

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICIA GUESMAN,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,
Respondent.

No. 51640

FILED

JAN 07 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

This is an appeal from a district court order denying a petition for judicial review in an occupational disease matter. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Like the district court, we review an appeals officer's decision to determine whether it is arbitrary and capricious or an abuse of discretion, Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003), abrogated on other grounds by Five Star Capital Corp. v. Ruby, 124 Nev. ___, ___, 194 P.3d 709, 712 (2008); NRS 233B.135(3), and will not disturb an appeals officer's fact-based conclusions of law if they are supported by substantial evidence. Ayala, 119 Nev. at 235, 71 P.3d at 491-92.

Under NRS 617.457(1), a police officer who has been continuously employed as such for more than five years is entitled to a conclusive presumption that any heart disease is work-related, unless, as set forth in subsection six¹ of that statute, after the police officer's annual medical exam, the examining physician ordered her in writing to correct a

¹We note that, subsequent to this appeal, NRS 617.457 was amended and renumbered in 2009.

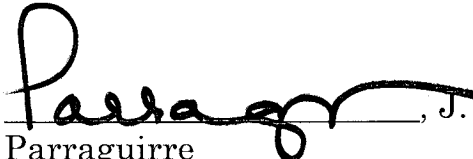
predisposing condition that was within her ability to correct and the officer failed to do so. In Employers Ins. Co. of Nev. v. Daniels, 122 Nev. 1009, 1016, 145 P.3d 1024, 1029 (2006), we recognized that smoking and being overweight are predisposing conditions and that failure to correct these conditions after being warned to do so in writing may preclude the employee from invoking the conclusive presumption.

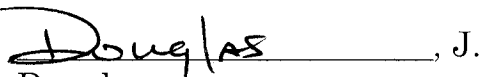
Having reviewed appellant Patricia Guesman's arguments, we affirm. The appeals officer's finding that Guesman was warned that she needed to stop smoking and correct this predisposing condition is supported by substantial evidence. Further, the appeals officer's conclusion that it was within Guesman's ability to stop smoking and correct this condition predisposing her to a heart attack is also supported by substantial evidence. Indeed, the record contains no evidence that it was not within her ability to stop smoking. Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (substantial evidence can be inferred from a lack of particular evidence). Additionally, Guesman conceded in her briefing that she was able to stop smoking after the heart issues underlying this appeal presented themselves. Dr. Henry Thomas's January 3, 2007, report corroborates this fact. Accordingly, we conclude that the appeals officer properly determined that Guesman was not entitled to the conclusive presumption that her heart disease was work-related.²

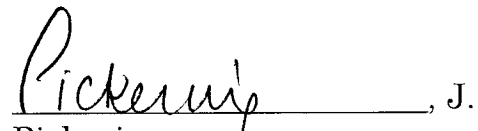
²We note that, to the extent that Guesman asserts that respondent Las Vegas Metropolitan Police Department is required to demonstrate what precisely caused her heart disease, that is a misreading of NRS 617.457(1) and (6).

Thus, to obtain occupational disease benefits, Guesman must instead have demonstrated, by a preponderance of the evidence, that her condition arose out of and in the course of employment. NRS 617.440; Law Offices of Barry Levinson v. Milko, 124 Nev. ___, ___, 184 P.3d 378, 384 (2008). The record supports the appeals officer's determination that she did not do so. To the extent that portions of Dr. Thomas's report suggest that Guesman's heart disease is attributable to her employment, we agree with the appeals officer that the doctor is providing a legal interpretation of NRS 617.457 and not a medical diagnosis that can establish an occupational disease claim. We thus conclude that the appeals officer's decision is supported by substantial evidence and that the appeals officer applied the correct legal standard. Accordingly, the district court properly denied the petition for judicial review and we therefore affirm the decision of the district court.

It is so ORDERED.


Parraguirre


Douglas


Pickering

cc: Hon. Elissa F. Cadish, District Judge
William C. Turner, Settlement Judge
Hardy Hardy & McNicholas
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Eighth District Court Clerk