IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG MICHIE,
Appellant,
vs.
FLAMINGO LAS VEGAS; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Respondents.

No. 57153

FILED

JAN 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
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 matter. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant sustained an industrial injury in October 1999 during his employment with respondents when he was struck from behind with a cart. Respondents originally accepted appellant's workers' compensation claim only for his right ankle, but his claim was subsequently expanded to include the right knee, lumbar sprain, right parascapular sprain, lumbar herniation, and chondromalacia of the right patella. In March 2006, after numerous administrative appeals, respondents denied appellant's request for additional medical treatment and a second opinion, closed appellant's claim, and ordered a permanent partial disability rating. Appellant challenged respondents' determinations, but a hearing officer affirmed the decisions. Following a hearing before an appeals officer, however, additional diagnostic testing was ordered. Based on this new medical evaluation, the appeals officer ultimately reversed the hearing officer's determinations, found that

appellant was not medically stable and ratable concerning his industrial injury, ordered that appellant's claim be expanded to include the C6-C7 region of his cervical spine, and ordered a new medical consultation to determine whether any further treatment was necessary. Respondents subsequently filed a petition for judicial review, which the district court granted. This appeal followed. On appeal, appellant argues that the appeals officer's decision was fact-based and entitled to deference on judicial review, and that because substantial evidence supports the appeals officer's determination, there was no clear error or abuse of discretion and the decision should be affirmed. We agree.

This court, like the district court, reviews an appeals officer's factual findings for clear error or abuse of discretion. NRS 233B.135(3); Vredenburg v. Sedgwick CMS, 124 Nev. 553, 557, 188 P.3d 1084, 1087-88 (2008). Judicial review is confined to the record before the appeals officer, and on issues of fact and fact-based conclusions of law, the appeals officer's decision will not be disturbed if it is supported by substantial evidence. Vredenburg, 124 Nev. at 557, 188 P.3d at 1087-88; Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." Vredenburg, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4 (quotation omitted). The court will not substitute its judgment for that of the appeals officer as to the weight of the evidence on questions of fact. Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

Here, the appeals officer made a factual determination that, based on the reports of two medical practitioners, appellant was not medically stable and ratable concerning his industrial injury, and thus his

claim should remain open. See NRS 616C.360(4) (giving the appeals officer the authority to consider the opinions of any examining physician in addition to those of an authorized treating physician when determining benefits). While there were conflicting reports from various medical practitioners throughout the life of appellant's claim, the appeals officer gave weight to the medical reporting of Dr. McKenna, who conducted the diagnostic testing that was ordered by the appeals officer on July 25, 2006. Based on Dr. McKenna's reporting, the appeals officer determined that appellant's claim should remain open for a consultation with a neurosurgeon, after which the insurer would determine whether further care was warranted. We conclude that there was no abuse of discretion in the appeals officer's decision to keep appellant's claim open. See NRS 616C.360(3)(a) (giving the appeals officer authority to order additional examinations to resolve medical questions or disputes concerning an injured employee's condition or to determine the necessity of treatment); see also Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005) (noting that on judicial review, neither this court nor the district court may substitute its judgment for that of the administrative officer on the weight of the evidence on a question of fact).

In addition, the appeals officer determined that the C6-C7 disc should be accepted as part of appellant's claim based on the finding that the cervical spine at the C6-C7 region generated the pain in appellant's neck and parascapular region. The appeals officer appears to have based its determination on Dr. McKenna's reports, and a medical report determined to be credible by the appeals officer constitutes substantial evidence. See Vredenburg, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4. Although respondents argue that the cervical spine issue was not properly

before the appeals officer, that argument lacks merit as the appeals officer was reviewing multiple hearing officer determinations, including the closure of appellant's claim, and thus, it was proper for the appeals officer to consider any injury for which appellant may have been entitled to benefits. See Diaz v. Golden Nugget, 103 Nev. 152, 155, 734 P.2d 720, 723 (1987) (noting that "[o]nce the jurisdiction of the appeals officer is invoked, the appeals officer 'must hear any matter raised before him [or her] on its merits, including new evidence bearing on the matter'" (quoting NRS 616.5426(2); cf. NRS 616C.360)).

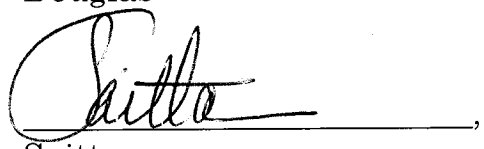
It does not appear, however, that respondents were given the opportunity to fully address their responsibility for any C6-C7 injuries before the appeals officer because the C6-C7 region was considered for the first time in the appeals officer's final order, which was based on medical reports issued after the final appeals hearing. Notably, respondents argue in this court that appellant's 2002 industrial injury precludes their liability for treatment of the C6-C7 disc under the "last injurious exposure rule." The appeals officer did not address the last injurious exposure rule in addressing the C6-C7 disc issue, and appellant does not assert that respondents had the opportunity to address this issue at the administrative level, but instead simply contends that the argument lacks merit. This court, however, is not the proper place to address the merits of this argument, as the issue must be addressed at the administrative level in the first instance. See Langman v. Nevada Administrators, Inc., 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998) (recognizing that this court's role in judicial review is to determine the propriety of the agency's decision in light of the evidence presented to the agency). Accordingly, we reverse the district court's order granting judicial review and direct the district

court to remand this matter to the appeals officer to address the application of the last injurious exposure rule in the context of appellant's C6-C7 disc injury.

It is so ORDERED.[1]

_____, J.
Gibbons

_____, J.
Douglas



_____, J.
Saitta

cc: Hon. Jessie Elizabeth Walsh, District Judge
William F. Buchanan, Settlement Judge
Law Office of James R. Cox
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

[1]To the extent that arguments raised by appellant or respondents have not been addressed, we conclude that the arguments lack merit.