

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ROSE (DECEASED) AND  
LINDA ROSE (SURVIVING SPOUSE),  
Appellant,  
vs.  
MEADOWBROOK INSURANCE  
GROUP; MEADOWBROOK  
INSURANCE SERVICES; AND  
NEVADA SECURITY SYSTEMS,  
Respondents.

No. 49780

FILED

APR 08 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *H. Ingoson*  
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. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

BACKGROUND

Appellant Robert Rose owned a security business with his wife, appellant Linda Rose. On June 27, 2003, Rose fell off a ladder while in the course of this employment. Two days later, Rose felt a severe pain in his leg and was taken to the hospital by paramedics. Rose was diagnosed with an ascending aortic aneurysm tear and underwent emergency surgery. Notwithstanding the surgery, Rose died on July 7, 2003. Shortly thereafter, Rose's claim for workers' compensation benefits stemming from the fall was denied on the basis that it could not be

established that he suffered an injury that arose out of and in the course of his employment.

Linda Rose administratively appealed on behalf of her deceased husband (hereafter "the Roses"), and both a hearing officer and an appeals officer affirmed the denial of the claim for benefits. The Roses then petitioned for judicial review, and the district court remanded the matter to the appeals officer, concluding that the determination that the Roses had failed to meet their burden of showing an accident arising out of and in the course of Rose's employment was not supported by substantial evidence and that, in fact, the Roses had demonstrated "by a preponderance of evidence and beyond a reasonable doubt" that Rose had suffered such an injury. The district court accordingly ordered the appeals officer to conduct an evidentiary hearing to determine whether Rose's industrial injury was the cause of his death.

Thereafter, the appeals officer rendered a second decision, which again affirmed the denial of the claim for workers' compensation benefits. Specifically, the appeals officer found persuasive testimony by Dr. Larry Cohler, a thoracic surgeon, that Rose's fall did not cause his death. This testimony was in conflict with the opinion of Rose's treating physician, Dr. Kevin Linkus, a heart surgeon, who testified that the fall did cause Rose's death. The Roses thereafter petitioned for judicial review. After a question arose over whether respondent Meadowbrook Insurance Group filed an intent to participate in the district court proceedings, the district court denied a motion to strike Meadowbrook's pleadings and ultimately entered an order affirming the appeals officer's decision. This appeal followed.

## DISCUSSION

On appeal, the Roses first argue that Meadowbrook should not have been permitted to participate in the district court proceedings for the second petition for judicial review. The Roses also contend that the district court improperly failed to set aside the appeals officer's clearly erroneous decision. Meadowbrook disagrees with both arguments.

### Meadowbrook's participation in the district court proceedings

The Roses first contend that Meadowbrook should not have been permitted to participate in the district court proceedings because it failed to timely file a statement of intent to participate, as required by NRS 233B.130(3). The Roses contend that copies of their petition and notice thereof were both filed in the district court and mailed to Meadowbrook on April 26, 2006. Thus, argue the Roses, Meadowbrook had until May 19, 2006, to file its statement of intent, if three additional days are allowed for mailing. The Roses acknowledge, however, that while the court clerk received Meadowbrook's statement of intent on May 12, 2006, the statement was returned to Meadowbrook unfiled because Meadowbrook had failed to include the appropriate filing fee or a telephone number that would have enabled the clerk to contact Meadowbrook to correct this omission. The Roses rely on the mandatory language in NRS 233B.130(3), and argue that, under Kame v. Employment Security Department, 105 Nev. 22, 769 P.2d 66 (1989), the court clerk lacked authority to date the corrected statement, which was received on May 25, 2006, as in fact filed on May 19, 2006. Meadowbrook, however, asserts that, under Bing Construction v. State, Department of Taxation, 107 Nev. 630, 817 P.2d 710 (1991), the court clerk acted appropriately because such a technical dereliction should not preclude its right to participate.

According to the court clerk's affidavit, the statement of intent was ultimately filed on May 25, 2006, but the court clerk noted May 19, 2006, as the filing date, which she claims would have been standard procedure if the clerk's office had been able to contact Meadowbrook by telephone. Having reviewed the parties' arguments and the authority provided, we conclude that this omission of the filing fee more closely triggers the concerns noted in Bing Construction, 107 Nev. 630, 817 P.2d 710, than those set forth in Kame, 105 Nev. 22, 769 P.2d 66. As the filing fee was paid shortly thereafter, and in light of the court clerk's apparent policy of preserving the filing date in other instances when a filing fee is erroneously omitted, we conclude that to deprive Meadowbrook of its right to review would not advance the interests of justice or further the purpose of the filing fee requirement. See Bing Constr., 107 Nev. at 632, 817 P.2d at 711. Accordingly, we reject the Roses' argument.

The appeals officer's decision

Next, regarding the appeals officer's decision, the Roses argue that the overwhelming weight of the evidence proved that the industrial injury caused Rose's death, that several conclusions of the appeals officer were not supported by substantial evidence, and that Dr. Cohler's opinion that Rose's fall was not the cause of his death was unduly speculative and based upon a faulty understanding of the facts.<sup>1</sup>

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<sup>1</sup>The Roses additionally assert that the appeals officer failed to follow the district court's instructions upon remand and that Meadowbrook's counsel engaged in misconduct during his closing argument. Having reviewed these arguments, we conclude that they lack merit.

Meadowbrook, however, contends that the appeals officer was forced to choose between two conflicting expert opinions and did not commit reversible error in weighing the evidence and finding that the opinion rendered by Dr. Cohler was more persuasive than the opinion provided by Dr. Linkus. Meadowbrook also contends that Dr. Cohler's opinion was properly supported and constituted substantial evidence for the appeals officer's conclusion that Rose's fall did not cause his death and should not be considered unduly speculative simply because the opinion was based on a previously undiagnosed medical condition.

This court, like the district court, reviews an administrative decision to determine whether the agency's decision constituted an abuse of discretion. Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). While purely legal determinations are reviewed de novo, *id.*, on a question of fact, this court reviews for clear error and will not overturn an appeals officer's determination that is supported by substantial evidence. Day v. Washoe County Sch. Dist., 121 Nev. 387, 389, 116 P.3d 68, 69 (2005). "While this court will not substitute its judgment for that of the agency as to the weight of the evidence, this court will reverse an agency decision that is clearly erroneous in light of reliable, probative, and substantial evidence on the whole record." *Id.* (internal quotations omitted). Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'" State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

Having reviewed the briefs, the appendix, and the other materials filed with this court, we conclude that the appeals officer's determination that Rose's fall did not cause his death is supported by

substantial evidence. Dr. Cohler opined, to a reasonable degree of medical certainty, that the cause of Rose's death was acute aortic dissection, which he explained is "caused by separation of the layers of the aorta usually caused by hypertension and some atherosclerotic disease but not by trauma." Dr. Cohler then proceeded to detail the various reasons to support his opinion that acute aortic dissection was the correct diagnosis and that Dr. Linkus's conflicting diagnosis of a traumatic aortic transection was incorrect. A reasonable mind could accept Dr. Cohler's testimony as adequate support for the conclusion that Rose's fall was not the cause of his death. See Hilton Hotels, 102 Nev. at 608, 729 P.2d at 498. Moreover, the fact that Dr. Cohler's opinion was based on a previously undiagnosed medical condition does not, in and of itself, render the opinion unduly speculative. Cf. United Exposition Service Co. v. SIIS, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993) (finding, in a workers' compensation matter, that a doctor's testimony that "[i]t is my belief that the accident (work-related) possibly could have been the precipitating factor in [the employee's] illness," was too speculative); Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005) (concluding that a doctor's expert medical opinion regarding standard of care and causation that he could offer a theory that was just as plausible as another theory, was unduly speculative). Here, Dr. Cohler's medical opinion was based upon a proper understanding of the facts and was stated to a reasonable degree of medical probability. As for the Roses' arguments that Dr. Linkus's diagnosis is the more persuasive analysis, this court will not substitute its judgment for that of the appeals officer regarding the proper weight of the evidence. See Day, 121 Nev. at 389, 116 P.3d at 69.

Accordingly, having concluded that the agency decision was neither clearly erroneous nor an abuse of discretion, we affirm the district court's order denying the petition for judicial review.

It is so ORDERED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Steven R. Kosach, District Judge  
Janet L. Chubb, Settlement Judge  
Joel A. Santos  
Wolfenzon Schulman & Ryan  
Washoe District Court Clerk