IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM SWAGER,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA,
Respondent.

No. 50416

FILED

JUN 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant William Swager suffered industrial injuries to his wrists, neck, back, and shoulder area in 1988. He was awarded permanent partial disability (PPD) benefits in 1989, based on impairment to his right upper extremity, lumbar spine, and cervical spine. In the 1989 PPD evaluation, the rating physician noted that Swager had "superior range of motion" in his shoulders and deemed all injuries stable. Thereafter, in 1990, Swager's claim was reopened for a right carpel tunnel release, following which he was awarded additional PPD benefits. Swager's claim was reopened for a second time in 1992, apparently to treat his cervical spine, and it was then closed in 1993 with no residual impairment noted.

In 2004 and 2005, Swager was evaluated by Dr. Scott W. Southard for right shoulder pain. In January 2005, Dr. Southard opined that Swager's symptoms were likely the result of a rotator cuff tear and impingement problems. In so opining, Dr. Southard noted that this condition "would certainly be consistent" with Swager's industrial injury,

during which he "could well have" injured his rotator cuff. Dr. Southard stated that he thought the shoulder problem was "likely related" to the industrial injury, and that the shoulder injury "could well have occurred at that time."

Thereafter, Swager sought to reopen his claim, noting that his physician believed that his right shoulder required surgery. Ultimately, however, respondent Employers Insurance Company of Nevada (EICN) denied reopening, based on Dr. Francisco Villanueva's opinion that Swager's right shoulder was never given any medical attention under his claim and that it was medically probable that the shoulder problem bore no relation to the industrial incident.

Upon administrative review, an appeals officer pointed out that, while Swager did complain of right shoulder pain while his industrial claim was open, he was not then diagnosed with a rotator cuff tear. Further, the appeals officer determined, Swager failed to demonstrate that reopening was warranted under NRS 616C.390 because Dr. Southard's opinion on causation was "equivocal," in that he used terms of "possibility," not the "probability" required to meet the legal standard. The district court denied Swager's subsequent petition for judicial review, and Swager has appealed.

Like the district court, we review an appeals officer's decision for clear error or an arbitrary abuse of discretion.[1] Although an appeals officer's legal determinations are independently reviewed, the appeals officer's fact-based conclusions of law are entitled to deference and will not

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

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

Under NRS 616C.390(1), a claim may be reopened only when the claimant demonstrates that (1) an increase or rearrangement of compensation is necessitated by changed circumstances, (2) the original claim's injury is the primary cause of the changed circumstances, and (3) a physician certifies that the changed circumstances warrant a change in compensation. Generally, evidence establishing causation must be based on reasonable medical probability or otherwise sufficient for the appeals officer to reasonably conclude that the condition was primarily caused by the industrial injury.[5] The claimant bears the burden to show, by a preponderance of the evidence, that claim reopening is appropriate.[6]

Here, while Dr. Southard in some manner connected Swager's 2005 condition to his industrial injury, the appeals officer correctly concluded that Dr. Southard did not state to a reasonable degree of medical probability that the industrial injury was the primary cause of the

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[2]Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-492 (2003). Substantial evidence is that "'which a reasonable person might accept as adequate to support a conclusion.'" Id. (quoting SIIS v. Montoya, 109 Nev. 1029, 1032, 862 P.2d 1197, 1199 (1993).

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

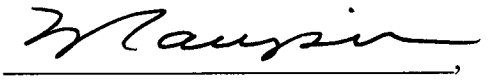
[4]Id. at 536, 936 P.2d at 842.

[5]Id. at 537-38, 936 P.2d at 842 (citing United Exposition Service Co. v. SIIS, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993)).

[6]SIIS v. Hicks, 100 Nev. 567, 569, 688 P.2d 324, 325 (1984).

2005 condition. As it is the appeals officer's responsibility to weigh the evidence, and since substantial evidence supports the appeals officer's conclusion that Swager failed to meet his burden to show that his 1988 injury was the primary cause of his 2005 shoulder condition, we cannot conclude that the appeals officer's decision is clearly erroneous or an abuse of discretion.[7] Accordingly, having reviewed the record and considered the parties' filed arguments,[8] we affirm the district court's order denying judicial review.

It is so ORDERED.



_____, J.
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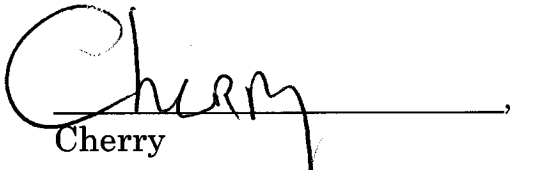

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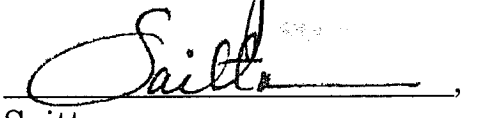

_____, J.
Saitta

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[7]See Langman v. Nevada Administrators, Inc., 114 Nev. 203, 209, 955 P.2d 188, 192 (1998) (recognizing that having "a definite relationship" is not necessarily the same as "primary cause," as is required to reopen a claim under NRS 616C.390); Horne, 113 Nev. at 539, 936 P.2d at 843 (stating that "'mere possibility' is not sufficient to establish medical causation"); Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47, 675 P.2d 401 (1984) (recognizing that a claimant seeking PPD benefits could not introduce sufficient evidence to compel a disability finding simply through the claimant's own assertions).

[8]We grant EICN's motion to exceed the page limit set forth in our April 8, 2008 order, and we direct the clerk of this court to file EICN's response and appendix, provisionally received in this court on May 22, 2008.

cc: Hon. Sally L. Loehrer, District Judge
William Swager
Law Offices of David Benavidez
Eighth District Court Clerk