IN THE SUPREME COURT OF THE STATE OF NEVADA

GOLDEN NUGGET HOTEL AND CASINO,
Appellant,
vs.
JAMES MANN,
Respondent.

No. 51988

FILED

NOV 0 2 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Golden Nugget Hotel and Casino argues that the district court erred in denying its petition for judicial review of an appeals officer's workers' compensation award to respondent James Mann because: (1) the district court failed to apply the proper standard of review, (2) its affirmation was not supported by substantial evidence, and (3) its decision was unwarranted due to conflicting testimony and evidence. We disagree and conclude that substantial evidence supported the appeals officer's decision, and thus the district court properly denied appellant's petition.[1]

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[1]Appellant requests this court apply sanctions to respondent and his counsel for violations of: (1) NRAP 30(b), requiring brevity, (2) NRAP 30(b)(4), limiting duplicated documents in the appendix, and (3) NRAP 30(g)(1), stating that the filing of non-conforming copies amounts to unlawful interference with court proceedings.

We reserve reprimands or sanctions for willful or grossly negligent violations of rules of appellate procedure. See State v. Haberstroh, 119 Nev. 173, 179, 69 P.3d 676, 680-81 (2003) (admonishing counsel for violation of brevity in filing 52 volume appendix but failing to cite to 22 of

continued on next page . . .

The parties are familiar with the facts, and we do not recount them here except as is necessary for our disposition.

DISCUSSION

The district court applied the proper standard of review

Appellant argues that the appeals officer's decision was not entitled to deference by the district court. We disagree.

When considering the final decision of an agency or an appeals officer, the reviewing court applies the standard of NRS 233B.135. Both the district court and this court review the evidence presented to the appeals officer to determine whether the officer acted arbitrarily or capriciously and thus abused his or her discretion. NRS 233B.135(3)(f); Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 582-83, 854 P.2d 862, 865 (1993). Our central inquiry is whether substantial evidence supports the appeals officer's decision. Brocas, 109 Nev. at 583, 854 P.2d at 865. 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)). If the decision was based on substantial evidence, "neither this court, nor the district court, may substitute its judgment for the administrator's determination." Id. at 607-08, 729 P.2d at 498.

. . . continued

those volumes in brief to the court). We decline to reprimand or impose sanctions upon either respondent or his counsel here.

Regarding questions of fact, we determine only whether substantial evidence supports the appeals officer's conclusion. Installation & Dismantle v. SIIS, 110 Nev. 930, 932, 879 P.2d 58, 59 (1994). Conclusions of law by an appeals officer are entitled to deference when those conclusions closely relate to the officer's view of the facts. Id. Here, conclusions of law relate closely to the numerous factual determinations made at the hearing.

In her order, the appeals officer stated the burden of respondent in proving his injury arose out of employment was by a preponderance of the evidence under NRS 616C.150. The appeals officer found that respondent met this burden, citing respondent's credible testimony at the hearing, the medical reports in evidence from several doctors, and the report of Dr. Wise, who treated respondent while he was hospitalized after the accident, and subsequently reviewed the medical reporting and offered his opinion regarding causation.

The district court properly noted the standard required by NRS 233B.135 and by Nevada caselaw, in its narrow role of determining whether the quantity and quality of evidence was such that a reasonable mind might accept it as adequate to support the appeals officer's conclusion. The district court, in its review of the record, appropriately applied NRS 233B.135, gave deference to the appeals officer's decision, and found substantial evidence to support the appeals officer's conclusion. Therefore, we determine that the district court applied the correct standard of review here.

Objective evidence and properly applied statutes support the district court's affirmation of the appeals officer's decision

Appellant argues that the district court's deference to the appeals officer's decision is unwarranted because that decision is legally

and factually erroneous, and disregards evaluation of the necessary statutory requirements. Appellant contends that the appeals officer found respondent's claim compensable solely under NRS 616C.150, requiring that the claimant establish that his injuries arose out of the scope of employment. Appellant argues that had the appeals officer properly considered NRS 616A.265 and 616C.175, the officer could not have concluded respondent met his burden for a compensable claim. We disagree because the testimony and medical evidence presented to the appeals officer was of such a quantity and quality that a reasonable person would accept the evidence as wholly adequate.

Application of NRS 616A.265, NRS 616C.150, and NRS 616C.175

NRS 616A.265 and NRS 616C.150

NRS 616A.265 defines injury as a "sudden and tangible happening of a traumatic nature, producing an immediate or prompt result . . . established by medical evidence." NRS 616C.150 states that compensation pursuant to the Nevada Industrial Insurance Act is prohibited unless a preponderance of the evidence establishes that the injury arose out of and in the course of employment. The claimant must establish a causal connection between the injury and the employee's work, and how the workplace conditions caused the injury. Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 604, 939 P.2d 1043, 1046 (1997). To resolve whether the injury arose out of employment, we examine a totality of the circumstances. Id.

The employer's investigation revealed that respondent suffered a slip and fall accident during the course of his duties as a cook at Carson Street Café. The report findings included photos of the accident scene showing water on the tile floor. A statement by an independent eyewitness supported respondent's story. At the emergency room, Dr.

Suvarna diagnosed respondent with chest pain of musculoskeletal origin causally related to the fall, and noted this on the C4 form. Dr. Suvarna noticed that respondent had older rib fractures, but observed that respondent's current pain emanated from a different location than those preexisting fractures. On the duplicate C4 form, completed two days later, Dr. Wang diagnosed respondent with chest pain and hypoxia and causally related these conditions to the September 4 accident. Dr. Wise concluded that a reasonable review of the records showed that respondent's injuries related causally to his slip and fall at work. This evidence establishes both injury and a causal connection between injury and employment.

Appellant objects to the inclusion of "flail chest" on the claim because none of the diagnostic testing on respondent established such an injury. Because no medical opinion from a treating physician supports the diagnosis of "flail chest," appellant argues that its inclusion is unsupported by law. We disagree.

While the hearing officer, in her discretion, may give greater weight to the diagnosis of a treating physician, this court has recognized that "physicians commonly rely not solely upon their own observations but upon the expertise of other physicians . . . when trying to resolve questions such as diagnosis of a condition and causation of an injury." McClanahan v. Raley's, Inc., 117 Nev. 921, 927, 34 P.3d 573, 577 (2001). The absence of a diagnosed "flail chest" by a treating physician is not automatically entitled to greater evidentiary weight, but is subject to the appeals officer's discretion. See id. (rejecting the "treating physician" rule).

Here, Dr. Wise described the disarticulation involving the chest wall and sternum, resulting from bilateral rib fractures at the costochondral junction. Dr. Wise opined, to a reasonable degree of medical

probability, that the accident caused a disarticulation of respondent's chest wall, and the development of a "flail chest." During his testimony, respondent described the aberrant protrusion of his chest wall after his accident. The chest scan taken by respondent's physician Dr. Lippman on August 25, 2006, corroborates respondent's testimony that no such protrusion existed prior to the accident. The order stated that respondent exceeded his burden under a preponderance of the evidence standard. We agree.[2]

NRS 616C.175

Appellant objects to the failure of the district court to recognize the appeals officer's failure to apply NRS 616C.175. Appellant argues the pre-accident medical evidence establishes prior rib fractures and chest pains, and the appeals officer did not afford this evidence adequate weight. We disagree.

The statute provides that when there is a preexisting condition and the employee sustains an injury by accident arising out of and in the course of his employment which aggravates, precipitates, or accelerates his preexisting condition, for the injury not to be compensable under the workers' compensation statutes, the insurer must prove by a preponderance of evidence that the subsequent injury was not a substantial contributing cause of the resulting condition. NRS 616C.175(1)(b).

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[2]Appellant objects to the appeals officer's inclusion of respondent's right-elbow injury. Medical personnel at the scene observed respondent's bleeding right elbow, and it was listed as an injured body part on the completed C4 form. We do not find it necessary to include analysis of how respondent meets his burden of proof regarding the elbow injury.

In her order awarding workers' compensation benefits to respondent, the appeals officer found no medical evidence to support appellant's position that the T7 compression fracture preexisted the September 4 accident. The August 25 chest x-ray report reveals fractures at the third through seventh left side posterior ribs which are distinct from the anterior, bilateral rib fractures identified after the accident. Dr. Rule, who examined respondent's MRI, characterized the T7 fracture as "more recent." The appeals officer considered Dr. Wise's opinion that, in all reasonable medical probability, the more recent T7 fracture resulted from the accident. Dr. Wise did not find any causal relationship between respondent's preexisting medical conditions of osteoporosis, barrel chest, and kyphosis, and the injuries sustained following the accident.

We agree with the district court that the evidence presented to the appeals officer was substantial and such that a "'reasonable mind might accept as adequate to support a conclusion.'" State, Emp. Security, 102 Nev. at 608, 729 P.2d at 498 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). The appeals officer properly considered evidence of the medical records regarding respondent's preexisting conditions, and the determinations by Dr. Wise that those conditions did not relate to the injuries sustained by respondent in his accident. In her request of respondent's counsel to prepare the findings of fact and conclusions of law in the matter, the appeals officer acknowledged that respondent had substantial preexisting conditions, but the evidence supported that entirely new injuries resulted from the accident at issue. While not using the precise language of NRS 616C.175, the appeals officer acknowledged appellant's burden regarding respondent's preexisting conditions, but found the position unsupported by the evidence. Thus, we conclude that

the appeals officers' decision to decline to apply NRS 616C.175 was supported by substantial evidence.

Conflicting testimony of respondent and medical report of Dr. Wise

Appellant argues that the appeals officer erred in relying upon the testimony of respondent, which allegedly conflicted with the medical records in evidence. Appellant also argues that the appeals officer misplaced her reliance on Dr. Wise's report because no evidence confirms that Dr. Wise reviewed respondent's past medical records. We disagree with appellant on both contentions.

Respondent's testimony

Under NRS 233B.135, we confine our evaluation of the district court's decision to the record. Here, the appeals officer heard respondent's testimony, under oath, subject to cross-examination by appellant's counsel. The hearing officer deemed respondent a credible witness and "'[a]n administrative agency's decision based on a credibility determination is not open to appellate review.'" McClanahan, 117 Nev. at 925, 34 P.3d at 576 (quoting Langman v. Nevada Administrators, Inc., 114 Nev. 203, 209, 955 P.2d 188, 192 (1998)).

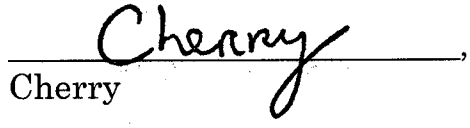
Because the appeals officer considered respondent a credible witness, and because the weight of the medical evidence supports her conclusions, any slight inconsistencies in respondent's testimony, which have largely been taken out of context by appellant, do not affect our decision here to affirm the district court's ruling.

Medical report of Dr. Wise

An award cannot be based upon possibility or speculative testimony, but a physician must state to a degree of reasonable medical probability that the industrial accident causally relates to the injuries sustained. United Exposition Service Co. v. SIIS, 109 Nev. 421, 424-25,

851 P.2d 423, 425 (1993). The record indicates that Dr. Wise received respondent's prior records and reviewed them in making his determinations. Dr. Wise's report stated that in all reasonable medical probability, respondent's injuries causally related to his accident at work. Because Dr. Wise so reported, and because the appeals officer deemed his opinion credible, she properly found a causal connection, supported by medical evidence, between respondent's industrial accident and his injuries, and awarded respondent compensation.

Accordingly, we ORDER the judgment of the district court AFFIRMED.



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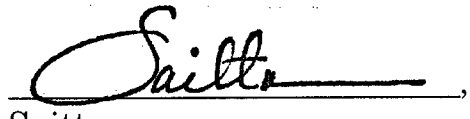

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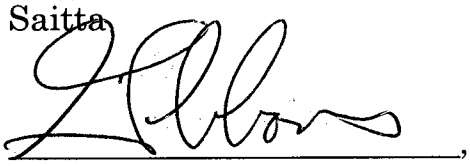

_____, J.
Gibbons

cc: Hon. David B. Barker, District Judge
William F. Buchanan, Settlement Judge
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Nevada Attorney for Injured Workers/Carson City
Eighth District Court Clerk