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Bad News for Nevada Injured Workers Who Fall At Work?

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According to the U.S. Bureau of Labor Statistics, in 2010, about a fifth of all workplace fatalities in Nevada were caused by a worker falling. Almost every serious fall injury I've handled in the Nevada work comp arena in the past fifteen years was caused either by the employer's obvious failure to follow safe work practices, or the employee's own unsafe actions.

Contrary to what most non-attorneys think, whose fault caused the injured worker to fall isn't supposed to determine whether a workers' compensation claim is accepted or denied. However, a recent 2011 **unpublished** decision from the Nevada Supreme Court has me worried that the current justices want to allow employers and insurers to use fault by the injured worker to deny claims. I hope that I'm wrong, and that the Nevada Supreme Court's Order of Reversal and Remand in Fitzgerald's Casino/Hotel v. Mogg, No. 55818 (11/18/11) isn't a major attitude shift against injured workers.

Under Nevada work comp law, injured workers are entitled to medical care, benefits payable at two-thirds of their wages when off work, an award for most permanent injuries, retraining if necessary, and lifetime reopening rights for serious injuries. Nevada law states in NRS 616C.150(1) that a claim is compensable if the employee's accident and resulting injuries **arise out of and in the course and scope of the employment**.

It has always been a key component to Nevada's workers compensation system that in exchange for purchasing workers' comp insurance, an employer cannot be sued for work-related injuries to employees, even if the employer's negligence causes the injury. The trade-off for the employee not being able to sue the employer is the employee's entitlement to benefits, even if the employee causes his own accident. The underlying premise behind these trade-offs is that the statutory benefits for injured workers will be borne by industrial insurance purchased by employers, the cost of which will ultimately be spread to consumers and society. This is called the exclusive remedy doctrine, and is codified at NRS 616A.020.

Nevada law states that because workers cannot sue their employers who comply with the law by purchasing workers' comp insurance, the employer cannot assert common law defenses to a a claim. In other words, the employer cannot defeat an employee's worker's comp claim by arguing that the employee was contributory negligent in causing his own accident and injuries.

Two notable exceptions are laws that exclude self-inflicted injuries, and injuries caused by the employee's intoxication. Otherwise, an employee's own fault in causing his accident is not supposed to be a valid reason to deny his claim.

The justices discussion in the Fitzgerald v. Mogg case however, comes dangerously close to introducing the idea that an employee's simple failure to follow an unwritten rule at work can be used to deny his claim. Mogg was employed as a security officer who monitored the surveillance cameras in the casino's eye in the sky. When he went to put his feet up on a desk while working, his chair fell over and he was injured. An appeals officer ruled that the injury was compensablle, but the Nevada Supreme Court reversed and remanded the case back to the appeals officer for further findings.

The court referenced a case they had recently decided involving a casino employee's fall on back stairs to an employee break room. In Rio All Suite Hotel v. Phillips, 126 Nev. Adv. Op. 34 (2010), a poker dealer twisted her ankle for some unknown reason while descending stairs to the employee break room. The Court applied an **increased risk test** to this unexplained fall to determine whether the injury "arose out of " employment. The Court noted that the dealer was required to use these stairs more frequently than the general public, and that they were the only stairs to the employee break room. The dealer's risk of injury was therefore greater than the general public risk of injury on these particular stairs, so the claim was considered **in the course and scope of employment.**

In Mogg's case, the appeals officer neglected to make findings that Mogg was at increased risk of falling at work from a chair that wasn't defective. If Mogg wasn't put at increased risk (due to long hours of watching security cameras), then his claim would not be considered work-related.

The court also wanted the appeals officer to make findings whether Mogg's injury came within the the **personal comfort doctrine.** That legal theory says that an injury is work-related if it happens when an employee is injured while engaging in **reasonable** personal comfort activities, such as going to the restroom. Mogg's employer didn't have a written policy against employees charged with viewing security monitors all day from putting their feet on desks, but the employer got statements from other employees that the employer had an implied prohibition against putting feet on desks. The employer argued that putting feet on a desk while working was unreasonable, and took the activity outside the course and scope of employment. The court didn't decide that question, and wanted the appeals officer to first clarify whether the employer had an implied prohibition about putting feet on a desks. If so, Mogg wouldn't get any medical care or benefits because his conduct was outside the personal comfort doctrine and therefore not within the course and scope of employment.

Fortunately, the court's order is not an official published decision. The order cannot be cited as precedent by appeals officers or district court judges as an interpretation of Nevada law. However, it does tell us how the justices are thinking about injured workers in Nevada. The court's discussion has me worried that the court is dangerously close to judicially legislating that employers can deny claims if they can show that an employee was doing something that the employer impliedly prohibited.

Almost all large employers have written and implied safety rules. If employers can show that an employee is doing his job in such a way as to violate a written or an implied safety rule, almost every claim can be denied as being outside the course and scope of employment Employers can easily get written statements from supervisors stating that there are implied rules against doing anything unsafe. What employer won't come up with an implied prohibition against whatever conduct causes their employees to get injured? I'm not sure the court completely considered the effect of allowing employers to argue that there are unwritten, implied rules against innocuous, but slightly unsafe conduct by employees that might cause an accident.

Remember that the flip side of the exclusive remedy rule is that employers cannot be sued for work-related injuries, even if the accident is caused by the employer's violation of safety rules. Employees who are seriously injured by their employers' fault are only entitled to the specific benefits available to all injured workers under the Nevada Industrial Insurance Act (NRS 616). The employee cannot sue his employer for any additional money by showing that the employer was at fault, or that the employer violated safety regulations.

If the court were to officially adopt the analysis it uses in the recent Order in the Fitzgerald v. Mogg case, then employers will be able to circumvent the exclusive remedy rule by showing that the employee was at fault for the accident and that the claim should be denied. The court doesn't come right out and use the word "fault", but that is what the court is really talking about when it refers to unreasonable conduct that is outside the course and scope of employment. It isn't fair if the court is not likely to employ the same legal analysis when an employee is injured by the fault of an employer who insists that the employee work under unsafe conditions. Will the court find that unsafe employer-required activity that causes an accident is outside the course and scope of an injured worker's employment so as to allow the employee to sue the employer? I doubt it. The court is more likely to tell an injured employees that they are limited to workers' comp benefits even if the employer insisted they do some unreasonable and unsafe activity at work that caused the accident.

The court's decision last year in Rio v. Phillips is more helpful to employees who have injures from **unexplained falls** than two older cases often relied on by insurers to deny slip and fall claims. See Mitchell v. Clark County, 121 Nev. Adv. 21 (2003), and Rio Suite Hotel v. Gorsky, 113 Nev. 600, 939 P.2d 1043 (1997). Those two older cases were not overruled in the recent Phillips case, however, and injured workers must still prove **more** than that their injury happened at work. Insurers frequently deny cases involving unexplained falls at work, or falls where the employee cannot remember exactly what happened before he or she fell. Many of those cases are actually winnable cases when appealed correctly. An injured worker shouldn't give up on a denied claim caused by a fall at work without an experienced legal opinion.

As I first mentioned, most serious fall injuries can be easily related to either the fault of the employer or fault of the employee. There really aren't that many unexplained fall, so I think the court's discussion in the unpublished Fitzgerald v. Mogg case is more significant than the published decision in the Rio v. Phillips case. The Fitzgerald v. Mogg analysis is unfair to injured workers because it will allow employers to use the employee's own fault (unreasonable conduct) as a defense to a claim. This is a fundamental change to Nevada workers' compensation law, and should instead come the Nevada legislature, if at all.