

IN THE SUPREME COURT OF THE STATE OF NEVADA

BORKA DEVETAK
Appellant,
vs.
INSURANCE COMPANY OF THE
WEST,
Respondent.

No. 46446

FILED

JUL 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *A. Alvarado*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's petition for judicial review in a workers' compensation matter. Eighth Judicial District Court; David Wall, Judge.

Appellant petitioned the district court for judicial review of an appeals officer's order denying her claim for workers' compensation. The district court denied review, and appellant has appealed.¹

Appellant claims that she sustained an on-the-job injury to her left hip on January 8, 2001. She was, at that time, employed as a maid at the Regent Hotel in Las Vegas. Appellant rests her appeal on the argument that the appeals officer's decision was based upon false evidence consisting of the items contained in the records of Dr. Zarka, who was the

¹While appellant represents herself in this appeal, she did have the benefit of counsel during the claims review administrative process and in seeking district court judicial review.

second physician to see appellant after the claimed injury, the language barrier (appellant speaks Bosnian and required the help of friends or family to communicate at work and with physicians), and, in appellant's words, "unfair representation."

The appeals officer specifically found that appellant's testimony was not credible; he concluded that appellant had failed to prove, by a preponderance of evidence, that an accident and injury arose out of the course and scope of her employment.² The appeals officer also concluded that appellant had failed to provide her employer with timely written notice of an accident and injury, determining, therefore, that as a matter of law, appellant was barred from receiving workers' compensation.³

NRS 233B.135(1)(b) requires that judicial review of a final decision by an agency be confined to the record. We have carefully reviewed the record in this case. During the administrative proceedings, appellant testified that, through the help of another maid who speaks both English and Bosnian, she told her supervisor, on the day of the event, both that she was injured and that her injury was work-related. The maid and appellant's supervisor, however, testified to the contrary. The maid testified that appellant told her that her leg hurt and that appellant complained that she was too old to do the job; her supervisor testified that

²See NRS 616C.150(1) (prohibiting compensation unless a claimant proves, by a preponderance of the evidence, that her injury arose out of and in the course of employment).

³See NRS 616C.015 (governing notice of injury requirements).

she was told by the appellant, through the other maid, that appellant felt sick. The supervisor testified that appellant had difficulty setting her pace for timely completion of all work assigned for her to perform.

Additionally, the medical evidence resulting from two different doctor visits sought by appellant in January 2001, and admitted at the hearing before the appeals officer, fails to demonstrate that appellant made any mention during those visits of the alleged work-related nature of the injury. The first time medical evidence referenced the appellant's complaints as being work-related was in February 2001, when appellant was seen at UMC and diagnosed with a broken hip. Dr. Zarka noted in his report that appellant had a prior fracture of the hip, which had been surgically repaired. Appellant testified to the contrary, stating that she had never before this incident sought medical attention and that she had never before broken a hip or had hip surgery.

After the hearing, on a motion for reconsideration before the appeals officer, which was ultimately denied, the appellant produced a document from Dr. Zarka indicating that his previous report was inaccurate about the patient ever having suffered a hip fracture or undergoing surgery on an earlier occasion. Dr. Zarka also stated therein that appellant's body bore no sign of surgical incision or scarring. Dr. Zarka indicated that a language barrier was a possible cause for the inaccuracy, although a Bosnian speaker from his office apparently was present when he saw appellant as a patient.

The appeals officer's decision referred to Dr. Zarka's report. The district court, in its first round of judicial review, remanded the case to the appeals officer for a determination as to whether or not Dr. Zarka's

report influenced the appeals officer's ultimate decision. The appeals officer concluded that even if he disregarded Dr. Zarka's evidence, his findings, conclusion, and decision would not change.

Most of appellant's arguments and complaints mentioned in this appeal are offered to rebut the appeals officer's finding that she was not credible. Appellant, in her brief, encourages this court to search out records, witnesses, and evidence that were not produced at the hearing. Appellant also makes factual representations on appeal that are not a part of the record and so cannot be considered by this court.⁴ For example, appellant would like this court to check the records of hospitals in Europe, which would purportedly support her statement that she had never been to a hospital before the occasion of the injury in question. She would also like us to consider testimony not in the record consisting of a statement from another maid at the Regent with whom appellant rode the bus to work the morning of January 8, 2001, stating that appellant was in good physical condition in the morning, but that appellant does not think her attorney offered to the court. As noted, since these representations are not part of the record, we may not consider them.⁵

In reviewing the appeals officer's decision, as to matters of fact and credibility, this court may not substitute its judgment for that of the

⁴See NRS 233B.135(1)(b); Diaz v. Golden Nugget, 103 Nev. 152, 734 P.2d 720 (1987).

⁵See id.; Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 635 P.2d 276 (1981).

agency.⁶ The standard of review in this case is abuse of discretion.⁷ Therefore, this court will limit its review to determining whether substantial evidence exists in the record to support the determination below.⁸ Substantial evidence is that which a reasonable person could accept as adequate to support a conclusion.⁹ Although we review purely legal questions de novo, an appeals officer's fact-based conclusions of law are entitled to deference.¹⁰ From our review of the record, it is clear that substantial evidence, as described above, exists to support the appeals officer's decision, and thus, the appeals officers fact-based legal determinations are entitled to deference.

The appeals officer's legal conclusion that appellant is not entitled to workers' compensation benefits is based upon two factual determinations made with respect to the evidence presented. First, the appeals officer determined that appellant did not carry her burden of proving that she was injured on the job on January 8, 2001. The appeals officer's reasons for this are based upon substantial evidence, as discussed

⁶NRS 233B.135(3); Construction Indus. v. Chalue, 119 Nev. 348, 354, 74 P.3d 595, 597 (2003).

⁷Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 336, 792 P.2d 400, 401 (1990).

⁸Id.


⁹Chalue, 119 Nev. at 352, 74 P.3d at 597.

¹⁰Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003).

above. Second, the appeals officer concluded that appellant did not timely inform her employer of any on-the-job injury. This conclusion is also based upon substantial evidence, in that both the other maid and the supervisor who testified denied that appellant told them that she had been injured while working. Also, the medical reports of two physicians who saw appellant for treatment within one month of the incident both provide that the injury complained of was not work-related.

Appellant has failed to establish that the appeals officer's decision was not based upon substantial evidence. Accordingly, we affirm the district court's order denying judicial review.

It is so ORDERED.¹¹


_____, J.
Gibbons


_____, J.
Douglas


_____, Sr. J.
Agosti

¹¹The Honorable Deborah A. Agosti, Senior Justice, participated in the decision of this matter under a general order of assignment entered on July 6, 2007.

cc: Hon. David Wall, District Judge
Borka Devetak
David H. Benavidez
Clark County Clerk