

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHLEEN NICKEY,  
Appellant,  
vs.  
ST. ROSE DOMINICAN HOSPITAL-  
ROSE DE LIMA; AND SEDGWICK,  
Respondents.

No. 84688-COA

FILED

JUN 28 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kathleen Nickey appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Nickey was employed as a nurse by St. Rose Dominican Hospital (St. Rose).<sup>1</sup> In November 2019, she was working as an emergency room nurse with "Legal 2000" patients.<sup>2</sup> Nickey was responsible for caring for five patients with the assistance of a nursing assistant. The nursing assistant took one patient to the restroom, and while the assistant was gone from the room, another patient, S.H., stated that he needed to use the restroom. Nickey told him that he could not use the restroom at that time because she needed to watch the other patients while the nursing assistant was with the patient that was using the restroom. S.H. became upset, called Nickey vulgar names, and a security guard took the S.H. to the restroom. When S.H. returned, Nickey explained the rules to him again. A surveillance video of the interaction showed that Nickey was very animated while talking with

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<sup>1</sup>We recount the facts only as necessary for our disposition.

<sup>2</sup>These are patients hospitalized on a 72-hour psychiatric hold. They are not allowed to leave their bed unless a staff member is with them.

S.H. using gestures and pointing at S.H.. Nickey approached S.H. for no medical reason and came within one foot of S.H.'s face.<sup>3</sup> S.H. then slapped Nickey across the face. Nickey testified that she defended herself and struck S.H. several times. The altercation ended when another nurse physically got between Nickey and S.H., but there is no allegation that S.H. struck Nickey more than once.

Nickey was seen by Dr. Dy for her injuries and completed a C-4 form. Nickey was diagnosed with a facial contusion and cervical strain and reported that she was injured when S.H. slapped her. She was authorized to return to work with modified duty restrictions.

In December 2019, the insurer determined that Nickey's claim did not meet the requirements of NRS Chapters 616 and 617 and, as a result, that claim was denied.<sup>4</sup> That same month, Nickey was fired from St. Rose for committing an act of physical violence against S.H. as described above.

Nickey appealed the claim denial to a hearing officer. The hearing officer affirmed the denial because the evidence showed "that the altercation arose out of a personal issue and not work-related matters." Nickey appealed the hearing officer's decision to an appeals officer.

The appeals officer heard testimony from Nickey, reviewed her medical records, and watched surveillance video of the altercation. The appeals officer affirmed the hearing officer's decision and order after

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<sup>3</sup>Nickey testified that S.H. was calling her names during this time.

<sup>4</sup>The insurer specifically relied on NRS 616C.150, requiring an injury to arise out of and in the course of employment; NRS 616A.030, defining "accident"; NRS 616A.265, defining "injury"; NRS 616C.175, excluding compensation for pre-existing conditions; and NRS 616C.230 (2017), *amended by* 2021 Nev. Stat., ch. 277 § 17, at 1465-6, excluding compensation when there is evidence of use of alcohol or a controlled substance.

concluding that Nickey failed to show a causal connection between her injury and the workplace. Specifically, the appeals officer concluded that Nickey escalated the situation by approaching S.H., who made no attempt to leave his bed during the altercation. The appeals officer also found that confronting and “physically towering over [S.H.]” in close proximity did not qualify as duties performed within the scope of employment. Nickey filed a petition for judicial review, which the district court denied, concluding that substantial evidence supported the appeals officer’s decision and order, including the conclusion that Nickey exceeded the scope of her employment when she was injured. This appeal followed. Nickey argues that substantial evidence does not support the appeals officer’s decision and order. We disagree.

When reviewing a petition for judicial review, this court reviews an agency’s factual decisions for clear error or an abuse of discretion and will not overturn them if they are supported by substantial evidence. *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). “Substantial evidence is evidence that a reasonable mind could accept as adequately supporting the agency’s conclusions.” *Id.* This court reviews legal issues de novo. *Id.* Further, we will not reweigh evidence or revisit an appeals officer’s credibility determinations on appeal. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008) (stating that this court does not reweigh evidence or revisit an appeals officer’s credibility determinations on appeal).

To receive workers’ compensation, NRS 616C.150(1) requires workers to show, by a preponderance of the evidence, that their injury arose out of and in the course of their employment. *See* NRS 616C.150(1). “[A]n injury arises out of employment if there is a causal connection between the

injury and the employee's work, in which the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350-51, 240 P.3d 2, 5 (2010) (internal quotation marks omitted).

Nickey argues that her injury arose out of her employment because she was injured while giving instructions to a patient, so her injury was related to a risk within the scope of her employment. However, after reviewing the surveillance video, Nickey's medical records, and hearing Nickey's testimony, the appeals officer determined that Nickey did not need to escalate the situation and closely approach S.H., who made no attempt to leave his bed and had already used the restroom, to perform her job.<sup>5</sup> Not only do we not reweigh the evidence or revisit an appeals officer's credibility determinations, *Law Offices of Barry Levinson*, 124 Nev. at 362, 184 P.3d at

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<sup>5</sup>We note that Nickey provided no legal authority to support her position. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that it is the appellant's responsibility to present relevant legal authority). Our research has revealed that the Nevada Supreme Court has not specifically addressed whether escalation to confrontation is within the scope of employment in workers' compensation matters. However, the supreme court has addressed similar issues in the context of claims of vicarious liability in tort cases. See *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970) (holding that an employer was vicariously liable when the employee, a blackjack dealer, hit a customer in the face while dealing a game because the assault occurred within the scope of the task assigned to the dealer, that of dealing blackjack); *J.C. Penney Co. v. Gravelle*, 62 Nev. 434, 449-50, 155 P.2d 477, 481-82 (1944) (concluding that an on-duty security guard acted outside of the scope of his employment when he punched Gravelle because the guard's acts were done to punish Gravelle for interfering with the guard's pursuit of a shoplifter). Nickey's actions are more similar to the situation in *Gravelle* because Nickey aggressively approached S.H. and escalated the situation into a confrontation without having a medical reason to do so.

383-84, but we do not have the ability to review the surveillance video because it was not provided as part of the record on appeal, *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that we generally cannot consider matters not contained in the record on appeal). It was Nickey's responsibility to provide the video to this court, and since it is missing, we must presume that it supports the district court's findings below. *Id.* (stating that we must presume that the missing portions of the record support the district court's ruling).

We conclude that the appeals officer correctly found that the evidence shows an animated Nickey closely approaching the seated S.H., who made no attempt to get up. Nickey got within one foot of the S.H.'s face for no medical reason before the patient slapped her. Therefore, the appeals officer could have reasonably found that Nickey escalated the situation and created an unnecessary confrontation which resulted in her injury. *Cf.* NRS 203.030 ("Every person who shall by word, sign or gesture willfully provoke, or attempt to provoke, another person to commit a breach of the peace shall be guilty of a misdemeanor."). Thus, substantial evidence supported the appeals officer's determination that Nickey was not acting within the scope of her employment.<sup>6</sup>

Accordingly, we


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<sup>6</sup>Nickey also argues that St. Rose agreed with her version of the incident by checking a box on the C-4 form stating that it agreed with Nickey, which shows that substantial evidence does not support the appeals officer's decision and order. The appeals officer reviewed the C-4 form, Nickey's medical records, Nickey's testimony, and the surveillance video and concluded that Nickey's description of the event was inaccurate. This court does not reweigh the evidence or credibility on appeal. *See Law Offices of Barry Levinson*, 124 Nev. at 362, 184 P.3d at 383-84. Accordingly, we conclude that the appeals officer did not err.

ORDER the judgment of the district court AFFIRMED.<sup>7</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook

  
\_\_\_\_\_, Sr.J.  
Silver

cc: Hon. Ronald J. Israel, District Judge  
Bertoldo Baker Carter Smith & Cullen  
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas  
State of Nevada Department of Administration, Hearings Division  
Eighth District Court Clerk

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<sup>7</sup>The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.