

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREEMAN COMPANIES,  
Appellant,  
vs.  
REYNALDO CANTU,  
Respondent.

No. 53865

**FILED**

JUL 14 2010

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

ORDER OF AFFIRMANCE

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

Respondent Reynaldo Cantu (Cantu) sustained an industrial injury to his back when he tripped over an air hose and fell onto the concrete floor while working within the course and scope of his employment for appellant Freeman Companies (Freeman). He was originally diagnosed with a bilateral hip contusion, low back strain with radiculopathy, and bilateral pelvic strain. Within a couple weeks of the accident, Cantu was also diagnosed with a lumbar strain as he continued his treatment. Cantu filed a workers' compensation claim that was subsequently approved.

Cantu sought treatment from several doctors following the accident, complaining that his pain was not improving. Following spine injections, Cantu experienced increasing symptoms and was referred to an infectious disease specialist for an infection in the spine. After the infection was cleared, Cantu had two lower back surgeries to try to relieve his pain.

After one year of rehabilitation and a finding that he had reached maximum medical improvement for his industrial injury, Cantu

saw three doctors that gave him differing permanent partial disability evaluations using the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Ed. (AMA Guides). Dr. Michael Weinberger determined that Cantu had a 10% whole person impairment as a result of his industrial injury using the diagnosis related estimates (DRE) categories for rating purposes; Dr. Steven Holper determined that Cantu had a 12% whole person impairment after apportionment for preexisting degenerative arthritis using the range of motion model; and Dr. Gary Becker determined that Cantu had a 26% whole person impairment without apportionment using the range of motion model.<sup>1</sup> Freeman disputed Dr. Becker's results and sought

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<sup>1</sup>Under NAC 616C.490(1):

[i]f any permanent impairment from which an employee is suffering following an accidental injury or the onset of an occupational disease is due in part to the injury or disease, and in part to a preexisting or intervening injury, disease or condition, the rating physician or chiropractor . . . shall determine the portion of the impairment which is reasonably attributable to the injury or occupational disease and the portion which is reasonably attributable to the preexisting or intervening injury, disease or condition.

Freeman argues that the Appeals Officer's decision was correct because apportionment was proper due to Cantu's preexisting degenerative arthritis. Cantu argues that apportionment was not appropriate because the record does not contain documentation concerning the scope and nature of impairment that existed before the industrial accident as required by the AMA Guides.

review of his evaluation by Dr. Richard Kudrewicz. Freeman offered Cantu an undisputed 10% whole person award with a 16% abeyance until it could make a final determination based on Dr. Kudrewicz's review.

After reviewing the permanent partial disability evaluations, Dr. Kudrewicz determined that the DRE model should be used, apportionment was not proper, and that an appropriate award would be between 10% and 13%. Based on the evaluations and Dr. Kudrewicz's review, Freeman offered Cantu an 11% impairment award. Cantu did not agree with this award and requested a hearing with the Nevada Department of Administration, Hearings Division.

The Hearing Officer acknowledged the discrepancies between the rating physicians regarding apportionment and the appropriate model to use in determining the permanent partial disability of Cantu. Based on the information before her, the Hearing Officer determined that the criteria for apportionment was not met and Dr. Becker's impairment evaluation was deemed to be the most accurate assessment of Cantu's impairment. The Hearing Officer reversed and remanded the matter instructing Freeman to offer Cantu the 26% whole person impairment award.

Freeman appealed the Hearing Officer's decision to the Appeals Officer of the Division. The Appeals Officer determined in her memorandum that the controversy was resolved due to the performance of a third evaluation and therefore, the appeal was moot and the Appeals Officer dismissed the appeal. Freeman appealed this decision, arguing that the Hearing Officer's decision violated clear and specific statutes and caselaw and that a reversal was warranted. Following review of

Freeman's second appeal, the Appeals Officer reversed the Hearing Officer's decision, finding Dr. Holper's rating of 12% impairment, reached through the range of motion method and apportionment, to be the most persuasive in evaluating Cantu's permanent partial disability. The Appeals Officer remanded the matter for Freeman to offer Cantu a 12% award.

Cantu filed a motion for reconsideration, which was denied by the Appeals Officer. Cantu then filed a petition for judicial review in the district court. The district court granted Cantu's petition, finding insufficient documentation in the record on appeal to support the scope and nature of any preexisting condition pursuant to NAC 616C.490(7). Therefore, the district court reversed and remanded with instructions for the Appeals Officer to order a permanent partial disability award in accordance with Dr. Becker's determination of 26% impairment. Freeman filed this appeal in response.

#### Petition for judicial review

When an administrative decision is challenged, this court's function is identical to that of the district court; we review the evidence presented to the administrative agency to determine whether it acted arbitrarily or capriciously, thus abusing its discretion. See Knapp v. State, Dep't of Prisons, 111 Nev. 420, 423, 892 P.2d 575, 577 (1995); Father & Sons v. Transp. Servs. Auth., 124 Nev. 254, 259, 182 P.3d 100, 103 (2008). This court has further stated:

An abuse of discretion occurs when the record does not contain substantial evidence supporting the administrative decision. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. While this court reviews purely legal questions

de novo, a hearing officer's conclusions of law, which will necessarily be closely tied to the hearing officer's view of the facts, are entitled to deference on appeal.

City Plan Dev. v. State, Labor Comm'r, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005) (citations omitted).<sup>2</sup>

Freeman argues that the district court misinterpreted NAC 616C.490(7) in finding that there was insufficient documentation to support the scope and nature of any preexisting condition. Citing to Ransier v. SIIS, 104 Nev. 742, 766 P.2d 274 (1988), Freeman argues that although the parties did not provide documentation of an earlier injury, apportionment should still have been allowed because medical opinions stated that the condition indicated that apportionment to an earlier injury was appropriate. Freeman asserts that the district court improperly substituted its judgment where the Appeals Officer's decision to allow apportionment was supported by substantial evidence.

Cantu counters that the district court's decision was proper because the record does not contain any evidence that he had a disability prior to the accident at issue and this court should affirm the district court's reversal of the Appeals Officer's decision. Cantu also asserts that Freeman's reliance on Ransier is misplaced because it is distinguishable. Cantu argues that, unlike the injury here, the court in Ransier allowed apportionment because Ransier had a prior knee injury and operation,

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<sup>2</sup>The parties dispute which standard of review is appropriate in this case. We reject Cantu's argument that we should review this petition under a de novo standard.

which are specifically ratable criteria under the AMA Guides, unlike the degenerative arthritis that led to apportionment by the Appeals Officer in this case.

Cantu further argues that under the required evaluation using AMA Guides, “disability’ requires a showing of substantial limitation of physical function caused by an impairment reducible to a percentage number utilizing the appropriate method,” and the record does not contain documentation regarding any disability. In the absence of a specific showing of disability subject to quantification, Cantu contends there is no evidence to support that he had any injury prior to the accident.<sup>3</sup>

In Ransier, appellant James Ransier suffered two injuries to his knee—one in 1960 which resulted in knee surgery and one in 1984 at work. 104 Nev. at 743, 766 P.2d at 275. Although no documents existed concerning the 1960 knee injury, his treating physicians found that the injuries were distinguishable and his award was apportioned. Id. at 743-44, 766 P.2d at 275. Here, the evaluating physicians noted preexisting degenerative arthritis but only one doctor, Dr. Holper, took this preexisting condition into consideration in apportioning Cantu’s whole person impairment.

NAC 619C.490 instructs the Division on apportionment of impairments. Specifically, NAC 616C.490(7) states: “[i]f there are

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<sup>3</sup>Cantu also asserts that under NAC 616C.490(9), apportionment is not allowable because his degenerative arthritis did not play a role in preventing him from returning to or remaining in the work force and did not effect his wage or wage earning capacity. We reject this contention.

preexisting conditions, including, without limitation, degenerative arthritis, rheumatoid variants, obesity or congenital malformations, the apportionment must be supported by documentation concerning the scope and the nature of the impairment which existed before the industrial injury or the onset of disease.” (Emphasis added).

In this case, the parties included many of the medical evaluations that the Hearing Officer used when she made her initial decision that the criteria for apportionment was not met and instructed Freeman to offer Cantu a 26% whole person impairment award. While the evaluations mention Cantu suffering from degenerative arthritis, none of the medical reports indicate that Cantu’s degenerative arthritis existed before the industrial injury. Further, the medical records that mention Cantu’s degenerative arthritis do not discuss how it factors into his industrial injury. Accordingly, Cantu’s degenerative arthritis was properly not considered for apportionment purposes because there is no “documentation concerning the scope and the nature of the impairment which existed before the industrial injury or the onset of the disease.” NAC 616C.490(7).

The district court did not err in finding “insufficient documentation in the record on appeal to support the scope and nature of any preexisting condition” when granting Cantu’s petition for judicial review. The district court did not improperly reweigh the evidence and factual issues. There are no medical records that predate Cantu’s injuries from the industrial accident in the record before this court; the record does not contain substantial evidence supporting the administrative decision of the Appeals Officer who reversed and

remanded for Freeman to offer a 12% impairment award. Accordingly,  
we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

cc: Hon. Jackie Glass, District Judge  
William C. Turner, Settlement Judge  
Lewis Brisbois Bisgaard & Smith, LLP  
Michael Paul Wood  
Eighth District Court Clerk