IN THE SUPREME COURT OF THE STATE OF NEVADA

AIG CLAIM SERVICES, INC.,
Appellant,
vs.
KARA ROSS,
Respondent.

No. 49918

FILED

MAY 09 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a petition for judicial review in a workers' compensation matter. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On November 13, 2005, respondent Kara Ross suffered an industrial injury to her lower back. Her ensuing workers' compensation claim was accepted by appellant AIG Claim Services, Inc., for a lumbosacral strain, only. Ross participated in a two-week physical therapy program, after which, she reported, her condition had improved. Ross returned to her treating physician for a follow-up visit on February 10, 2006. At that time, the treating physician noted that Ross was "doing well" and suffered "only rare fatigue of her lower back at the end of the day," and he discharged her from care.

Apparently, in March 2006, AIG notified Ross that her claim would be closed, which decision Ross administratively contested. While the administrative appeal was pending, on April 12, 2006, Ross returned to the treating physician, complaining that while bending to pick up something at home, she had experienced a sudden onset of pain to her lower right back. At that time, the treating physician noted Ross's

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comment that from the time of her previous visit in February until the April incident, she felt "totally fine," and he opined that Ross had suffered a lumbar strain with nerve root irritation or, possibly, a lumbar disc bulge. Approximately one week later, the treating physician again diagnosed a lumbar strain and recommended physical therapy and obtaining a magnetic resonance image (MRI) for further evaluation purposes. Ross completed several physical therapy sessions, but at a May 22, 2006 examination with her treating physician, she claimed that her back condition was worse. The treating physician's report from that date stated that "[t]he patient is now approximately six months post injury to her back." Later in that report, he opined that Ross suffered from chronic low back pain with possible nerve root irritation and noted that permission for an MRI scan had been requested, apparently from AIG.

The next month, pursuant to the hearing officer's order in Ross's administrative appeal from the March claim closure, AIG reviewed the medical reporting and issued a new letter, which essentially stated that the February 10 and April 12 medical reports showed that Ross's industrial injury had resolved and that her current condition was not related to her employment, and thus, that claim closure was appropriate. Ross again administratively appealed, and a hearing officer affirmed the claim closure, noting that Ross's then-current complaints appeared to be related to a nonindustrial injury.

Ross appealed to an appeals officer, who affirmed the hearing officer's decision. According to the appeals officer's oral findings, Ross's April symptoms differed substantially from the symptoms that she had felt with respect to the November industrial injury, and moreover, Ross

had failed to demonstrate with medical evidence that her industrial injury had been aggravated or precipitated in April.

Ross petitioned for judicial review. In granting judicial review and reversing the appeals officer's decision, the district court concluded that, under NRS 616C.175(2), which governs non-industrially caused aggravations to industrial injuries, an insurer must cover any condition that the employee claims constitutes the aggravation of an industrial injury, unless the insurer can show by a preponderance of the evidence that the industrial injury was not a substantial cause of the current condition. The court then noted that the treating physician should continue to treat Ross and should determine whether her current condition is related to her industrial injury. AIG has appealed.

Like the district court, we review the appeals officer's decision for abuse of discretion.[1] 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 will not be disturbed if they are supported by substantial evidence.[2] We may not substitute our judgment for that of the appeals officer as to the weight of the evidence on

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[1]Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003).

[2]Id. Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion, and it can be inferred from a lack of particular evidence. Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

a question of fact,[3] and our review of the facts is limited to the record before the appeals officer.[4]

Under NRS 616C.175(2), an insurer is responsible for the resulting condition of an employee who aggravates, precipitates, or accelerates an industrial injury, unless the insurer proves that the industrial injury did not substantially cause the resulting condition.[5] Thus, an insurer's burden to show that the resulting condition should not be covered arises only once it is demonstrated that the industrial injury was aggravated, precipitated, or accelerated. Although NRS 616C.175(2) does not explicitly state who bears the burden to demonstrate an

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

[4]Id. at 536, 936 P.2d at 842.

[5]In its entirety, NRS 616C.175(2) provides

> The resulting condition of an employee who:
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> (a) Sustains an injury by accident arising out of and in the course of his employment; and
>
> (b) Subsequently aggravates, precipitates or accelerates the injury in a manner that does not arise out of and in the course of his employment, shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the injury described in paragraph (a) is not a substantial contributing cause of the resulting condition.

aggravation, precipitation, or acceleration of the industrial injury, the statutory scheme indicates that the employee bears that burden.[6]

In this case, as the appeals officer and the district court acknowledged, no medical evidence demonstrates that Ross's current condition was related to her industrial condition. Indeed, the medical reporting suggested that Ross's industrial injury was substantially resolved and that she suffered an independent lumbar strain in April. Accordingly, as it was not clear from the medical reporting that an aggravation, precipitation, or acceleration of the industrial injury occurred, under the particular circumstances of this case, the appeals officer properly determined that to meet her burden, Ross had to provide medical evidence connecting her April condition to her industrial injury.[7] In other words, because the record contains no evidence that her industrial injury—the February strain—itself worsened, or that additional medical treatment was warranted with respect to that strain, the appeals

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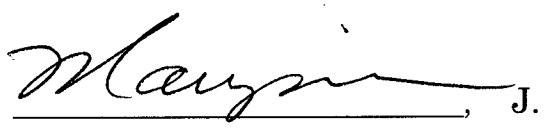
[6]See, e.g., Richards v. Republic Silver State Disposal, 122 Nev. 1213, ____, 148 P.3d 684, 693 (2006) (Becker, J. concurring) (noting that, when a statute is unclear, the Legislature's intent can be derived from the statutory scheme); NRS 616C.137(3) (explaining that an employee who challenges an insurer's refusal to pay for services that it claims are not related to the industrial injury must show that the services were either related to the injury or authorized); Hayes v. SIIS, 114 Nev. 1340, 1345-46, 971 P.2d 1257, 1260-61 (1998) (explaining that, generally, the employee bears the burden to show that new symptoms were caused by the original accident, as set forth in NRS 616C.160).

[7]See, e.g., Town of Hudson v. Wynott, 522 A.2d 974, 975 (N.H. 1986) (discussing New Hampshire's workers' compensation law), cited in Grover C. Dils Medical Center v. Menditto, 121 Nev. 278, 288 n.27, 112 P.3d 1093, 1100 n.27 (2005).

officer's determination that claim closure was appropriate despite Ross's then-current lower back condition is based on substantial evidence. Accordingly, as the appeals officer did not abuse her discretion, the district court improperly granted judicial review, and we reverse the district court's order.

It is so ORDERED.[8]



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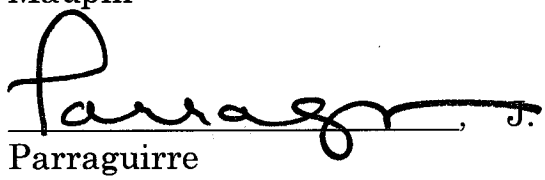

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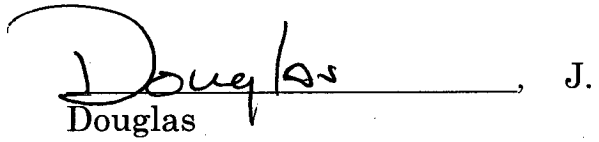

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Douglas

cc: Hon. Andrew J. Puccinelli, District Judge
Cathy Valenta Weise, Settlement Judge
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Law Office of John E. Lambert, Ltd.
Elko County Clerk

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[8]Having considered respondent's motion for oral argument, we conclude that oral argument is not warranted in this case, and therefore, we deny the motion. NRAP 34(f)(1).