IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLANDO ROTHERMUND, JR.,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA,
Respondent.

No. 43348

FILED

DEC 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; David Wall, Judge. We affirm.

In 1987, appellant Orlando Rothermund, Jr., injured his back while working as a security guard for the Las Vegas Convention and Visitors Authority. Rothermund accepted a lump-sum payment for a ten percent permanent partial disability (PPD) award in connection with that injury. Between 1987 and the present, either the State Industrial Insurance System, or its successor, respondent Employers Insurance Company of Nevada (EICON), administratively dealt with his recurring back problems. Alleging a substantial worsening of the back condition and poor prospects for regular employment, Rothermund sought an award of permanent total disability (PTD) benefits under NRS 616C.435(2), which embraces the so-called "odd-lot" doctrine, and alternatively sought an award of continuing vocational rehabilitation benefits. An appeals officer denied the PTD claim and awarded a lump-sum amount as and for vocational rehabilitation services. The district court denied Rothermund's petition for judicial review. This appeal followed.

Standard of review

The standard of review of an administrative agency's decision is the same for this court as for the district court: for questions of fact, we

will not substitute our judgment for that of an agency, but review for clear error or an arbitrary abuse of discretion.[1] Questions of fact include a determination of the extent or permanency of an employee's medical disability and will be affirmed unless it is against the manifest weight of the evidence.[2] We also defer to an agency's conclusions of law that are closely related to its view of the facts if supported by substantial evidence,[3] i.e., evidence that a reasonable mind might accept as adequate to support a conclusion.[4] Questions of law are reviewed de novo.[5]

Permanent total disability benefits

The odd-lot doctrine, per NRS 616C.435(2),

> "permits [a] finding of total disability where claimant is not altogether incapacitated for any kind of work but is nevertheless so handicapped that he will not be able to obtain regular employment in any well-known branch of the competitive labor market absent superhuman efforts, sympathetic friends or employers, a business boom, or temporary good luck."[6]

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[1]Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997).

[2]Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401, 404 (1984).

[3]SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992).

[4]Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997).

[5]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[6]SIIS v. Perez, 116 Nev. 296, 297 n.1, 994 P.2d 723, 724 n.1 (2000) (quoting Black's Law Dictionary 1080 (6th ed. 1990)).

"'The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market . . . .'"[7] Consideration may be given to the worker's age, experience, training and education, among other factors.[8] In considering the various factors, the focus of the analysis is on the degree to which the worker's physical disability impairs the worker's earning capacity or ability to work.[9]

We conclude that the appeals officer did not clearly err or abuse her discretion in denying Rothermund PTD benefits under the odd-lot doctrine.

At the time of the evidentiary hearing, Rothermund was only fifty years old and had not yet reached retirement age. He had attended one year of college and possessed a good command of the English language. Also, his claim file admitted before the appeals officer contained the following history. Rothermund accepted the ten percent PPD award in 1989, and was re-rated with a five percent whole body impairment in 1999. Interestingly, a 1999 functional capacity examiner found that Rothermund had magnified his symptoms. The evaluator concluded that he was capable of light-duty work for a four-hour day. In 2000, an EICON medical advisor noted that an MRI had failed to show any worsening of Rothermund's pathology, and that he had good control of his extremities, was able to travel, and had no incapacitating medical conditions such as heart or lung disease. Evidence also indicated that Rothermund frustrated the completion of a 2002 functional capacity

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[7]Hildebrand, 100 Nev. at 51, 675 P.2d at 404 (quoting 2 Arthur Larson, The Law of Workmen's Compensation § 57.51 (1981)).

[8]Id.

[9]Id.

evaluation through self-limiting participation, which suggested psychosocial and/or motivational, rather than physical, factors. Finally, based upon Rothermund's testimony about his participation in a Colorado hotel/boarding house he co-owned with his wife, Rothermund demonstrated that he was self-employed in a sedentary job, and his ability to work was unimpaired.

Thus, substantial evidence supports the appeals officer's findings and conclusions that Rothermund was not so handicapped that he could not obtain regular employment in any well-known branch of the competitive labor market. We therefore conclude that the appeals officer did not clearly err or abuse her discretion by denying Rothermund PTD benefits under the odd-lot doctrine.

Vocational rehabilitation benefits

The appeals officer also denied Rothermund prospective vocational rehabilitation benefits for out-of-state services. Rather, she retroactively approved a lump-sum buyout in light of the transferable skills Rothermund had demonstrated while self-employed in Colorado, characterizing the experience as a successful job-retraining program.

Rothermund argues that, under the law in effect at the time of his 1987 injury, he is entitled to ongoing vocational rehabilitation benefits and services in Colorado, at EICON's cost, rather than a lump-sum buyout.

First, as a general matter, we conclude that Rothermund was eligible for vocational rehabilitation, whether in the form of benefits or a buyout, at some point in time. From 1996 through 1998, Rothermund's PPD status was changed to that of temporary total disability (TTD) because of worsening back pain, resulting in $30,052.90 in compensation from EICON. After Rothermund's status resolved, this change in

circumstance would have required EICON to reinstate Rothermund's vocational rehabilitation benefits.[10] Indeed, after a vocational rehabilitation assessment on August 11, 1999, EICON offered Rothermund a lump-sum buyout in lieu of vocational rehabilitation benefits.

Second, we conclude that the appeals officer reached the correct result when she approved a lump-sum buyout for Rothermund. When a claimant requests vocational rehabilitation benefits after his claim has been reopened, the law to be applied is that which is in effect at the time of the request,[11] in this case, NRS 616C.580.[12] Generally, under NRS 616C.580(1), vocational rehabilitation services must not be provided outside of Nevada.[13] However, as noted, an injured out-of-state employee

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[10]See NAC 616C.595(2) ("If the injured employee is unable to perform the duties of a new job for reasons related to his injury or disease, the insurer must reinstate vocational rehabilitation benefits."); Jerry's Nugget v. Keith, 111 Nev. 49, 56, 888 P.2d 921, 925 (1995) (stating that NRS Chapter 616 allows EICON to award vocational rehabilitation services upon a claimant's change of circumstances); see also Stark v. SIIS, 111 Nev. 1273, 1276, 903 P.2d 818, 820 (1995) (holding that an injured worker should be given another rehabilitation program if he is unable to perform the duties of the job he was rehabilitated to do because of a worsening condition).

[11]See Seader v. Clark Co. Risk Mgmt., 111 Nev. 1399, 1402-03, 906 P.2d 255, 257 (1995).

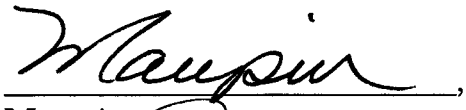
[12]The appeals officer properly dismissed the legislators' letters suggesting that NRS 616C.580 did not retroactively apply to injuries predating its promulgation; these letters were outside the official record of the legislative proceedings and are basically hearsay.

[13]NRS 616C.580 was added to the NRS in 1993, and was amended in 1999, 2001, and 2005. These amendments do not touch upon the issue at hand, nor do they affect our analysis.

who qualifies for vocational rehabilitation services may receive a lump sum in lieu of such services.[14]

Here, EICON informed Rothermund on July 6, 1999, that NRS 616C.580 applied to him. On September 27, 1999, after an August 11 vocational rehabilitation assessment, EICON offered Rothermund a $3,926.70 lump-sum settlement in lieu of vocational rehabilitation benefits. The appeals officer's re-characterization of this offer as compensation for a successful job-retraining program, rather than because NRS 616C.580 applied and because Rothermund resided in Colorado, ignores EICON's written interactions with Rothermund. However, we conclude that the district court did not err in deeming the $3,926.70 lump-sum buyout appropriate because it was properly authorized by NRS 616C.580 and nothing in the record suggests that the amount was contrary to substantial evidence. Therefore, having concluded that the appeals officer did not err, we

ORDER the judgment of the district court AFFIRMED.



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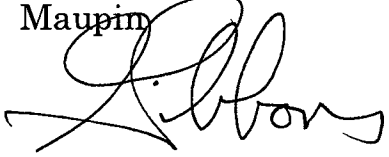

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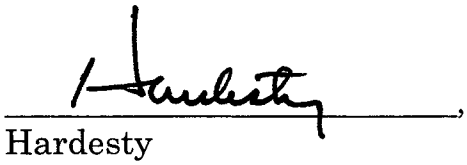

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[14]NRS 616C.580(2).

cc: Hon. David Wall, District Judge
Nevada Attorney for Injured Workers/Las Vegas
Beckett & Yott, Ltd./Carson City
Clark County Clerk