of a prohibited act may be compensable, e.g., "the acceptance of the benefit of the practice by the employer with the awareness that the rule has been violated" (footnote omitted)).

Notwithstanding the foregoing, respondents argue that Durst took himself outside the course of employment when he "took it upon

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still be "an unexpected or unforeseen event happening suddenly and violently" under NRS 616A.030. *Cf. Jackson v. Indus. Comm'n of Ariz.*, 2021 WL 1811923, at *3 (Ariz. Ct. App. 2021) ("When a punch is directed at a fellow worker, the co-worker could evade the blow or run away without any injuries. . . . He could land a punch . . . or the co-worker could trounce the claimant and break the claimant's nose. *The outcome is inherently uncertain.*" (emphasis added) (internal quotation marks omitted)).

himself to" physically engage with Lester. The Legislature has provided a mechanism for denying industrial insurance claims because of an employee's willful intent to injure another, but this provision was neither cited to nor analyzed by the appeals officer in his decision. *See* NRS 616C.230(1)(b) (barring compensation when the injury is "[c]aused by the employee's willful intention to injure another").[15] If the appeals officer intended for Durst's compensation to be barred because of his willful intent to harm Lester, then the appeals officer will need to make additional factual findings and conduct further analysis on remand.

We conclude the appeals officer improperly analyzed whether Durst's injury arose out of and in the course of his employment with Silver State. In analyzing the "arose out of" prong, the appeals officer failed to apply *Phillips* in order to determine the type of risk faced by Durst by considering the totality of the circumstances. The analysis of the "in the course of" prong requires consideration of *Baiguen*, as Nevada law does not require that Durst have been actively engaged in his work duties as a sales agent at the time of the injury for it to be compensable. The appeals officer's decision fails to explain and cite relevant authority to support how Durst's actions deviated from the course of his employment to deny compensation, or instead were incidental thereto and compensable. The appeals officer further failed to consider whether Durst's actions served his own personal

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[15]We take this opportunity to note that Nevada, unlike several other states, does not have an "initial physical aggressor" statute. The legislatures of some states have written into their workers' compensation scheme a bar to compensation when the worker initiates the physical aggression. *E.g.*, Cal. Lab. Code § 3600(a)(7) (West 2022) (compensation exists "[w]here the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor"). Nevada, however, bars recovery for an employee's willful intent to injure another.

interests instead of his employer's, particularly in light of Dolan's conduct. Therefore, we conclude that the district court improperly denied Durst's 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.[16]


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Leon Aberasturi, District Judge
Carolyn Worrell, Settlement Judge
The Law Offices of Joel A. Santos
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Third District Court Clerk

[16]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.