IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIMOTHY ROSS,
Appellant,
vs.
WASHOE COUNTY,
Respondent.

No. 78618-COA

FILED

APR 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING AND REMANDING

Timothy Ross appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Ross is employed as a deputy sheriff by the Washoe County Sheriff's Office (WCSO), and he is a member of the Washoe County Sheriff Deputies Association (WCSDA).[1] WCSDA and its individual members are members of the Peace Officers Research Association of Nevada (PORAN), which is an organization consisting of various law enforcement professionals. WCSDA, along with other similar associations, fund PORAN using a portion of members' dues. PORAN is also affiliated with the Peace Officers Research Association of California (PORAC).

At the time of the events giving rise to this action, Ross was president of both WCSDA and PORAN. As president of WCSDA, Ross represented association members in a variety of ways, including assisting with contract negotiations and disciplinary matters. Under the WCSDA's collective bargaining agreement (CBA), WCSO was required to allocate at

[1]We do not recount the facts except as necessary to our disposition.

least twenty hours of paid time per week to the WCSDA president so that he or she could perform association duties. This is known as "association time."

In 2016, Ross requested leave to attend the PORAC conference, which was to be held at the Disneyland Hotel in Anaheim, California, from November 17 to November 20. Ross requested leave from November 13 through November 22. WCSO approved the request, which consisted of a combination of mostly association time and some vacation time. On November 13, Ross—along with two fellow deputies—drove to Anaheim for the conference, arriving in the evening. The following morning, November 14, Ross went for a jog. While jogging on the sidewalk, a cyclist struck Ross, knocking him to the ground. As a result of the incident, Ross went to a local hospital in Anaheim, where he was diagnosed with multiple injuries.

When Ross returned home, he filed a timely notice of injury and workers' compensation claim with WCSO. Ross' supervisor completed the necessary incident reports and submitted the claim to Washoe County's third-party administrator, Cannon Cochran. After reviewing Ross' claim, Cannon Cochran denied the request for workers' compensation benefits, reasoning that Ross' injury did not arise out of and in the course of employment. Ross then requested that a hearing officer review his claim. After a hearing on the matter, the hearing officer reversed the administrator's denial of benefits, concluding that Ross' injury occurred in the course of his employment because his activities at the conference advanced his employer's interests.

The County appealed the hearing officer's decision. On appeal, the appeals officer reversed the hearing officer's determination and concluded, among other things, that (1) "at the time of the accident, it [was] more likely Deputy Ross was in Anaheim for recreation/vacation time"; (2)

"[t]here is no evidence any work-related activity, any WCSDA activity or any PORAN or PORAC activity required [Ross] to be in Anaheim" three days before the conference began; (3) although Ross "requested [and received] association pay for the leave requested on [the date of loss], there was no evidence . . . that [Ross] engaged in any association activity or had any association activity planned for that day"; and (4) the personal comfort doctrine was not applicable because "there is no evidence [that] any work-related duty compelled [Ross] to be in Anaheim three days early." Ross petitioned for judicial review, which the district court denied. Ross now appeals from the order of denial.[2]

Ross' argument on appeal is twofold: first, he contends that because his attendance at the PORAC conference was approved by and benefited WCSO, he was within the course and scope of his employment when the injury occurred. Second, Ross posits that his claim is compensable under the personal comfort doctrine. Washoe County argues that Ross' injury did not occur within the course of his employment, that his injury did not arise out of his employment, and that Ross was not a traveling employee for purposes of the personal comfort doctrine because he was not required to be at the conference three days early.

"Because judicial review is limited to the appeals officer's final written decision, NRS 616C.370(2), this court's role is identical to that of the

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[2]The appeals officer also found that the CBA excluded the use of association time for conferences like PORAC. Nevertheless, the record demonstrates that WCSO approved Ross' use of association time to attend the PORAC conference and that it had done so for the previous seven years. Thus, it does not appear that WCSO believed that use of association time to attend the PORAC conference was beyond the scope of what the CBA would allow.

district court." *Buma v. Providence Corp. Dev.*, 135 Nev., Adv. Op. 60, 453 P.3d 904, 907 (2019) (internal quotation marks omitted).[3] "The reviewing court must affirm if the appeals officer applied the law correctly and the facts reasonably support the decision." *Id.*; *see also* NRS 233B.135. "We review the appeals officer's view of the facts deferentially . . . but decide questions of law independently." *Buma*, 135 Nev., Adv. Op. 60, 453 P.3d at 907 (internal citation omitted).

To receive benefits under the Nevada Industrial Insurance Act (NIIA), an injured employee must show "that the employee's injury arose out of and in the course of his or her employment." *Id.* (emphases omitted) (quoting NRS 616C.150(1)). "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." *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600, 426 P.3d 586, 590 (2018) (internal quotation marks omitted).

"[U]nder NRS 616B.612(3), a traveling employee is in the course of employment continuously for the duration of the trip, excepting the employee's distinct departures on personal errands." *Buma*, 135 Nev., Adv. Op. 60, 453 P.3d at 909. Generally, traveling employees are permitted to "tend to their reasonable recreational needs during downtime without leaving the course of employment." *Id.* at 910; *see, e.g., Proctor v. SAIF Corp.*, 860 P.2d 828, 830-31 (Or. Ct. App. 1993) (authorizing benefits where a traveling employee drove fifteen miles away from a work conference to a gym

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[3]As discussed *infra*, the supreme court's holding in *Buma* is controlling and essential to the resolution of this case. However, the supreme court did not publish its opinion in *Buma* until December 2019, after this appeal had been filed. As such, neither the district court nor the appeals officer had the benefit of *Buma*—which clearly approves of the personal comfort doctrine—while reviewing this case below.

and was injured there while playing basketball). To be compensable, however, "a traveling employee's injury must have arisen out of the employment." *Buma*, 135 Nev., Adv. Op. 60, 453 P.3d at 910. "[R]isks necessitated by travel—such as those associated with eating in an airport, sleeping in a hotel, and *reasonably tending to personal comforts*—are deemed employment risks for traveling employees" and are thus compensable. *Id.* (emphasis added).

Having reviewed the record, we conclude that the appeals officer's decision was erroneous for several reasons. First, the appeals officer's finding that Ross was more likely on vacation is not supported by substantial evidence. Prior to the conference, Ross requested, and received, time off from WCSO for the specific purpose of attending the PORAC conference. Ross testified that he was attending the PORAC conference in his capacity as president of PORAN and president of WCSDA and that he used a combination of association leave and vacation time to attend the conference. Ross also testified that he drove to Anaheim three or four days early with fellow deputies and WCSDA members, Scott Thomas and Chad Sabo, for the purpose of networking with other PORAC attendees, not leisure. Thus, Ross' testimony tends to support the proposition that he was engaged in work-related activities, not leisurely endeavors.

Furthermore, the undisputed documentary evidence is consistent with Ross' testimony. Specifically, the record demonstrates that (1) Ross requested November 13 through November 22 off, using primarily association time; (2) the PORAC conference began on November 17 and ended on November 20, with formal and informal networking opportunities prior to the conference; and (3) Ross' payroll ledger indicates that every day within the requested date range, except November 21, was processed and

coded as association time. The record also reveals that Ross was injured on the November 14—a day on which he was using association time. Based on this record, we conclude that the appeals officer's finding that "it [was] more likely Deputy Ross was in Anaheim for recreation/vacation" at the time of the incident is not supported by substantial evidence and therefore clearly erroneous. *See* NRS 233B.135(4) (defining substantial evidence as "evidence which a reasonable mind might accept as adequate to support a conclusion").

Second, the appeals officer determined that "[t]here is *no evidence* [that] any *work-related activity*, any WCSDA activity or any PORAN or PORAC activity required [Ross] to be in Anaheim" three days before the conference. (Emphasis added.) This determination is not supported by the record and, moreover, the Nevada Supreme Court has recently concluded that a traveling employee may be in a location for a work-related purpose, even without any specific work events scheduled for that day. *See Buma*, 135 Nev., Adv. Op. 60, 453 P.3d at 911. In *Buma*, an appeals officer denied benefits to Jason Buma, a traveling employee, in part because "there were no company events scheduled for the day of [his] accident . . . [and because] Buma was not meeting with clients until the following day." *Id.* at 910-11 (internal quotation marks omitted). On appeal, the supreme court reversed, concluding that such "factual findings do not speak to the reality that [Buma] was required to be in the Houston area for work and that, to get there in time to make the scheduled joint presentation . . . [he] needed to arrive a day ahead of time." *Id.* at 911 (emphases omitted).

Here, Ross testified that as president of WCSDA, as well as PORAN, he was expected to attend the conference. He also testified that he, Sabo, and Thomas arrived in Anaheim early to network with other attendees, which included having lunch and/or dinner with various vice presidents of

other law enforcement organizations, and to check in early with conference registration. In addition, official conference literature encouraged attendees to arrive early in order to interact with members of other PORAC affiliates, such as the Legal Defense Fund. This level of participation by conference attendees appears to have been known by Ross' employer, and, indeed, the full amount of time off that Ross requested was approved and most of his leave was coded as association time.

Ross further testified that his attendance and networking during and before the conference benefitted WSCO because he and the other attendees often learned about new law enforcement training techniques and discussed "hot topics," such as "body-worn cameras." Thus, the record shows that Ross may have been in Anaheim on the day of injury to tend to conference business and that both the conference and preconference activities may have been work related and/or benefitted WCSO. *See Elyria v. Scott*, 49 N.E.3d 801, 804-05 (Ohio Ct. App. 2015) (concluding that a police officer who was killed after leaving a union-sponsored event was in the course of his employment); *see also* 99 C.J.S. *Workers' Compensation* § 427 (2019) (explaining that an activity is in the course of employment if it is performed for the benefit or interest of the employer). Therefore, at the time of the injury, there is evidence that Ross may have been a traveling employee who was in the course of his employment. *See Buma*, 135 Nev., Adv. Op. 60, 453 P.3d at 909 (providing that "a traveling employee is in the course of employment continuously for the duration of the trip, excepting the employee's distinct departures on personal errands"). Thus, the appeals officer's finding that there was *no* evidence of work-related activity is not supported by substantial evidence, and this should be reexamined, in light of the supreme court's decision in *Buma*, on remand.

Furthermore, the appeals officer's finding that "there was no evidence . . . that [Ross] engaged in any association activity or had any association activity planned for that day" (i.e. the day of the accident) is also erroneous. The first part of this finding ignores that Ross was injured and taken to the hospital early in the morning that day, and therefore, it was very unlikely that he would engage in any subsequent afternoon or evening activities, especially since he suffered multiple fractures. The second part of the statement is contradicted by the testimony and evidence discussed above, specifically that Ross was hoping to network at lunch and dinner that day, as well as check in to the conference. Moreover, no evidence was offered suggesting Ross was engaged in or had planned vacation activities for that day. Thus, this finding, too, is not supported by substantial evidence.

Finally, the appeals officer's conclusion that the personal comfort doctrine was not applicable because "there is no evidence [that] any work-related duty compelled [Ross] to be in Anaheim three days early" appears to be a byproduct of her conclusion that Ross was likely on vacation. But, as discussed above, the record shows that although Ross was not necessarily compelled to be in Anaheim three days early, he may have been there for a work-related purpose, and not merely vacation. Consequently, under the supreme court's decision in *Buma*, the appeals officer erred in failing to properly consider the personal comfort doctrine because the record contains evidence that Ross may have been in the course of his employment and under his employer's control while he was in Anaheim to attend the conference, and the supreme court clarified that a traveling employee is permitted to engage in "reasonable recreational needs during downtime," which includes activities such as jogging. *Id.* at 911 ("A traveling employee is under his

employer's control for the duration of his or her business trip . . . ." (citing NRS 616B.612(3)); *see also Proctor*, 860 P.2d at 830-31.[4] Accordingly, we

VACATE the district court's order denying Ross' petition for judicial review, AND REMAND to the district court to remand to the appeals officer with instructions to apply the personal comfort doctrine in light of *Buma* and to conduct additional fact-finding consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Jerome M. Polaha, District Judge
Lansford W. Levitt, Settlement Judge
Hutchison & Steffen, LLC/Reno
Hutchison & Steffen, LLC/Las Vegas
McDonald Carano LLP/Reno
Washoe District Court Clerk

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[4]Again we note that neither the appeals officer nor the district court had the benefit of *Buma* when considering the personal comfort doctrine and its applicability to the instant matter.

[5]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.