IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHEL KEKEROVIC,
Appellant,
vs.
TRAVELERS WORKERS COMPENSATION DEPARTMENT; AND BERGELECTRIC CORPORATION,
Respondents.

No. 65810

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; J. Charles Thompson, Senior Judge.

Appellant Michel Kekerovic filed claims for injuries to his lower back and right wrist, which he purportedly incurred in the course of and arising out of his employment with respondent Bergelectric Corporation. Bergelectric's insurer, respondent Travelers Workers Compensation Department, ultimately accepted the lower back claim as to a lumbar strain, denied the wrist claim, denied temporary total disability benefits, and closed the claims without obtaining a permanent partial disability rating. Kekerovic appealed each of these rulings. Following decisions by the hearing officer in favor of Travelers and Bergelectric, Kekerovic appealed to the appeals officer, and the appeals were consolidated. The appeals officer affirmed the hearing officer's decision as to each of the appeals. Kekerovic then filed a district court petition for judicial review, which was denied. This appeal followed.

15-901003

Standard of review

Like the district court, we review an administrative agency's decision to determine whether the decision was arbitrary or capricious, and thus, an abuse of discretion. NRS 233B.135(3)(f); *State, Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385, 254 P.3d 601, 603 (2011). We review the agency's factual findings for clear error or an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. ___, ___, 262 P.3d 715, 718 (2011). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion, *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. ___, ___, 310 P.3d 560, 564 (2013), and this standard may be inferentially met through a lack of relevant evidence. *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

Scope of lower back claim

As to his lower back claim, Kekerovic argues the appeals officer improperly affirmed the denial of his request to expand the scope of his claim to include disc protrusions at two levels of his spine. Kekerovic also asserts that Travelers and Bergelectric were estopped from arguing that the disc protrusions were not work related insofar as Travelers had paid for steroid injections intended to treat the protrusions. Travelers and Bergelectric argue that the scope of the claim was properly limited to the lumbar strain.

In support of his estoppel argument, Kekerovic relies on *Dickinson v. American Medical Response*, 124 Nev. 460, 186 P.3d 878 (2008), in which the Nevada Supreme Court concluded that "[e]quitable estoppel may be invoked against a party who claims a statutory right in

administrative workers' compensation proceedings, when the invoking party has reasonably relied on the other party's words or conduct to her detriment." *Id.* at 467, 186 P.3d at 883. Here, Kekerovic has not explained how he relied on Travelers' coverage of the injections to his detriment. In particular, unlike the employee in *Dickinson*, Kekerovic timely appealed the exclusion of the disc protrusions from his accepted claim and has continued to seek acceptance of the protrusions as part of his back claim. Thus, his estoppel argument lacks merit. *See Dickinson*, 124 Nev. at 467, 186 P.3d at 883 (providing that equitable estoppel may apply "when the invoking party has reasonably relied on the other party's words or conduct to her detriment").

As to the evidence connecting the disc protrusions to Kekerovic's employment, in order to demonstrate that an injury is compensable under the workers' compensation scheme, an employee has the burden of demonstrating, by a preponderance of the evidence, that the injury arose out of and in the course of the employment. NRS 616C.150(1); *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). In doing so, the employee must demonstrate a causal connection "between the workplace conditions and how those conditions caused the injury." *Phillips*, 126 Nev. at 350, 240 P.3d at 5 (internal quotation marks omitted).

While Kekerovic points to the opinions of Dr. Petar Jamborcic and Dr. Marlene Duffy to support his assertion that the disc protrusions were connected to his employment, these doctors merely stated, without elaboration, that the protrusions were related to, or were consistent with, the industrial injury. But in reviewing the evidence, the appeals officer discounted both of these doctors' opinions, noting that there was no

evidence Dr. Jamborcic had reviewed Kekerovic's entire medical record and that Dr. Duffy ignored the video evidence and omitted any discussion of a particular report in her findings. Moreover, none of the doctors who examined Kekerovic testified at the hearing regarding a causal link between the protrusions and Kekerovic's workplace conditions. Further, the appeals officer's decision was supported by the opinions of Dr. Archie Perry, who specifically stated that he could not relate the protrusions to Kekerovic's industrial claim, and Dr. Mark Reed, who noted, based on video evidence, that Kekerovic did not demonstrate any functional difficulties related to the disc protrusions, indicating that Kekerovic had no ratable disability or impairment.

On this record, the appeals officer's affirmance of the exclusion of the disc protrusions from the accepted claim was supported by substantial evidence and was not arbitrary or capricious. *See Smith*, 129 Nev. at ___, 310 P.3d at 564; *Wright*, 121 Nev. at 125, 110 P.3d at 1068; *see also Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 210, 955 P.2d 188, 192 (1998) (explaining that, in considering conflicting evidence, a reviewing court "will not substitute its judgment as to the weight of the evidence for that of the administrative agency"); *Seaman v. McKesson Corp.*, 109 Nev. 8, 10, 846 P.2d 280, 282 (1993) (providing that, in order to show a causal connection between work performed and an occupational disease, "the claimant must show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease"). Thus, the district court properly denied the petition for judicial review as to this claim.

Wrist claim

With regard to his wrist claim, Kekerovic argues that the appeals officer improperly denied this claim because the evidence demonstrated that it arose out of and in the course of his employment. As to this claim, Kekerovic also points to the opinion of Dr. Jamborcic, who related the wrist claim to Kekerovic's industrial injury, but the appeals officer discounted Dr. Jamborcic's conclusion because it relied on the examination conducted by Dr. Ryan Grabow, who had specifically stated that he needed copies of Kekerovic's medical records in order to provide an opinion as to his workers' compensation status. Additionally, Kekerovic refers to the opinion of Dr. Duffy, who stated that her findings regarding Kekerovic's condition were "consistent with the mechanism of [the work-related wrist] injury." But Dr. Duffy did not explain what she meant by this statement, did not state to a reasonable probability that the injury was related to Kekerovic's workplace conditions, and did not provide testimony to that effect at Kekerovic's hearing.[1] Indeed, although Kekerovic contends that his wrist injury was sustained because of stripping wires at work, no medical testimony or other evidence was presented to demonstrate that stripping wires could cause the type of injury Kekerovic purportedly sustained.

Further, on Kekerovic's claim form for the wrist injury, Dr. Larry E. Drumm placed a question mark next to the question asking about

---

[1]The appeals officer did not discuss Dr. Duffy's report with regard to the wrist injury, but it seems that the appeals officer's reasons for discounting Dr. Duffy's report as to the back injury—failure to consider the video evidence or refer to another doctor's report—were equally as applicable to the wrist claim as they were to the back claim.

whether the injury was directly connected with the job conditions, which falls far short of indicating that the two were related to a degree of reasonable medical probability. Finally, none of the other doctors whose treatment of Kekerovic are reflected in the record even addressed any connection between the wrist injury and the workplace conditions.

In light of the appeals officer's conclusions regarding the weight to be afforded to Dr. Jamborcic's and Dr. Duffy's reports, the absence of any other evidence to support Kekerovic's claim that he suffered a work-related wrist injury was significant. *See Wright*, 121 Nev. at 125, 110 P.3d at 1068. Under these circumstances, we conclude that substantial evidence in the record supports the appeals officer's affirmance of the denial of this claim. *See Smith*, 129 Nev. at ___, 310 P.3d at 564; *Phillips*, 126 Nev. at 349-50, 240 P.3d at 4-5; *Wright*, 121 Nev. at 125, 110 P.3d at 1068; *Seaman*, 109 Nev. at 10, 846 P.2d at 282. Thus, the district court also properly denied the petition for judicial review in this regard.

Temporary total disability benefits

Next, Kekerovic contends he was entitled to temporary total disability benefits because he was terminated from his position for reasons related to his claim, namely, for refusing to perform light duty work that conflicted with his medical restrictions. Travelers and Bergelectric contend, however, that Kekerovic was actually terminated for failing to return to work after being told to bring back more specific written restrictions from a doctor.

When an employee sustains an industrial injury, he or she is generally entitled to temporary total disability benefits. NRS 616C.475(1). But those benefits may be denied if the injured employee is terminated for

gross misconduct, as long as the termination is "not for any reason relating to the employee's claim for compensation." NRS 616C.232(1), (4).

At the hearing before the appeals officer, Bergelectric employees Mike Belcher and Mike McGowan testified that Kekerovic was told to bring in specific restrictions from any doctor ordering him not to perform the light duty work being offered to him.[2] Belcher and McGowan further testified that, not only did Kekerovic not return with such paperwork, he never returned to Bergelectric at all. Thus, the appeals officer's conclusion—that Kekerovic was fired for failing to come in to work, rather than for refusing to perform work that conflicted with his medical restrictions—was supported by substantial evidence.[3] *See Smith*, 129 Nev. at ___, 310 P.3d at 564.

Although Kekerovic asserts that refusing to perform work that violates medical restrictions is not gross misconduct, he does not argue that failing to appear for work for multiple days is not gross misconduct. As a result, Kekerovic has waived any challenge to the appeals officer's

---

[2]A third employee, Richard King, also testified regarding Kekerovic's termination, but denied being present for the conversation in which Kekerovic was told to return to work with verification of his medical restrictions. In his opening brief, Kekerovic contends the testimony of King, Belcher, and McGowan was contradictory, but a review of the record demonstrates that their testimony was generally consistent.

[3]Kekerovic contends that, in reaching this conclusion, the district court relied on a document that was improperly admitted into evidence at the administrative hearing. He has not, however, set forth any cogent argument or citations to authority to demonstrate that the document was improperly admitted into evidence, and thus, we do not consider whether the admission of this document was proper. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

determination that failing to appear for work constitutes gross misconduct, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised by a party on appeal are deemed waived), and we necessarily conclude that the appeals officer's conclusion in this regard was proper. Thus, the district court also properly denied the petition for judicial review as to the denial of temporary total disability benefits.

Permanent partial disability

Finally, Kekerovic argues the appeals officer improperly affirmed the closure of his appeal without obtaining a permanent partial disability rating. Kekerovic notes that he obtained a disability rating from a certified rating physician, and he argues that the appeals officer was not entitled to reject that rating in favor of two doctors who are not rating physicians. Travelers and Bergelectric contend that Kekerovic was not entitled to a permanent partial disability rating because no doctor had found him to have a ratable injury.

Under NRS 616C.490, an insurer must schedule an appointment with a rating physician "[w]ithin 30 days after receiving from a physician or chiropractor a report indicating that the injured employee may have suffered a permanent disability and is stable and ratable." NRS 616C.490(2). In this case, only Dr. Reed ever indicated that Kekerovic was medically stable and entitled to permanent partial disability benefits. Less than 30 days after he provided that opinion, however, Dr. Reed reversed his position in light of the video evidence, finding Kekerovic to have no ratable disability or impairment.

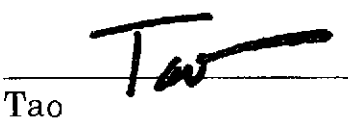
As no other doctor submitted a report finding Kekerovic to have a ratable impairment, no obligation to schedule an appointment with

a rating physician arose under NRS 616C.490(2). Therefore, the appeals officer's affirmance of the closure of the claim without a permanent partial disability rating was not arbitrary or capricious and was supported by substantial evidence in the record. *See* NRS 233B.135(3)(e), (f); *Warburton*, 127 Nev. at ___, 262 P.3d at 718. And the district court properly denied the petition for judicial review in this regard as well. *See Phillips*, 126 Nev. at 349-50, 240 P.3d at 4-5.

Accordingly, for the reasons set forth above, we affirm the district court's denial of judicial review.

It is so ORDERED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Persi J. Mishel, Settlement Judge
Greenman Goldberg Raby & Martinez
Law Offices of David Benavidez
Eighth District Court Clerk