IN THE SUPREME COURT OF THE STATE OF NEVADA

THE BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS; AND STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS,
Appellants,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Respondent.

No. 57568

ORDER OF REVERSAL

This is an appeal from a district court order granting a petition for judicial review in a self-insured employer subsequent injury reimbursement action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

A police officer employed by respondent Las Vegas Metropolitan Police Department (Metro) was involved in two work-related motor vehicle accidents, approximately one year apart. Subsequently, the injured officer was seen by a certified rating physician, Dr. Overland, who determined that the officer should receive a permanent partial disability (PPD) award based on a 15-percent whole person impairment rating.

The third-party administrator handling the officer's claim requested that the officer's treating physician, Dr. Schifini, apportion the officer's injuries between the two separate accidents. Dr. Schifini opined that the second injury appeared to be an exacerbation of the first injury and that the pain seemed worse after the second injury; he apportioned one-third of the officer's impairment to the first accident and two-thirds of the impairment to the second accident. Based on Dr. Schifini's apportionment, Metro offered the injured officer a PPD award based on a 5 percent whole-person impairment from the first accident and a 10 percent whole-person impairment from the second accident.

Metro then requested that another physician, Dr. Kudrewicz, review the claim to assess its eligibility for reimbursement from the subsequent injury account under NRS 616B.557. Dr. Kudrewicz allocated 80 percent of the officer's impairment to the first accident and the remaining 20 percent to the second accident, for an apportionment of 12 percent and 3 percent of the PPD rating to the respective accidents.

Metro submitted its application for reimbursement to appellant, State of Nevada Department of Business and Industry, Division of Industrial Relations (DIR). Relying upon the opinion of Dr. Schifini, the DIR found that NRS 616B.557(3) was not satisfied because the requisite 6-percent preexisting impairment had not been established, and it recommended that appellant, The Board for the Administration of the Subsequent Injury Account for Self-Insured Employers (the Board), deny Metro's claim for reimbursement. Based on DIR's recommendation, the Board denied Metro's claim for reimbursement. Metro filed a petition for judicial review, which the district court granted, concluding that the

prerequisite 6 percent preexisting impairment had been demonstrated. DIR and the Board then appealed.

The issue on appeal is whether the district court improperly substituted its judgment for that of the Board when deciding (a) whether the Board improperly relied upon a medical opinion from a doctor who was not a certified rating physician, and (b) whether substantial evidence supported the Board's determination that Metro failed to satisfy the 6-percent preexisting-impairment rule.

This court's role when reviewing a district court's disposition of a petition for judicial review is the same as the district court's: to determine whether substantial evidence supports the underlying administrative decision and whether that decision is affected by legal error. Holiday Retirement Corp. v. State, DIR, 128 Nev. __, __, 274 P.3d 759, 761 (2012). Neither this court nor the district court may substitute its judgment for that of an agency "as to the weight of evidence on a question of fact," and our review is limited to the record that was before the agency. NRS 233B.135(3); Employment Security Dep't v. Cline, 109 Nev. 74, 76, 847 P.2d 736, 738 (1993).

The district court improperly substituted its judgment for that of the Board

The Board argues that the district court improperly usurped the Board's function by substituting the court's judgment on questions of fact. The Board asserts that because a certified rating physician rated the officer and because there is no requirement that the apportioning physician be a certified rating physician, the Board's reliance on the opinion of Dr. Schifini in apportioning the officer's injury was not improper. It asserts that substantial evidence supported its

determination that Metro failed to satisfy the 6-percent preexisting-impairment rule. We agree.

NRS 616B.557(1) provides that

> If an employee of a self-insured employer has a permanent physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the course of his or her employment which entitles the employee to compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone, the compensation due must be charged to the Subsequent Injury Account for Self-Insured Employers in accordance with regulations adopted by the Board.

NRS 616B.557(3) defines a "permanent physical impairment" as any permanent condition, whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed.

"PPD awards are based on the percentage of whole person impairment as determined by a rating physician, who makes the calculations using the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment . . . adopted by the Division of Industrial Relations." Public Agency Compensation Trust v. Blake, 127 Nev. __, __, 265 P.3d 694, 695 (2011); see NRS 616C.490 (requiring that "the percentage of disability" be calculated by a qualified rating physician); NRS 616C.110 (requiring the adoption of the Guides).

When an employee who suffers a permanent impairment caused by an industrial injury reaches a stable and ratable condition, the insurer shall schedule an appointment with the rating physician to determine the extent of the employee's disability. NRS 616C.490(2). If

there was a pre-existing injury, "the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury." NRS 616C.490(9). The rating physician is required to provide the insurer with an evaluation of the employee, and the insurer is then required to provide the employee with the evaluation and notification of any compensation the employee is entitled to. NRS 616C.490.

When the injured employee works for a self-insured employer and has a pre-existing permanent physical impairment, and the subsequent injury entitles the employee to disability compensation that is "substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone," the compensation due is charged to the Subsequent Injury Account for Self-Insured Employers. NRS 616B.557(1). To qualify under this statute, the pre-existing "permanent physical impairment" must support a permanent whole person impairment rating of 6 percent or more. NRS 616C.557(3).

In this case, the PPD evaluation was performed by Dr. Overland, a certified rating physician. When he did not apportion the 15-percent PPD rating between the two accidents, the third-party administrator then looked to Dr. Schifini to apportion the PPD rating. Dr. Schifini had treated the officer but was not a certified rating physician. However, neither NRS 616B.557 nor NRS 616C.490 expressly require that the apportionment of the PPD rating between an existing impairment and a subsequent injury be performed by a certified rating physician for subsequent injury account purposes. Because the initial PPD rating of 15

percent was given by a certified rating physician, the Board's reliance on Dr. Schifini's apportionment of that rating, even though Dr. Schifini was not a certified rating physician, was not affected by legal error or clearly erroneous based on the record.

Here, following a PPD evaluation of the injured officer, certified rating physician Dr. Overland recommended that the "claim can be adjudicated and closed [at] an award of 15% whole person impairment." However, while he was aware that the officer was involved in two separate accidents, Dr. Overland did not apportion the PPD rating. He indicated that

> [t]he second accident was considered to be an aggr[a]vation of the injuries sustained in the first accident. Since the examinee had not yet been rated for his first MVA injuries and subsequent MRI studies were not significantly changed, there is no basis for apportionment as well.

Because there were two separate accidents, the third-party administrator requested that Dr. Schifini apportion between the two injuries. Dr. Schifini stated that one-third of the officer's impairment was from the first accident and two-thirds of the impairment was from the second accident. Accordingly, there was substantial evidence to support the Board's determination that Metro failed to satisfy the 6-percent preexisting-impairment rule. See Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996) (noting that "[s]ubstantial evidence is that which a reasonable mind could find adequate to support a conclusion"). While the opinions of Dr. Overland or Dr. Kudrewicz could support a different conclusion, this court does not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. See Cline, 109 Nev. at 76, 847 P.2d at 738.

Based on the foregoing, the district court should not have granted Metro's petition for judicial review because in doing so it usurped the Board's function and improperly substituted its judgment on questions of fact. We therefore

ORDER the judgment of the district court REVERSED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: William C. Turner, Settlement Judge
Dept of Business and Industry/Div of Industrial Relations/ Henderson
The Law Offices of Charles R. Zeh, Esq.
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk