

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD MAY,
Appellant,
vs.
TROPICANA HOTEL & CASINO,
Respondent.

No. 45614

FILED

MAY 11 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation case.¹ Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

The claimant, appellant Gerald May, suffered an industrial injury to his right eye in January 2001. His employer, respondent Tropicana Hotel & Casino, accepted his subsequent workers' compensation claim.

After May had been evaluated by several doctors, on October 30, 2002, Dr. Loren Little indicated that his October 28, 2002 examination of May's right eye vision, best corrected, showed a 20/40 rating, indicating vision loss. Dr. Little also stated that other tests indicated that May had better vision than what May objectively presented, but did not give that potential "better vision" any rating. Dr. Little noted that other doctors had indicated that the vision loss was "unexplained" and asserted that,

¹Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this case.

unless one of the other doctors, Dr. Kent Wellish, considered his prior diagnosis of possible corneal degeneration to be related to the industrial injury, Dr. Little "would suggest" that no additional medical treatment was warranted and that "no residual from the industrial incident" existed.

On December 9, 2002, May was notified that his claim would be closed, as no additional treatment had been recommended. May administratively appealed, contesting the closing of his claim without first scheduling an appointment with a rating physician to evaluate whether he was entitled to permanent partial disability (PPD) compensation.

Before the appeals officer, May submitted a letter from Dr. Wellish, dated July 31, 2003. In the letter, Dr. Wellish stated that, based on an August 17, 2002 examination, May's uncorrected right eye vision was 20/50 and his "manifest refraction" corrected vision was 20/20. He also provided, however, that "the only significant damage to [May's] right eye" was a change in shape "and now he requires glasses to see." Dr. Wellish concluded that a "reasonable probability of permanent partial industrial impairment" existed, but indicated that he would have to conduct additional evaluations to determine with any certainty whether May suffered from such a disability.

The appeals officer determined that because Dr. Little, a rating physician, had concluded that the claim could be closed with no ratable impairment and Dr. Wellish was unable to state whether May suffered a permanent partial impairment, May had failed to establish that he was entitled to a PPD evaluation. Accordingly, the appeals officer determined that the claim closure was proper.

May then petitioned for judicial review, which was denied. May appeals the district court order denying his petition for judicial review.

This court, like the district court, reviews an appeals officer's decision for clear error or an arbitrary abuse of discretion.² Although an appeals officer's pure legal determinations are independently reviewed, the appeals officer's fact-based "conclusions of law . . . are entitled to deference, and will not be disturbed if they are supported by substantial evidence.' Substantial evidence is that 'which a reasonable person might accept as adequate to support a conclusion.'"³ Nor may we substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact.⁴ Our review is limited to the record before the appeals officer.⁵

Although a claimant has no absolute right to a PPD evaluation,⁶ NRS 616C.490(2) requires an insurer to schedule an appointment with a rating physician to ascertain the extent of a claimant's disability if it receives a physician's report "indicating that [the claimant] may have suffered a permanent disability and is stable and ratable." NAC 616C.103(1)(a) and (b) define "stable" and "ratable" for the purpose of determining whether a claimant is entitled to a PPD

²Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003).

³Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003) (quoting SIIS v. Montoya, 109 Nev. 1029, 1031-32, 862 P.2d 1197, 1199 (1993)).

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

⁵Id. at 536, 936 P.2d at 842.

⁶Georgeff v. Sahara Hotel, 103 Nev. 485, 487, 745 P.2d 1142, 1143 (1987).

evaluation, under NRS 616C.490, to determine the extent of any permanent impairment. In relevant part, NAC 616C.103(1) provides,

(a) "Stable" [is] to include, without limitation, a written indication from a physician or chiropractor that the industrial injury or occupational disease of the injured employee:

- (1) Is stationary, permanent or static; or
- (2) Has reached maximum medical improvement.

(b) "Ratable" [is] to include, without limitation, a written indication from a physician or chiropractor that the medical condition of the injured employee may have:

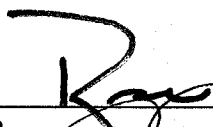
- (1) Resulted in a loss of motion, sensation or strength in a body part of the injured employee; or
- (2) Resulted in a loss of or abnormality to a physiological or anatomical structure or bodily function of the injured employee.

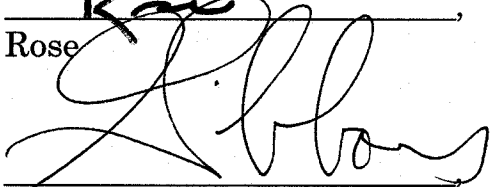
Here, Dr. Little's report seems to indicate that May suffered a vision loss that might be related to his industrial injury, depending on whether Dr. Wellish could connect the possible corneal degeneration to the industrial injury. Otherwise, Dr. Little apparently concluded that any vision loss did not result from the injury, so that the injury did not result in any disability. As Dr. Little also indicated that no further treatment was appropriate, Dr. Little's reporting leaves open the possibility that May's injury resulted in a permanent disability and indicates that an additional medical opinion is necessary to resolve that question. Consequently, the appeals officer's determination that claim closure was warranted without a PPD or other evaluation is not based on evidence that a reasonable person could accept as adequately supporting the conclusion that Dr. Little "persuasively opined that this claim should be closed with no ratable impairment."

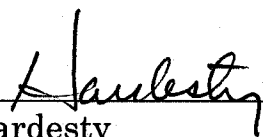
Moreover, although the appeals officer determined that May had failed to meet his burden of establishing that a PPD evaluation was warranted, under NRS 616C.490, that determination appears to be based on the factual finding that "Dr. Wellish could not state whether [May] had any permanent partial impairment." NRS 616C.490(2), however, does not require that a physician determine whether a claimant has a permanent impairment, but only that the claimant "may have" a permanent disability. Accordingly, as Dr. Little's and Dr. Wellish's reports indicate that May's vision loss, which appears to fall within the definitions of stable and ratable, might be related to his industrial injury, it appears that a medical question or dispute remains unresolved. The appeals officer should have directed an additional examination into this question.⁷

Accordingly, we reverse the district court's order and remand this matter to the district court, so that the district court may remand this matter to the appeals officer for further proceedings.

It is so ORDERED.


_____, C. J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

⁷NRS 616C.360(3); Georgeff, 103 Nev. at 488 n.3; 745 P.2d at 1144 n.3.

cc: Hon. Lee A. Gates, District Judge
Nevada Attorney for Injured Workers/Las Vegas
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Clark County Clerk