IN THE SUPREME COURT OF THE STATE OF NEVADA

CAESARS PALACE AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Appellants,
vs.
ELLEN BIRNBAUM,
Respondent.

No. 53796

FILED

SEP 22 2010

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

ORDER OF REVERSAL AND REMAND

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

Respondent Ellen Birnbaum worked for appellant Caesars Palace as a massage therapist for approximately eight years. Toward the end of her employment, she experienced numbness and tingling in her upper extremities. Approximately one month after termination of her employment, Birnbaum was diagnosed with carpal tunnel syndrome, for which she filed a workers' compensation claim against Caesars. Maintaining that Birnbaum did not notify Caesars of her condition prior to her termination, appellant Cannon Cochran Management Services, Inc., Caesars' third-party administrator, denied her ensuing workers' compensation claim.

An appeals officer affirmed the claim denial, determining that because Birnbaum continued performing massages after her employment at Caesars was terminated, "the last injurious exposure rule place[d]

responsibility . . . on the last employment bearing a causal relationship to the initial disability"—which, apparently, the appeals officer determined was not Caesars. The appeals officer further concluded that Birnbaum did not provide timely notice of her condition to Caesars pursuant to NRS 617.342(1). Moreover, the appeals officer determined that the fact that Birnbaum provided notice to Caesars after her employment gave rise to the rebuttable presumption in NRS 617.358(2) "that [her] occupational disease did not arise out of and in the course of . . . her employment." According to the appeals officer, Birnbaum failed to rebut the presumption. The district court granted Birnbaum's subsequent petition for judicial review, finding that the appeals officer's decision was not supported by substantial evidence and that Birnbaum presented sufficient evidence to rebut the presumption.

On appeal, Caesars and Cannon Cochran (collectively, Caesars) challenge the district court's determination that substantial evidence did not support the appeals officer's conclusion that Birnbaum failed to rebut the presumption in NRS 617.358(2).

When reviewing a district court order granting a petition for judicial review of an agency decision, this court engages in the same analysis as the district court: "we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion." Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008). This court defers to an agency's findings of fact that are supported by substantial evidence and will "not reweigh the evidence or revisit an appeals officer's credibility determination." Id. at 362, 184 P.3d at 383-84. However, questions of law are reviewed de novo. Id. at 362, 184 P.3d at 384.

To receive workers' compensation benefits, an employee must "establish by a preponderance of the evidence that [her] occupational disease arose out of and in the course of . . . her employment." NRS 617.358(1). NRS 617.358(2) provides that "[i]f the employee files a notice of an occupational disease . . . after his or her employment has been terminated for any reason, there is a rebuttable presumption that the occupational disease did not arise out of and in the course of his or her employment." Birnbaum concedes that her claim for workers' compensation was filed after her employment was terminated, thus the presumption applies to her claim.

In considering the rebuttable presumption, the appeals officer expressed uncertainty regarding whether the standard of proof under NRS 617.358(2) "requires a showing greater [than] a mere preponderance of the evidence." Nonetheless, the appeals officer concluded that Birnbaum failed to rebut the presumption. We have not previously interpreted NRS 617.358(2); however, we have addressed NRS 616C.150(2), which applies to work-related injuries reported after termination and which contains identical rebuttable presumption language. See NRS 616C.150(2).

Subsequent to the appeals officer's decision in the instant case, we issued our opinion in Milko, interpreting the presumption in NRS 616C.150(2) for the first time and clarifying an employee's burden of proof. 124 Nev. at 365, 368, 184 P.3d at 386, 387. We determined that the statute creates a presumption that arises when an employee files notice after termination of her employment "that the injury arose from an event that occurred after the termination of employment." Id. at 367, 184 P.3d at 387. "To rebut the presumption, a claimant must introduce evidence that proves the injury did not arise from an event that occurred after

termination." Id. at 368, 184 P.3d at 388. We further clarified that the rebuttable presumption in NRS 616C.150(2) does not place a greater burden of proof on the employee. Id. at 368, 184 P.3d at 387.

Here, we conclude that because the rebuttable presumption language in NRS 617.358(2) is nearly identical to that in NRS 616C.150(2), our holding in Milko is controlling in this case. Because the appeals officer did not have the opportunity to address whether Birnbaum rebutted the presumption in NRS 617.358(2) under the Milko standard, we reverse the district court's order and remand this matter to the district court with instructions to remand the matter to the appeals officer for a proper analysis under the Milko standard.[1]

Accordingly, we

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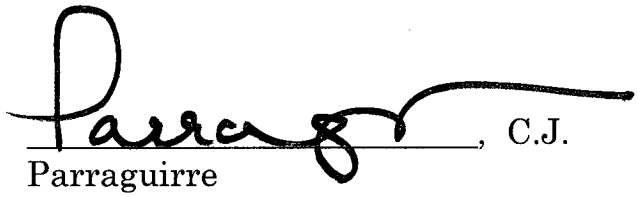
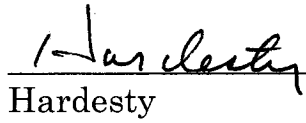
[1]Caesars also argues that the district court erred in its interpretation of the last injurious exposure rule and by reversing the appeals officer's determination that Birnbaum did not provide timely notice to Caesars of her occupational disease. Because we reverse the district court's order based on the rebuttable presumption standard in Milko, we do not reach the merits of these arguments.

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.[2]

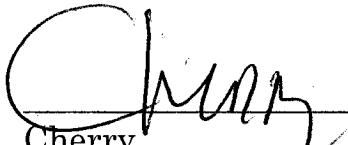


_____, C.J.
Parraguirre



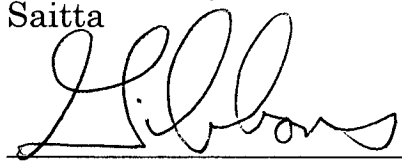
_____, J.
Hardesty

_____, J.
Douglas



_____, J.
Cherry

_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Doug Smith, District Judge
William F. Buchanan, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP
King Gross & Sutcliffe, Ltd.
Eighth District Court Clerk

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[2]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter..