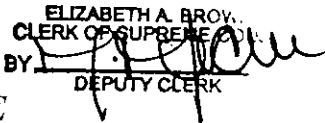


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALPHA LANDSCAPES, LLC.; AND  
GALLAGHER BASSETT SERVICES,  
INC.,  
Appellants,  
vs.  
JESUS LOPEZ,  
Respondent.

No. 87632-COA

**FILED**  
MAY 22 2025  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Alpha Landscapes, LLC and Gallagher Bassett Services, Inc. appeal from a district court order granting a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge.

Respondent Jesus Lopez was injured when he fell off a retaining wall while performing landscaping work for appellant Alpha Landscapes, LLC (Alpha) in November 2020. An urgent care doctor diagnosed lumbar strain. Lopez completed the appropriate workers' compensation form, missed five days of work, and subsequently received temporary total disability (TTD) benefits for the missed time. Over the subsequent months, Alpha's third-party insurer, appellant Gallagher Bassett Services, Inc. (Gallagher Bassett), scheduled several appointments for Lopez with multiple doctors. Lopez's subjective pain reports did not improve, despite nerve root blocks and steroid injections. He continued working for Alpha and was assigned to "light duty," which consisted of picking up trash, watering, and performing other miscellaneous tasks.

In July 2021, after Lopez's lumbar pain was determined to be chronic, a doctor recommended consultation with a spine surgeon, which

Gallagher Bassett approved and scheduled for September 2021. However, before that consultation took place, Alpha fired Lopez on August 19, 2021, citing constant tardiness, leaving work early without notice, sleeping on the job, and being observed not doing any work. The termination was not preceded by any progressive discipline, save for a warning notice shown to Lopez earlier that same day. The warning notice stated that a supervisor had a “final conversation” with Lopez, informing him that he was going to be fired for the reasons described above. No documentation of any previous conversations is included in the record, and Alpha did not cite any company policy or standard that Lopez violated.

Lopez requested TTD benefits, which Gallagher Bassett denied. Lopez requested a hearing on his TTD claim, and the hearing officer reversed Gallagher Bassett’s denial, stating that there was “no evidence provided to support the contention that [Lopez] was terminated for gross misconduct in accordance with NRS 616C.232.” Gallagher Bassett appealed that decision to an appeals officer. At the hearing, Lopez testified that he did sleep in the break area but had slept during break times and asserted that no one had ever warned him that sleeping during those times was an issue prior to the date of his termination. He also testified that he was prescribed multiple medications for his work-related injury that made him drowsy. In closing, he argued that the employer could not establish more than ordinary negligence or inefficient job performance, which Lopez argued did not rise to the level of gross misconduct. He asserted gross misconduct is the only reason why an employee who is otherwise qualified to receive TTD benefits could have them denied pursuant to NRS 616C.232(4) and that no such misconduct had been proven in this matter.

Gallagher Bassett countered that Lopez sleeping on the job constituted per se gross misconduct, even if the sleep was caused by medication. It further argued that Lopez had the burden of proof to show that his medications caused drowsiness and failed to meet that burden. The appeals officer entered a decision and order reversing the hearing officer's decision, thus denying Lopez TTD benefits. The appeals officer found that Lopez was terminated for gross misconduct that included sleeping on the job, being constantly late and leaving early without notice, and being observed not doing any work. The appeals officer also noted that Lopez had been given warnings about his workplace behavior.

The appeals officer acknowledged that Nevada courts have not defined "gross misconduct" in the context of TTD eligibility pursuant to NRS 616C.232. However, the appeals officer reviewed a decision issued by a federal district court in Louisiana that discussed "gross misconduct" in the context of eligibility for COBRA benefits, *Boudreaux v. Rice Palace, Inc.*, 491 F. Supp. 2d 625, 633 n.10 (W.D. La. 2007), and noted that the court there defined gross misconduct as "carelessness or negligence of such a degree or recurrence to show an intentional and substantial disregard for the employer's interests of the employee's duties and obligations to his employer." (Internal quotation marks omitted.)<sup>1</sup> The appeals officer decided to apply the definition utilized in *Boudreaux* to this matter and concluded that Lopez's behavior—particularly sleeping during work

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<sup>1</sup>Notably, while a termination for gross misconduct disqualifies a former employee from receiving COBRA benefits pursuant to 29 U.S.C. 1163(2), the termination notice given to Lopez indicates that he was COBRA-eligible.

hours—met the definition of gross misconduct. Accordingly, the appeals officer found Lopez was disqualified from receiving TTD benefits.

Lopez petitioned for judicial review, both parties submitted briefs, and oral argument was held. The district court granted the petition, finding that the appeals officer's decision was "in violation of constitutional or statutory provisions, affected by clear error of law, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and therefore arbitrary, capricious or characterized by abuse of discretion." The district court remanded the case to Gallagher Bassett to make a correct determination of the amount of TTD benefits that Lopez was owed, including benefits from after his termination of employment. This appeal followed.

On appeal, Alpha and Gallagher Bassett argue that Lopez did not proffer enough evidence to show that he was entitled to TTD benefits, and thus that the appeals officer's decision and order was supported by substantial evidence and should have been entitled to deference. Lopez responds that that the petition for judicial review was properly granted because the appeals officer's finding that his behavior constituted gross misconduct was a clear error of law and not supported by substantial evidence.<sup>2</sup>

Like the district court, we review an appeals officer's decision in workers' compensation matters for clear error or abuse of discretion. *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008); NRS 233B.135(3)(e)-(f). An appeals officer's fact-based conclusions

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<sup>2</sup>The Nevada Justice Association also filed a Brief of Amicus Curiae in support of Lopez.

of law are entitled to deference and will not be disturbed if they are supported by substantial evidence. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). “Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion.” *Id.* (internal quotation marks omitted). We will not substitute our own judgment for that of the appeals officer and our review is limited to the record before the appeals officer. *Id.* at 283-84, 112 P.3d at 1097. However, we review questions of law de novo. *Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

An employee requesting workers’ compensation benefits must “establish by a preponderance of the evidence” that his injury arose out of and in the course of his employment. NRS 616C.150(1). However, when an insurer attempts to deny TTD benefits to an injured employee on the basis that the employee was terminated for gross misconduct, the burden shifts to the insurer to prove gross misconduct by a preponderance of the evidence. NRS 616C.232(1). “Discharge from employment for reasons other than gross misconduct does not limit an injured employee’s entitlement to receive benefits for temporary total disability.” NRS 616C.232(4).

The Legislature did not define “gross misconduct” when it updated NRS 616C.232 in 2009. However, disqualifying conduct in the context of unemployment benefits under NRS 612.385 has been determined to “occur[ ] when an employee deliberately and unjustifiably violates or disregards her employer’s reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer’s interests or the employee’s duties and obligations to her employer.” *Clark Cnty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445-46, 148 P.3d 750, 754-55 (2006) (internal quotation marks, footnote, and brackets

omitted). In addition, the supreme court explained in another unemployment benefits matter that “[m]ere inefficiency or failure of performance because of inability or incapacity, ordinary negligence in isolated instances, or good faith errors in judgment or discretion are excluded in the definition of misconduct.” *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968) (internal quotation marks omitted).

While unemployment benefits and workers’ compensation are covered by different chapters of the NRS, both chapters are in Title 53, and each of the two systems concerns the provision of financial security for Nevadans who suddenly find themselves separated from, or unable to, work. See NRS 612.035 (defining “benefits” under NRS Chapter 612: unemployment compensation); NRS 616A.010 (Legislative declaration that NRS Chapter 616A is to be interpreted and construed to ensure quick and efficient payment to employees who are injured or disabled). This court applies consistent meaning to similar terms in similar statutes. See *Poole v. Nev. Auto Dealership Inv., LLC*, 135 Nev. 280, 284, 449 P.3d 479, 483 (Ct. App. 2019) (explaining that this court presumes that the Legislature intends terms of art to be interpreted in the same fashion across similar statutes). Based on the preceding authority and the facts concerning Lopez’s conduct in the record before this court, we conclude that Alpha and Gallagher Bassett did not prove with sufficient evidence that Lopez’s conduct rose to the level of gross misconduct.

Lopez’s conduct was similar to that discussed by the supreme court in *Bundley*. See *Bundley*, 122 Nev. at 1449-50, 148 P.3d at 756-57. In *Bundley*, the supreme court held that just because a teacher’s absences were unauthorized, it did not necessarily mean that the absences constituted

disqualifying misconduct under NRS 612.385.<sup>3</sup> *Id.* It reached that conclusion, in part, because the school district had not provided its absence policy, and thus it could not find that the teacher deliberately and unjustifiably violated any policy or directive. *Id.* at 1449, 148 P.3d at 757. This was notwithstanding the school district's allegations that the teacher took seven days off without available leave, did not submit evidence showing that her absences were justified or approved, and did not timely notify the school of her planned absences despite being aware of a duty to do so. *Id.* at 1447, 148 P.3d at 755.

Here, the appeals officer found that three of Lopez's behaviors constituted gross misconduct justifying denial of TTD benefits: (1) sleeping during work hours; (2) arriving late to and leaving early from work without notifying Alpha; and (3) being observed not doing any work. While such behavior is undesirable and potentially inimical to the work environment, Alpha, like the school district in *Bundley*, provided no written work rules, policies, or standards to the appeals officer stating that these actions were prohibited and the consequences for any violations. *Cf. id.* at 1449, 148 P.3d at 757. Nor did Alpha demonstrate to the appeals officer that any intermittent idleness of an employee assigned to light duty manifested a "substantial disregard for [its] interests." *See id.* at 1445-46, 148 P.3d at 754-55. Given that a teacher's unexcused absences were determined not to be disqualifying misconduct in the absence of a district policy or standard prohibiting such behavior, Lopez's behaviors likewise cannot be deemed gross misconduct, in part because Alpha similarly did not specify any formal

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<sup>3</sup>The supreme court did determine, however, that a "clear pattern of unauthorized absenteeism" created a rebuttable presumption of willful misconduct. *Bundley*, 122 Nev. at 1450, 148 P.3d at 757.


policy that Lopez deliberately and unjustifiably violated, but more importantly, it did not show how his conduct adversely affected its interests. Rather than displaying a deliberate disregard of his obligations to Alpha, Lopez's behavior suggests errors in judgment or ordinary negligence, which the supreme court has determined is excluded from the definition of disqualifying misconduct under NRS 612.385. *See Barnum*, 84 Nev. at 41, 436 P.2d at 222. As this court applies consistent meaning to similar terms in similar statutes, *see Poole*, 135 Nev. at 284, 449 P.3d at 483, we cannot conclude that Lopez's behavior rose to gross misconduct under NRS 616C.232(4).

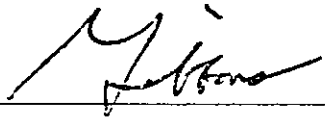
Moreover, the appeals officer's findings were not supported by substantial evidence. The appeals officer relied on two short video clips—one lacking a time stamp, and both totaling only five minutes in length—to establish that Lopez was asleep during work hours. The videos were insufficient to establish that Lopez was not on break at those times, or that he was asleep for more than a few minutes. As for Lopez's purported lack of punctuality and idleness, the only documentation Alpha and Gallagher Bassett provided of such behavior was the warning letter issued the day of Lopez's termination and the termination notice itself. They provided no documentation to the appeals officer of progressive discipline or any record whatsoever of Alpha taking issue with any of the behaviors they now deem "gross misconduct," prior to terminating Lopez.

As stated previously, NRS 616C.232(1) placed the burden on Alpha and Gallagher Bassett to prove gross misconduct by a preponderance of the evidence. However, Alpha and Gallagher Bassett failed to identify any written or disseminated work rule or policy prohibiting the conduct of which they accused Lopez. Nor did they meaningfully argue how Lopez's

purported misconduct adversely affected their interests. Accordingly, Alpha and Gallagher Bassett failed to produce evidence that a reasonable mind would accept as adequate to support the appeals officer's conclusion that Lopez was properly fired for gross misconduct. *See* NRS 233B.135(4). Thus, the appeals officer's decision and order was not supported by substantial evidence, and he abused his discretion by finding Lopez was fired correctly for gross misconduct. *See* NRS 233B.135(3)(f). The district court therefore did not err in reversing the decision and order and remanding to the insurer to calculate appropriate TTD benefits. Accordingly, we affirm the district court's order granting Lopez's petition for judicial review.<sup>4</sup>

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Bulla

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

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

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<sup>4</sup>Insofar as Alpha and Gallagher Bassett have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Chief Judge, Eighth District Court  
Eighth District Court, Dept. No. XXVII  
State of Nevada Department of Administration, Hearings Division  
Hooks Meng & Clement  
Jenny Legal  
The Law Firm of Herb Santos, Jr.  
Eighth District Court Clerk