

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED DAY,  
Appellant,  
vs.  
WASHOE COUNTY SCHOOL  
DISTRICT; AND NEVADA  
COMPFIRST,  
Respondents.

No. 44679

**FILED**

**JUL 05 2006**

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation case. First Judicial District Court, Carson City; William A. Maddox, Judge.

While working for respondent Washoe County School District, appellant Alfred Day sustained a number of industrial injuries to his neck, back, and hips between 1986 and 1995. By 1995, doctors had diagnosed Day with degenerative osteoarthritis in both hips. Respondent Nevada CompFirst approved hip replacement surgeries for each hip. Day underwent right hip replacement surgery, but elected not to immediately proceed into surgery for the left hip. CompFirst closed Day's claim and granted him a 21 percent permanent partial disability ("PPD") rating: 12 percent for his right hip, 4 percent for his left hip, 3.5 percent for his cervical spine, and the remainder for his lumbar spine. In making this award, CompFirst concluded that Day's condition, with the exception of his lumbar spine, was 100 percent the result of his industrial injuries. CompFirst concluded that Day's lumbar spine condition was only 50 percent industrially related.

In 1999, CompFirst denied Day's request to reopen his claim for treatment of his left hip. An appeals officer upheld the denial based in

part on the medical opinion of Dr. Phelps Kip, who concluded that Day's hip injury was not industrially related in the first instance. However, Dr. Kip subsequently clarified that if Day's degenerative hip disease was originally classified as an industrial condition, then the worsening of this condition was also industrial. The district court denied Day's petition for judicial review. In Day v. Washoe County School District,<sup>1</sup> this Court remanded for a new hearing before the appeals officer, concluding that the appeals officer had improperly permitted reconsideration of the accuracy of a prior decision that an injury was industrial in nature. We determined that this issue had been previously resolved, and held that NRS 616C.390 did not permit reconsideration.<sup>2</sup>

In 2003, while the Day case was pending, Day filed another request to reopen his claim for treatment of his hips, as well as his back. Eventually, an appeals officer reversed a hearing officer's determination that Day was entitled to claim reopening, basing her decision in part on Dr. Kip's medical report, in which he classified Day's hip and back injuries as non-industrial. Day now appeals the district court's denial of his petition for judicial review.

On appeal, Day makes two arguments. First, he argues that per Day, the appeals officer legally erred by misconstruing NRS 616C.390. Second, Day argues that the appeals officer's decision is unsupported by substantial evidence. Specifically, Day contends that Dr. Kip's diagnosis of Day's degenerative hip condition as a preexisting rheumatologic

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<sup>1</sup>121 Nev. \_\_\_, \_\_\_, 116 P.3d 68, 70 (2005).

<sup>2</sup>Id.

condition conflicts with CompFirst's prior acceptance of the injury as 100 percent industrial.

In its answer, CompFirst highlights Dr. Kip's independent medical examination and argues that there is substantial evidence to support the appeals officer's conclusion that Day had failed to prove that the original industrial injury was the primary cause of the appellant's need for treatment.

We conclude that substantial evidence supports the appeals officer's decision with respect to Day's lumbar spine condition, but the appeals officer improperly reconsidered a prior decision that Day's hip and cervical spine conditions were industrial in nature.

#### Lumbar spine

"[O]n questions of fact, this court reviews an administrative body's decision for clear error or an arbitrary abuse of discretion[,] and will not overturn an appeals officer's factual decision that is supported by substantial evidence."<sup>3</sup> Day's PPD evaluation apportioned 50 percent of the lumbar back injury to an industrial cause, which leaves open the possibility that a non-industrial factor was the primary cause for a worsening of Day's lumbar back injury. In his medical report, Dr. Kip opined that Day's lumbar spondylosis was a pre-existing condition that predated Day's industrial injury. This report constitutes substantial evidence supporting the appeals officer's decision that Day's lumbar spine injury was a non-industrial injury.

#### Left hip and cervical spine

In our prior Day opinion, we explained, "NRS 616C.390 does not permit reconsideration of the accuracy of a prior decision that an

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<sup>3</sup>Id., 116 P.3d at 69 (internal quotation marks omitted).

injury is industrial in nature.”<sup>4</sup> Here, as to Day’s left hip, the appeals officer considered Dr. Kip’s medical report in which the doctor concluded that any worsening resulted from non-industrial factors. However, in making that conclusion, Dr. Kip re-diagnosed Day’s degenerative hip condition by ascribing its cause to various non-industrial sources: a genetic factor, a general systemic disorder, a musculoskeletal problem, and/or an underlying rheumatologic condition. The only hip injury of Day’s that Dr. Kip categorized as industrial was a contusion to the right hip. Dr. Kip’s report ignored CompFirst’s prior acceptance of Day’s degenerative hip condition as 100 percent industrially related. As a result, the appeals officer appears to have improperly permitted reconsideration of an issue that had been previously resolved.

A similar analysis applies for Day’s cervical spine injury. In his medical report, Dr. Kip diagnosed Day with cervical spondylosis, or spinal osteoarthritis, which he categorized as a non-industrial injury. Dr. Kip variously ascribed the cause of the injury to genetic factors, a generalized systemic disorder, an underlying rheumatologic condition, a musculoskeletal problem, and/or a metabolic disorder, possibly compounded by years of morbid obesity. He then ascribed the worsening of Day’s cervical back injury to non-industrial, possibly developmental, factors. In so doing, he ignored CompFirst’s prior acceptance of Day’s cervical spine injury as 100 percent industrially related.<sup>5</sup> Thus, the

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<sup>4</sup>Id., 116 P.3d at 70.


<sup>5</sup>CompFirst’s acceptance of Day’s cervical back injury as 100 percent industrial was based on the PPD evaluation, which found no prior injury or impairment to the cervical spine.

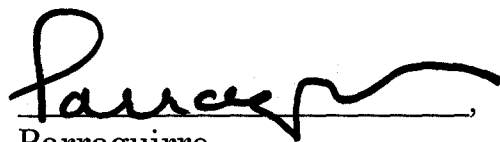
appeals officer appears to have again improperly permitted reconsideration of the nature of Day's injuries.

Accordingly, the district court should order the appeals officer to conduct a new hearing with the sole issue to be whether the primary cause for the worsening of Day's left hip osteoarthritis and cervical spine injury was the industrial injury for which the claim was originally made. In making this determination, the appeals officer should be mindful of the fact that the respondents originally accepted Day's degenerative hip condition and cervical spine injury as industrially related and that NRS 616C.390 requires only a determination of whether that injury is the primary cause of Day's worsened condition. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. William A. Maddox, District Judge  
Nevada Attorney for Injured Workers/Carson City  
McDonald Carano Wilson LLP/Reno  
Carson City Clerk