IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BERNARD SANDS,
Appellant,
vs.
MGM RESORTS INTERNATIONAL,
Respondent.

No. 68926

AMENDED ORDER OF AFFIRMANCE

This is an appeal from an order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant Bernard Sands worked as a baker at respondent MGM Resorts International's Luxor Hotel when he allegedly injured his back carrying heavy food packages. Sands filed a workers' compensation claim, which the insurer denied under NRS 616A.030, NRS 616A.265, and NRS 616C.150 (requiring a claimant to prove by a preponderance of the evidence that the injury arose out of and in the course of employment) and a hearing officer affirmed.[1] An appeals officer then conducted a full hearing. The officer denied the claim concluding that, although she found Sands credible, Sands failed to establish by a preponderance of evidence

[1]Although the insurer based its decision on these statutes, the parties stipulated below that NRS 616 did not apply as Sands did not sustain an "injury" as defined by that Chapter. Rather, NRS 617.358(1) applies, which requires the claimant satisfy the same burden for an occupational disease claim.

the elements required by NRS 617.440(1)(a) and (b),[2] or that Sands' condition was aggravated by the performance of his job duties under NRS 617.366(1).[3] The district court denied Sands' petition for judicial review. This appeal followed.

On appeal, Sands contends that the appeals officer committed legal error or abused its discretion by denying his claim for workers' compensation because he provided sufficient medical evidence that his occupational disease arose out of and in the course of employment. Specifically, he claims that the C-4 form constituted prima facie evidence of medical causation. Further, Sands argues that the insurer failed to rebut the presumption that his disease arose out of and during the course of his employment. Sands argues that the appeals officer should have at least found a medical question based on the evidence.[4]

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[2]NRS 617.440(1) states:

> An occupational disease defined in this chapter shall be deemed to arise out of and in the course of employment if: (a) [t]here is a direct causal connection between the conditions under which the work is performed and the occupational disease; (b) [i]t can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment

[3]NRS 617.366(1) permits compensation for a claimant's preexisting condition where the claimant's occupational disease "aggravates, precipitates or accelerates the preexisting condition."

[4]Sands relies on NRS 616C.360 to advance this argument; however, he did not expressly raise this issue before the appeals officer.

The role of judicial review on appeal of 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 appeals officer's decision in workers' compensation matters for clear error or abuse of discretion. NRS 233B.135(3); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). This court will not substitute its judgment of the evidence for that of the administrative agency. *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993). The appeals officer's decision on issues of fact and fact-based conclusions of law will not be disturbed if supported by substantial evidence. *See Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88.

Although a claimant is required to use a C-4 form when filing a claim for workers' compensation, *see* NAC 616A.480(1)(e), the C-4 form does not automatically establish by a preponderance of the evidence that the claimed occupational disease arose out of and in the course of employment, *see* NRS 617.358(1). Rather, a claimant may satisfy this burden by providing evidence from a physician stating "to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." *United Exposition Serv. Co.*, 109 Nev. at 424-25, 851 P.2d at 425. Only when the claimant has met its burden is the insurer required to provide evidence to rebut the presumption that the disease arose out of and during the course of employment. *See* NRS 617.366.

Here, Sands attempted to establish the requisite causal relationship with the C-4 form and his family doctor's response to Sands' counsel's letter requesting additional medical information, in which Sands' doctor replied affirmatively to the question of whether Sands' current back problems were *related* to his work. Importantly, the appeals officer could have reasonably found that, under the circumstances of this case, the form and the letter did not constitute sufficient evidence of medical causation.

The appeals officer found that Sands did not provide any evidence that indicated that any of Sands' treating physicians believed to a reasonable degree of medical probability that Sands' employment caused his condition, or sufficient facts, including his own testimony, to show the condition was caused by an industrial injury or disease. *Cf. United Exposition Serv. Co.*, 109 Nev. at 425, 851 P.2d at 425 (discussing factors other than the industrial injury that contributed to the claimant's condition where physician did not testify to a medical probability). Specifically, since neither the form nor the letter opines causation to a reasonable medical probability, and causation was reasonably in doubt because the appeals officer found that Sands' treating physicians' written medical reports had undermined the C-4 form and the letter,[5] Sands did not satisfy the burden of proof. Further, Sands failed to provide sufficient evidence about the work environment to the appeals officer to establish

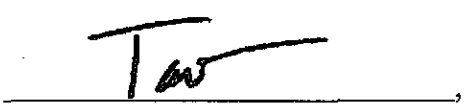
[5]Accordingly, there was substantial evidence supporting the appeals officers' implicit finding that Sands failed to advance "sufficient facts" from which the officer could have "reasonabl[y] conclu[ded] that the condition was caused by the industrial injury." *See United Exposition Serv. Co.*, 109 Nev. at 425, 851 P.2d at 425.

the first two elements required by NRS 617.440(1). Therefore, the appeals officer could have reasonably found that Sands failed to prove, by a preponderance of the evidence that his condition arose out of and during the course of his employment. *See Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 539, 936 P.2d 839, 843 (1997).

We thus conclude, under the facts of this case, that substantial evidence supports the appeals officer's conclusion that Sands failed to prove his condition arose out of and in the course of his employment. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (stating that substantial evidence may be inferred from the lack of certain evidence). We also conclude the appeals officer did not abuse her discretion by not sua sponte finding a medical question under NRS 616C.360. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Janet Trost, Settlement Judge
Kemp & Kemp
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk