

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUXOR HOTEL & CASINO,
Appellant,
vs.
JAMES SCOTT,
Respondent.

No. 49180

FILED

FEB 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Respondent James Scott suffered an industrial injury on August 31, 2000, while working for appellant Luxor Hotel & Casino. In 2001, amidst on-going litigation over whether Luxor should accept Scott's resulting workers' compensation claim, Scott requested temporary total disability (TTD) benefits. After further proceedings resulted in an appeals officer decision awarding Scott TTD benefits for the period of August 31, 2000, through August 7, 2003, Luxor petitioned the district court for judicial review. The district court determined that the appeals officer lacked jurisdiction to award TTD benefits after July 11, 2001, and thus, the court granted Luxor relief with respect to any benefits awarded after that date. Scott appealed.

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

Meanwhile, Scott requested that Luxor pay him TTD benefits, retroactive from July 11, 2001. When Luxor refused, Scott administratively appealed. An appeals officer, after considering whether the pending appeal concerning the July 11, 2001 – August 7, 2003 period preempted her jurisdiction, determined that she had authority to consider the matter because the district court had made no decision on the merits. The appeals officer then considered the evidence and, on March 8, 2006, issued an order directing Luxor to pay the requested TTD benefits, retroactive from July 11, 2001, through January 6, 2005. Luxor petitioned the district court for judicial review of the appeals officer’s March 8 order, and when judicial review was denied, Luxor appealed.

In the meantime, on July 10, 2006, this court resolved the appeal from the district court’s order regarding the appeals officer’s jurisdiction. In the July 10 order, we affirmed the district court’s order because, regardless of whether the appeals officer had jurisdiction, no TTD benefits for the July 11, 2001 – August 7, 2003 period were available, since Scott had not submitted proper disability certifications for that period.² Thereafter, in resolving Scott’s subsequent petition for rehearing, we clarified that the July 10 order had no bearing on any subsequent action.³

With respect to the instant matter—Luxor’s appeal from the order denying judicial review of the appeals officer’s March 8 order—we, like the district court, review the appeals officer’s decision for clear error

²Scott v. Luxor Hotel & Casino, Docket No. 44308 (Order of Affirmance, July 10, 2006).

³Id. (Order Denying Rehearing, September 27, 2006).

or an arbitrary abuse of discretion.⁴ Although the appeals officer's purely legal determinations are independently reviewed, we give deference to the appeals officer's fact-based conclusions of law, which we will not disturb if supported by substantial evidence.⁵ We may not substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact,⁶ and our review is limited to the record before the appeals officer.⁷

Luxor challenges the appeals officer's decision on two grounds. First, it contends, the appeals officer lacked jurisdiction to consider the matter because of the appeal pending before this court. But appeals officers have jurisdiction over aggrieved persons' administrative challenges to hearing officer's orders,⁸ and in that context, they must consider the merits of any matter raised.⁹ Accordingly, the appeals officer

⁴Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003).

⁵Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003). Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion. Id. at 235, 71 P.3d at 491-92.

⁶Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997).

⁷Id. at 536, 936 P.2d at 842.

⁸NRS 616C.345(1); see also NRS 616C.315(3) (explaining that a hearing officer has jurisdiction over aggrieved persons' challenges to insurers' written determinations pertaining to workers' compensation matters); NRS 616C.340(6) (providing that an appeals officer's order is the final and binding administrative decision with respect to a claim for workers' compensation).

⁹NRS 616C.360(2).

had jurisdiction to consider Luxor's denial of Scott's request for TTD benefits.¹⁰

Second, Luxor argues that the appeals officer's decision is not supported by substantial evidence. In particular, Luxor asserts that Scott has again failed to present proper certificates of disability supporting his inability to work from July 11, 2001 – January 6, 2005.

As Luxor points out, under NRS 616C.475(7), a disability certificate must meet three requirements: it must (1) “[i]nclude the period of disability and a description of any physical limitations or restrictions imposed upon the work of the employee,” (2) “[s]pecify whether the limitations or restrictions are permanent or temporary,” and (3) be signed by a statutorily permissible treating physician or chiropractor. Luxor asserts that neither a July 11, 2001 form report¹¹ nor a December 31, 2001 medical report, both of which, it states, the appeals officer apparently relied on, showed that Scott was totally incapacitated from work after July 11, 2001.

¹⁰As Scott points out, to the extent that Luxor's argument can be viewed as invoking the doctrine of res judicata or issue preclusion, those doctrines do not apply, since no final decision on the merits had been rendered at the time the appeals officer considered the matter. See Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 835-36, 963 P.2d 465, 473-74 (1998). And as noted above, we have already recognized that our July 10 order had no bearing on any subsequent action.

¹¹Luxor asserts that the July 11 form report contradictorily stated that Scott was both totally incapacitated from work and capable of performing light duty employment. But the copy of that report provided to this court, while not clear, suggests that the physician attempted to delete his comments regarding total incapacitation, explaining that while Scott could perform light duty work, he could not perform his pre-injury job.


But the appeals officer also noted that after some initial medical consultation, ongoing litigation regarding Scott's entitlement to workers' compensation prevented Scott from seeking medical treatment regarding his industrial injury for approximately four years. At that time, the appeals officer found, a physician continued to opine that Scott's injuries prevented him from returning to his pre-accident employment. This finding is supported by substantial evidence, as a January 7, 2005 medical report pointed to the December 31, 2001 medical report and concluded that the permanent restrictions listed in that earlier report continued to be reasonable. Thus, as the January 7, 2005 report covered the July 11, 2001 – January 6, 2005 period, the appeals officer did not abuse her discretion in awarding Scott TTD benefits for that period.¹²

As the appeals officer had authority to consider whether Scott was entitled to TTD benefits from July 11, 2001, through January 6, 2005, and because she did not abuse her discretion in awarding Scott TTD

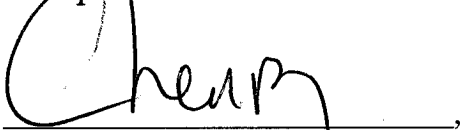
¹²See Diaz v. Golden Nugget, 103 Nev. 152, 156, 734 P.2d 720, 723-24 (1987) (recognizing that rehabilitative (TTD) benefits are appropriate when the claimant is not able to return to full duty employment). We note that, under NRS 616C.475(5), TTD benefits must cease when a physician determines that a claimant is physically capable of suitable, gainful employment, given the claimant's education, training, and experience, or when the employer offers suitable light duty employment. Further, the insurer may include with each TTD check it issues, an approved form for the claimant to request continued TTD benefits. NRS 616C.475(6). Luxor has not pointed to any medical report or other evidence indicating that Scott is no longer entitled to TTD benefits because either of the above criteria have been met, and at least one medical report indicates that Scott's work restrictions are permanent and that vocational rehabilitation is appropriate.

benefits for that period, we affirm the district court's order denying Luxor's petition for judicial review.

It is so ORDERED.


_____, J.

Maupin


_____, J.

Cherry


_____, J.

Saitta

cc: Hon. Valerie Adair, District Judge
Lester H. Berkson, Settlement Judge
Lynne & Associates
Greenman Goldberg Raby & Martinez
Eighth District Court Clerk