

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RODOLFO MORA-ALMARAZ,
Appellant,
vs.
LAS VEGAS SUSHI & SEAFOOD
BUFFET, INC./TODAI RESTAURANT;
AND FIRSTCOMP,
Respondents.

No. 66082

FILED

NOV 04 2015

TRACIE F. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie F. Lindeman*
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; Douglas Smith, Judge.

In this appeal we must determine whether substantial evidence supports an appeals officer's denial of a claim for workers' compensation where an employee was injured on the job. We also determine whether an employee who sustained an industrial injury has a right to compensation for a permanent partial disability (PPD).

On August 11, 2011, appellant Rodolfo Mora-Almaraz injured himself when he slipped and twisted his back while working at respondent Las Vegas Sushi and Seafood Restaurant Buffet, Inc.'s Todai Restaurant. Mora-Almaraz felt a "pop" in his back, and by the end of his shift, he felt back pain. Five days later, Dr. Carlos Emorcilla examined Mora-Almaraz for the pain in his back. Dr. Emorcilla diagnosed Mora-Almaraz with a lumbar strain and back spasms and prescribed pain medication and

physical therapy (pending approval from respondent insurer FirstComp). Mora-Almaraz informed Dr. Emorcilla that he had no previous injury to his back.

FirstComp approved Mora-Almaraz's claim for lumbar strain treatment, but excluded any preexisting or degenerative conditions to his back. Mora-Almaraz then went to Dr. Archie Perry, an orthopedic specialist, who recommended an MRI and CT scan. Dr. Perry's initial diagnosis was acute low-back pain related to the industrial injury as well as a questionable avulsion injury to the L-4 region. Mora-Almaraz informed Dr. Perry that he had no previous injury to his back.

Dr. Perry reviewed the MRI and CT scan and opined Mora-Almaraz had some preexisting disc desiccation at L4-L5 as well as preexisting, and previously asymptomatic, spondylolysis at L5, with acute aggravation of this condition. In addition, he opined that Mora-Almaraz's disc herniation was likely related to the industrial injury. Dr. Perry recommended pain management by lumbar injections, medication, and physical therapy. Dr. Joseph Schifini administered the lumbar injections and along with Dr. Perry, noted slight improvements in pain toleration, about 15-20%.

FirstComp then referred Mora-Almaraz to Dr. Victor Klausner, who reviewed Mora-Almaraz's patient history, including his MRI and CT scan. Mora-Almaraz informed Dr. Klausner he was involved in a car accident in 2009 that injured his back and his neck. This was the first time Mora-Almaraz informed any treating physician about the prior injury. In his report, Dr. Klausner found the pure twisting mechanism

that caused the industrial injury was a weak mechanism for a disc protrusion. He also found the calcification present in the area indicated the disc protrusion at L4-L5 was chronic in nature and must have occurred at least 12 months before the industrial injury. Finally, Dr. Klausner stated the minimal relief experienced from the lumbar injections further supported the opinion that the L4-L5 disc protrusion predated the industrial injury. Therefore, Dr. Klausner concluded Mora-Almaraz's treatment should be limited to the lumbar sprain.

Dr. Daniel Lee also examined Mora-Almaraz. After reviewing Mora-Almaraz's treatment history, Dr. Lee also opined that the slight decrease in pain after the lumbar injections ruled out the L4-L5 disc protrusion as being caused by the industrial injury. Dr. Lee concluded Mora-Almaraz was stable, not ratable, and that treatment for the lumbar strain was complete.

Mora-Almaraz then went to Dr. John Siegler for a second opinion. Dr. Siegler recommended ordering a functional capacity evaluation (FCE). After receiving Drs. Klausner and Lee's reports, however, FirstComp notified Mora-Almaraz it was closing his claim as complete. Mora-Almaraz then followed up with Dr. Siegler who reportedly disagreed with Dr. Lee's analysis regarding the relief experienced after the lumbar injections.

Mora-Almaraz appealed FirstComp's claim closure and both parties agreed to have the matter heard by an appeals officer. The appeals officer held a hearing in which each party presented its case, including the presentation of each doctor's reports as evidence. The

appeals officer found Drs. Klausner and Lee's reports, which concluded Mora-Almaraz's L4-L5 injury was preexisting and not aggravated by the industrial injury, to be persuasive. The appeals officer also found Dr. Siegler's report contradicting Dr. Lee's report unpersuasive.

The appeals officer concluded that Mora-Almaraz had not proved he needed further treatment, an FCE, or that FirstComp improperly closed his claim. The appeals officer also concluded respondents proved by a preponderance of the evidence that Mora-Almaraz's industrial injury did not substantially contribute to the aggravation, precipitation, or acceleration of his preexisting injury. The district court, thereafter denied Mora-Almaraz's petition for judicial review, summarily stating that substantial evidence supported the appeals officer's decision.

On appeal, Mora-Almaraz argues the appeals officer erred in finding the industrial injury did not substantially contribute to the aggravation, precipitation, or acceleration of his preexisting non-industrial condition. Mora-Almaraz also argues he is entitled to receive PPD compensation because his injury arose out of, and in the course of, employment under NRS 616C.490, which provides for PPD compensation. Respondents argue Mora-Almaraz's industrial injury, the lumbar strain, was treated and FirstComp properly closed the claim.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. ___, ___, 312 P.3d 479, 482 (2013). This court reviews "an administrative agency's factual findings for clear error or an arbitrary

abuse of discretion and will only overturn those findings if they are not supported by substantial evidence.” *Id.* (internal quotation marks omitted). “Substantial evidence is evidence 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) (internal quotation marks omitted). On appeal from an administrative decision, this court will not reweigh the evidence or reassess witness credibility. *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. ___, ___, 302 P.3d 1108, 1118 (2013).

Mora-Almaraz first challenges the appeals officer’s conclusion that his preexisting L4-L5 disc protrusion is not an injury by accident eligible for PPD compensation. An insurer must prove by a preponderance of the evidence that an industrial injury did not substantially contribute to the aggravation, precipitation, or acceleration of a preexisting condition; otherwise, the preexisting condition is deemed to be an injury by accident eligible for PPD compensation. NRS 616C.175(1).

Here, the appeals officer reviewed Dr. Klausner’s report concluding that the industrial injury was unrelated to and did not substantially contribute to the resulting condition. The appeals officer also relied on Dr. Lee’s opinion that the lack of relief from the lumbar injections ruled out that the industrial injury substantially contributed to the aggravation, precipitation, or acceleration of the preexisting condition. The appeals officer also weighed Dr. Perry’s report opining that the industrial injury aggravated the preexisting injury and Dr. Siegler’s report

opining Mora-Almaraz was ratable. The appeals officer, however, found these reports unpersuasive.

Thus, substantial evidence supports the appeals officer's decision that the insurer proved by a preponderance of the evidence that the industrial injury did not substantially contribute to the aggravation, precipitation, or acceleration of Mora-Almaraz's preexisting condition. Therefore, Mora-Almaraz's L4-L5 disc protrusion is not an injury by accident eligible for PPD compensation. *See* NRS 616C.175(1). Insofar as Mora-Almaraz challenges the weight the appeals officer gave the doctors' reports, we do not reweigh the evidence or determine witness credibility. *See Bisch*, 129 Nev. at ___, 302 P.3d at 1118.

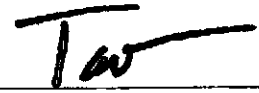
As to Mora-Almaraz's second assignment of error, we conclude Mora-Almaraz was not entitled to PPD compensation based on his industrial injury. NRS 616C.490 provides compensation for an employee who sustains a PPD from an accident arising out of and in the course of employment. To receive a determination of PPD compensation, however, the injured employee must also submit a report to the insurer from a physician or chiropractor indicating that the employee may have suffered a permanent disability and is stable and ratable. NRS 616C.490(2).


Here, both Drs. Klausner and Lee concluded in their reports that Mora-Almaraz did not suffer a permanent disability and that he was not ratable. *See* NRS 616C.103(1)(b). Although Dr. Siegler's report contradicted Dr. Lee's conclusion, we do not reweigh the evidence or determine witness credibility. *See Bisch*, 129 Nev. at ___, 302 P.3d at 1118. Therefore, substantial evidence supports the appeals officers'

decision that Mora-Almaraz was not entitled to PPD compensation based on the lumbar sprain injury by accident. *See also Georgeff v. Sahara Hotel*, 103 Nev. 485, 487, 745 P.2d 1142, 1143 (1987) (stating that claimants do not have an absolute right to a PPD evaluation).

Having concluded substantial evidence in the record supports the appeals officer's decision to deny workers' compensation for Mora-Almaraz's resulting condition, and that Mora-Almaraz is not entitled to a PPD determination because he did not suffer a permanent disability and is not ratable, we ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Janet Trost, Settlement Judge
Benson, Bertoldo, Baker & Carter, Chtd.
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk