IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL MAGGIO, SR.,
Appellant,
vs.
BUNKERS EDEN VALE MEMORIAL PARK; AND CONSTITUTION STATE SERVICE COMPANY,
Respondents.

No. 61638

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Appellant Russell Maggio, Sr. suffered injuries in two separate car accidents that occurred while in the course of his employment with respondent Bunkers Eden Vale Memorial Park. He did not file a workers' compensation claim for his first accident but filed a claim for his second accident. Respondent Constitution State Service Company (the Insurer) denied coverage of Maggio's request for surgery on his injuries. The appeals officer affirmed the Insurer's denial of coverage for the surgery because he found that the second accident did not aggravate, precipitate, or accelerate Maggio's injury from his prior accident. The district court denied Maggio's request for judicial review, and Maggio appealed. As the parties are familiar with the facts, we do not recount them further except as necessary for our disposition.

We conclude that the appeals officer (1) did not err in admitting the independent medical exam (IME) physician's report, despite the Insurer's failure to send Maggio a copy of its letter to the IME physician as required by NRS 616D.330(1); (2) did not abuse his discretion

in determining that the Insurer proved that the second accident was not a substantial contributing cause of Maggio's injury; and (3) did not err in applying NRS 616C.175 and not NRS 616C.425 in denying Maggio's request for benefits for his first injury.

The appeals officer did not err in admitting the IME report

Maggio argues that because the Insurer violated NRS 616D.330(1)(b), the appeals officer erred in not excluding the IME report. Specifically, Maggio requests that we create an exclusionary rule to deter violations of this statue. Because this argument raises an issue of law, we review the hearing officer's decision de novo, as did the district court. *Sierra Nev. Adm'rs v. Negriev*, 128 Nev. ___, ___, 285 P.3d 1056, 1058 (2012).

NRS 616D.330(1)(b) provides that when an insurer communicates with a physician about the employee's medical condition, it must provide a copy of the communication to the employee or the employee's representative. The Insurer sent a letter to the IME physician without providing a copy to Maggio or his attorney. The Division of Industrial Relations determined that the Insurer violated NRS 616D.330(1)(b) and issued the Insurer a notice of correction. Nothing in the Nevada Revised Statutes or Nevada Administrative Code provide for further penalties, remedies, or exclusions based on such violations. Nor does our caselaw authorize another remedy. Because "the issue [of determining remedies for statutory violations] is best left to legislative debate and rule-making," we do not address Maggio's policy arguments for an exclusionary rule and decline to establish an exclusionary rule for violations of NRS 616D.330(1)(b). *Nev. Highway Patrol Ass'n v. State, Dep't of Motor Vehicles & Pub. Safety*, 107 Nev. 547, 550, 815 P.2d 608,

610 (1991). Since no exclusionary rule applies, we conclude that the appeals officer did not err in considering the IME report.

The appeals officer did not abuse his discretion in determining that the Insurer met its burden under NRS 616C.175

Maggio argues that the Insurer did not meet its burden to prove that the industrial accident was not a substantial contributing cause of Maggio's condition. We review an appeals officer's decision in a workers' compensation matter for clear error or an abuse of discretion. NRS 233B.135(3); *Sierra Nev. Adm'rs*, 128 Nev. at ___, 285 P.3d at 1058. Judicial review is confined to the record before the appeals officer. *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087-88 (2008). 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. *Id.*; *see also Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283-84, 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 (quoting *Manwill v. Clark Cnty.*, 123 Nev. 238, 241 n.4, 162 P.3d 876, 879 n.4 (2007)). An appeals officer's determinations on pure issues of law, however, are reviewed de novo. *Sierra Nev. Adm'rs*, 128 Nev. at ___, 285 P.3d at 1058.

When an employee suffers an industrial injury that aggravates a preexisting nonindustrial condition, the employee must demonstrate that the injury occurred in the course of employment in order to be eligible for workers' compensation benefits. NRS 616C.150(1). The burden then shifts to the insurer to prove that the aggravating injury is not a substantial contributing cause of the employee's current condition

and that the insurer is therefore not liable for workers' compensation benefits. *See* NRS 616C.175.

We consider the common dictionary definitions of aggravate, precipitate, and accelerate in interpreting NRS 616C.175. *Ross v. Reno Hilton,* 113 Nev. 228, 231, 931 P.2d 1366, 1368 (1997). "[A]ggravate" is defined as "to make worse or more severe; intensify, . . . to annoy; irritate; exasperate[,] . . . to cause to become irritated or inflamed." *Random House Webster's College Dictionary* 25 (2d ed. 1997). "[P]recipitate" is defined as "to hasten the occurrence of; bring about prematurely or suddenly." *Id.* at 1024. Finally, "accelerate" is defined as "to cause faster development, progress, or advancement in." *Id.* at 7. We previously explained that an aggravation of an existing "injury must amount to more than merely the result of the natural progression of the preexisting disease or condition." *Grover C. Dils Med. Ctr.*, 121 Nev. at 287, 112 P.3d at 1099 (internal quotations omitted). Additionally, "when symptoms of an original injury persist and when no specific incident can independently explain the worsened condition, the condition is a recurrence of the original injury." *Id.* Thus, when a subsequent injury merely causes additional pain rather than a change in physical condition, an appeals officer need not conclude that an aggravation occurred.

The appeals officer determined that, based on the conflicting reports submitted by Maggio's treating physician and the IME physician, Maggio failed to show that the industrial accident worsened his condition and that the Insurer proved that the industrial accident was not a substantial contributing cause of his present need for surgery. Because we will not "substitute [our] judgment for that of the appeals officer as to issues of credibility or the weight of the evidence," we find that substantial

evidence supports the appeals officer's conclusion. *Grover C. Dils Med. Ctr.*, 121 Nev. at 283-84, 112 P.3d at 1097. Therefore, the appeals officer did not abuse his discretion in determining that Maggio's preexisting condition was not aggravated, precipitated, or accelerated by the industrial accident and that the industrial accident was not a substantial contributing factor for his need to have surgery.

The appeals officer did not err in applying NRS 616C.175 instead of NRS 616C.425

Maggio's third contention is that NRS 616C.425(2) applies to his claim and requires the Insurer to pay benefits from the date of his first accident, even though he did not file a claim for that accident. Because the appeals officer's decision involves both facts and law, it will not be disturbed if it is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88. The appeals officer's determinations on pure issues of law are reviewed de novo. *Sierra Nev. Adm'rs*, 128 Nev. at ___, 285 P.3d at 1058.

NRS 616C.425 governs the date used to determine compensation and benefits and does not create a right to compensation for injuries that predate an industrial accident. Therefore, it does not provide a right for Maggio to recover benefits relating back to his first injury. To recover for an accident, an employee must provide notice to the employer within seven days of the accident, NRS 616C.015(1), and file a claim for compensation with the insurer within 90 days after the accident. NRS 616C.020(1). If an employee fails to do either of these actions, NRS 616C.025 bars recovery unless the employee was mistaken or ignorant "of fact or of law." Although this issue was raised at the hearing, the appeals officer implicitly concluded that Maggio's testimony regarding ignorance of fact or law was not credible because the officer continued to refer to the

first accident as nonindustrial. As such, we find no error in the appeals officer's factual findings because there is no evidence that the finding was clearly erroneous. *See Day v. Washoe Cnty. Sch. Dist.*, 121 Nev. 387, 389, 116 P.3d 68, 69 (2005). Therefore, Maggio's failure to file a claim for his first injury prevents him from seeking recovery for that injury. Because evidence supported the hearing officer's conclusion that Maggio's "industrial accident was not a substantial contributing cause of his present need for . . . surgery," the hearing officer did not err. For the foregoing reasons,[1] we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Timothy C. Williams, District Judge
Craig A. Hoppe, Settlement Judge
Kemp & Kemp
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

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[1]We have considered Maggio's remaining arguments and conclude that they are without merit.