

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JESUS OROZCO,
Appellant,
vs.
WYNN RESORTS, LLC OCIP; AND
LIBERTY MUTUAL,
Respondents.

No. 66425

FILED

OCT 16 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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; Valorie J. Vega, Judge.

In 2004, appellant suffered industrial injuries while working for respondent Wynn Resorts, LLC, and began to receive workers' compensation benefits. Later that same year, appellant settled a case with the third-party tortfeasors whose equipment caused appellant's injuries. The settlement agreement, which appellant alleges respondent Liberty Mutual, Wynn's insurance company, participated in the negotiation of, portioned out \$100,000 to satisfy respondents' workers' compensation lien on the proceeds from appellant's case. Although the settlement agreement was not signed by either respondent, Liberty Mutual's counsel sent a letter stating that "Liberty has agreed to settle its workers[] compensation lien for \$100,000."

In 2009, subsequent to the settlement and the \$100,000 payment to Liberty Mutual, appellant sought to reopen his claim based on a new medical evaluation. Liberty Mutual denied this request and appellant appealed that decision to a hearing officer, who affirmed the

denial. This determination was then brought before an appeals officer, who also affirmed the denial, finding that appellant had not proven a change in circumstances that warranted reopening the claim and that he had not exhausted his settlement proceeds on expenses that would be covered by workers' compensation. Following the filing of a petition for judicial review by appellant, the district court affirmed the appeals officer's finding that appellant was required to exhaust his settlement proceeds, but remanded on the change of circumstances issue.

On remand, the appeals officer found that appellant's condition warranted a total permanent disability status. That decision was appealed by respondents, but the district court denied their petition for judicial review.¹ Appellant then filed this appeal, which challenges the district court's conclusion that he had to exhaust his settlement proceeds on workers' compensation expenses before he could reopen his claim. Of particular importance here, appellant argues that, by settling the lien on the third-party tortfeasors case for \$100,000, respondents are judicially estopped from enforcing, or have waived, their statutory right to offsets from the settlement proceeds retained by appellant for future workers' compensation payments. Respondents, however, assert that, while they did settle the lien for \$100,000, they never waived their right to future offsets.

When reviewing agency decisions regarding workers' compensation issues, this court, like the district court, reviews the matter for clear error or an abuse of discretion. See *Vredenburg v. Sedgwick*

¹Respondents have not appealed the denial of judicial review regarding appellant's total permanent disability status.

CMS, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Additionally, we defer to the appeals officer's fact-based conclusions so long as they are supported by substantial evidence. *See id.*

The Nevada Supreme Court has determined that the doctrines of equitable estoppel and waiver can be invoked in workers' compensation proceedings. *See Dickinson v. Am. Med. Response*, 124 Nev. 460, 467, 186 P.3d 878, 883 (2008). Specifically, the court held that equitable 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.* Similarly, the *Dickinson* court held that waiver was applicable "in those types of [workers' compensation] proceedings when the other party's conduct clearly shows an intention to waive a right or when that party's neglect to insist upon the right prejudices the invoking party." *Id.* Whether either of these doctrines is applicable under the circumstances presented by this appeal is a question of fact. *See id.* at 468, 186 P.3d at 883. As such, the factual findings must be made by the appeals officer in the first instance. *See id.* (requiring the appeals officer to address questions of fact before the supreme court will conduct its review of factual issues).

Here, the appeals officer made no findings regarding appellant's equitable estoppel and waiver arguments and further failed to address these issues in the conclusions of law.² Although the extent to which these issues were argued before the appeals officer is unclear, as the

²The district court likewise did not address these arguments in resolving appellant's judicial review petition.

briefs from the proceeding before the appeals officer are not included in the record,³ these issues were raised in appellant's petition for judicial review, and respondents did not argue that these issues were improperly raised for the first time in the judicial review proceeding.⁴ See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that points not made in the district court are deemed to have been waived on appeal). And on appeal, respondents likewise do not assert that these issues are not properly before this court. 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 on appeal are deemed waived).

Without any factual findings regarding the equitable estoppel or waiver issues, this court cannot adequately review the appeals officer's decision. See *Dickinson*, 124 Nev. at 469, 186 P.3d at 884 (stating that the appeals officer's factual findings are "crucial to the administrative process, as factual findings not only help ensure that the administrative agency engages in reasoned decision making, but they also facilitate judicial review" and that, through the factual findings, "the courts are enabled to evaluate the administrative decision without intruding on the agency's fact-finding function"). Accordingly, we must remand this case to the district court for it to remand this matter to the appeals officer for further


³The transcript from the hearing before the appeals officer demonstrates that the parties were to submit briefing regarding the issues presented in this case.

⁴In fact, respondents did not even respond to these arguments in their opposition to appellant's petition for judicial review, and only first addressed the issues in their opposition to appellant's motion for reconsideration of the order granting appellant's petition in part.

proceedings regarding whether respondents are equitably estopped from pursuing, or have waived their right to pursue, offsets from appellant's settlement proceeds for additional workers' compensation expenses. In so doing, the appeals officer must make explicit findings of fact that support its determinations as to these issues. See NRS 233B.125 (providing that findings of fact that support the appeals officer's ultimate determination must be included in the appeals officer's written decision).

It is so ORDERED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Eighth Judicial District Court, Dept. Two
Janet Trost, Settlement Judge
Gerald F. Neal
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

⁵In light of our decision, we need not reach appellant's remaining argument on appeal that, due to his total permanent disability status, workers' compensation expenses would exceed any offset amount because, if it is determined that respondents waived any right to future offsets or are equitably estopped from asserting future offsets, then appellant's argument would become moot as respondents would be responsible for all of appellant's workers' compensation expenses.