IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTHUR GOTTULA,
Appellant,
vs.
KEVCO CONSTRUCTION, LLC,
Respondent.

No. 67552

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; Joanna Kishner, Judge.

Appellant Arthur Gottula was employed by respondent Kevco Construction, LLC, when he stepped on a broken stair and fell, injuring his left shoulder and knee. The MRIs taken shortly after the accident revealed that, in addition to his current injuries, Gottula had preexisting arthritis in both locations. After having surgery, receiving some physical therapy, and being given a 12 percent permanent partial disability rating,[1] Kevco closed Gottula's claim but subsequently reopened it based on a doctor's recommendation because his symptoms worsened after he returned to work.

Shortly after reopening Gottula's claim, Kevco again decided to close the claim, concluding that no further treatment was warranted

[1]The hearing officer affirmed the 12 percent rating when Gottula appealed that decision, but Gottula did not appeal the hearing officer's decision in that regard.

because Gottula's current symptoms were related only to the preexisting arthritis. Gottula appealed this decision, and further evaluations were conducted. As relevant here, an additional report issued by Dr. Timothy Sutherland found no current shoulder tear and that Gottula was doing fine. Additionally, a report issued by Dr. Reynold Rimoldi opined that Gottula's current symptoms were not related to his industrial injury, but instead arose out of his preexisting arthritis, which related to a preexisting shoulder tear. Kevco thus closed the claim.

Gottula appealed and also obtained another medical opinion from Dr. Michael Bradford, which he submitted as evidence in support of his appeal. Both the hearing officer and the appeals officer affirmed the claim closure. The appeals officer also denied Gottula's later motion for reconsideration. Gottula's petition for judicial review with the district court was likewise denied, as was his subsequent motion for reconsideration in that venue. And this appeal followed.

Like the district court, we review an administrative agency's decision to determine whether the decision was affected by an error of law, or was arbitrary or capricious, and thus, an abuse of discretion. NRS 233B.135(3)(d), (f); *State, Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 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. 682, 686, 262 P.3d 715, 718 (2011). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS

233B.135(4); *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. ___, ___, 310 P.3d 560, 564 (2013).

Dr. Bradford's report and denial of reconsideration

At the outset, we address the appeals officer's decision to give little weight to Dr. Bradford's report. In the initial decision and order, the appeals officer found Dr. Bradford's report to not be persuasive because there was no indication of what medical records he had reviewed in coming to his conclusions. Gottula moved for reconsideration and attached a document from Dr. Bradford that Gottula contended explained what records Dr. Bradford had reviewed. Gottula asked the appeals officer to review that report in reconsidering the order regarding claim closure. The appeals officer denied reconsideration.

On appeal, Gottula argues the denial of reconsideration was improper because the initial order was based on a mistaken fact as to what records Dr. Bradford reviewed. We disagree. In workers' compensation matters, rehearing of a decision is only appropriate if it is "based on good cause or newly discovered evidence." NAC 616C.327(1).

Here, Gottula failed to demonstrate good cause, and the document from Dr. Bradford identifying what he reviewed in coming to his opinions was not "newly discovered evidence," but rather, was evidence Gottula failed to provide to the appeals officer in the first instance. *Cf. Drespel v. Drespel*, 56 Nev. 368, 374, 45 P.2d 792, 793 (1935) (recognizing that evidence that was within a party's power to present during a first trial will not constitute newly discovered evidence supporting a grant of a motion for a new trial), *reh'g granted in part on other grounds* 56 Nev. 368, 54 P.2d 226 (1936); *see also Defs. of Wildlife v. Bernal*, 204 F.3d 920, 929

(9th Cir. 2000) (providing that, in moving for a new trial based on newly discovered evidence under FRCP 59(a), the movant must demonstrate "the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage"). Accordingly, the appeals officer properly refused to grant reconsideration on this basis. *See* NAC 616C.327(1). Furthermore, we also will not reassess Dr. Bradford's credibility, *see Nellis Motors v. State, Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.3d 1061, 1066 (2008) (stating that, in administrative appeals, appellate courts "will not . . . reassess the witnesses' credibility"), and, therefore, we give little weight to his report in our review of this appeal.[2]

Substantial evidence as to Gottula's shoulder claim

Gottula next asserts that the appeals officer's decision was not supported by substantial evidence as to his left shoulder because two of the medical reports that the appeals officer expressly relied on for that decision were factually incorrect; thus, no reasonable person would find them adequate to support the appeals officer's conclusions. *See Nev. Pub. Emps. Ret. Bd.*, 129 Nev. at ___, 310 P.3d at 564 ("Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks omitted)). Kevco argues there was no issue with the reports, and thus, that substantial evidence supports the appeals officer's decision. In the decision and order, the appeals officer

[2]Additionally, while the letter from Dr. Bradford demonstrated that he had reviewed at least some of Gottula's medical history, it still did not specifically state what documents he was provided or actually reviewed.

stated that it found no flaws in either of the reports and also found them to be comprehensive and persuasive. We address each report in turn.

Dr. Timothy Sutherland's report

In his report, Dr. Sutherland opined that Gottula's current symptoms with his left shoulder "are related to his [preexisting] arthritis and there is no evidence on clinical examination of significant rotator cuff deficiency or evidence of current rotator cuff tear." Gottula argues that because it was proven at the time of the hearing before the appeals officer that he did have a current rotator cuff tear, Dr. Sutherland's report was incorrect and therefore does not constitute substantial evidence which can be relied upon. Kevco admits in its answering brief that Dr. Sutherland's conclusion that Gottula did not have a current rotator cuff tear "was later proven to be false," but asserts that Dr. Sutherland's opinion was based on the existence of the preexisting arthritis, not whether there was a current tear. Thus, despite any issues, Kevco submits that Dr. Sutherland's report constitutes substantial evidence supporting the appeals officer's decision.

Dr. Sutherland's opinion that Gottula's current symptoms were the result of his preexisting arthritis was at least partially based on the lack of a current tear. And it is unclear from Dr. Sutherland's report whether, if he had known of a current tear, he still would have opined that any current issues were caused by the arthritis rather than the current tear. Thus, because Gottula did have a tear at the time of the hearing, Dr. Sutherland's report may no longer have been viable insofar as the actual facts were different from those apparently relied on by Dr. Sutherland.

The appeals officer's decision and order, however, does not address the effect of the current tear on the continued viability of Dr.

Sutherland's opinion. Thus, we must remand this case so that the appeals officer can address the existence of the current tear and determine whether that condition affects the conclusion that Dr. Sutherland's report was error-free, comprehensive, and persuasive. *See Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008) (recognizing that courts are not to intrude on the administrative agency's fact-finding function when deciding petitions for judicial review, especially in cases where factual issues are not addressed by the appeals officer).

Dr. Reynold Rimoldi's report

The appeals officer also relied on the report of Dr. Rimoldi, who found that Gottula's "current ongoing symptoms in his . . . left shoulder are secondary to preexisting changes, that being the cuff tear arthropathy that predated the [industrial] incident in question." Gottula asserts that this was incorrect because the tear was a direct result of the industrial accident as demonstrated by medical records and by Kevco accepting the claim and paying for the surgery to repair the tear. Dr. Rimoldi also found that Gottula had a contusion on his shoulder as a result of the industrial incident, which Gottula argues further shows the report's inaccuracy as he did not land on his shoulder in the fall and no doctor at the time of the accident found him to have a contusion on his shoulder. Thus, due to these factual errors, Gottula argues that Dr. Rimoldi's report cannot constitute substantial evidence that supports the appeals officer's decision.

In response to these specific arguments, Kevco only generally asserts that Gottula did not submit enough evidence to the appeals officer to win his case. As with Dr. Sutherland's report, the appeals officer

concluded that Dr. Rimoldi's report was error-free, comprehensive, and persuasive without addressing Gottula's arguments regarding the errors in the report.

The medical records diagnosing the tear and Kevco's initial acceptance of Gottula's shoulder claim demonstrate that Dr. Rimoldi's report was factually incorrect in stating that Gottula's shoulder tear was preexisting. Moreover, given that his examination was conducted long after the accident occurred, the record demonstrates that Dr. Rimoldi's conclusion that Gottula suffered a left shoulder contusion was not based on direct examination. And as no doctor who examined Gottula at the time of the accident diagnosed him with a left shoulder contusion, nothing in the record supports this finding. Thus, we conclude that Dr. Rimoldi's finding that Gottula suffered a left should contusion was clearly erroneous.

In light of these demonstrated errors, no "reasonable person could find the evidence adequate to support the [appeals officer's] conclusion" that Dr. Rimoldi's report was error-free. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). Moreover, based on the unresolved issues discussed above with regard to Dr. Sutherland's and Dr. Rimoldi's reports, we conclude that substantial evidence does not support the appeals officer's decision as to Gottula's shoulder. Therefore, we reverse the district court's order denying the petition for judicial review and remand this matter to the district court to remand for further consideration of that portion of the appeals officer's decision. On remand, the appeals officer must reconsider to what extent,

if any, she wants to continue to rely on Dr. Sutherland's and Dr. Rimoldi's reports.[3]

Burden shifting

Gottula's final argument is that the appeals officer failed to properly apply NRS 616C.175(1), which provides that, if an employee has a preexisting condition which is aggravated, precipitated, or accelerated by an industrial injury, then the resulting condition is compensable "unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition." Gottula first asserts that the appeals officer failed to shift the burden to Kevco for it to demonstrate that the industrial injury was not a substantial contributing cause of Gottula's resulting condition. We agree with Kevco, however, that the statutory scheme requires the employee to first show that the industrial injury actually did aggravate, precipitate, or accelerate the preexisting condition before the burden shifts. *See* NRS 616C.175(1)(b); *see also* NRS 616C.150(1) (placing the burden of proving that an injury is industrial on the claimant); *Clay v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, 305 P.3d 898, 902 (2013) (providing that courts must apply a statute as written if its language is clear and unambiguous).

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[3]In this regard, we note that Dr. Rimoldi opined that Gottula's current issues with his shoulder were related to the tear. Thus, on remand, the appeals officer could find that the report supports a finding that the current shoulder issues are related to the industrial injury because the fact that Dr. Rimoldi incorrectly stated that the tear was preexisting may not detract from the overall conclusion that Gottula's current shoulder issues are being caused by the tear.

Gottula alternatively argues that he adequately demonstrated that his preexisting condition was aggravated, precipitated, or accelerated by the industrial injury and, thus, the appeals officer erred in failing to shift the burden to Kevco to demonstrate that the industrial injury was not a substantial contributing cause of Gottula's resulting condition. *See* NRS 616C.175(1). Regarding Gottula's shoulder, because we reverse and remand that decision for the appeals officer to address discrepancies in the relied-upon reports, the appeals officer will necessarily have to reconsider whether Gottula demonstrated that his current shoulder condition was the result of the preexisting arthritis being aggravated, precipitated, or accelerated by the industrial injury. Thus, we decline to address this issue further as to Gottula's shoulder because the appeals officer's decision may change on remand.

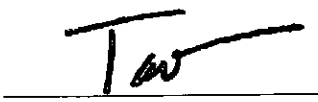
As to Gottula's knee, the initial appeals officer's decision does not address whether Gottula demonstrated that his preexisting condition was aggravated, precipitated, or accelerated by the industrial injury; whether Kevco was required to demonstrate, by a preponderance of the evidence, that the industrial injury was not a substantial contributing cause to Gottula's current condition; or, if the burden shifted to Kevco, whether it met its burden. *See id.* Similarly, the appeals officer's order denying reconsideration merely notes Gottula's burden-shifting argument and states that substantial evidence supports the initial decision without addressing if or how the parties met their respective burdens.

Without factual findings in this regard, we cannot adequately address this argument on appeal. *See Dickinson*, 124 Nev. at 469, 186 P.3d at 884 (providing that factual findings are crucial to facilitating

judicial review as they ensure that "the courts are enabled to evaluate the administrative decision without intruding on the agency's fact-finding function"). Thus, we must also reverse the district court's order denying the petition for judicial review as to the knee injury and remand this matter to the district court to remand to the appeals officer for findings of fact regarding the application of NRS 616C.175(1). *See id.* (reversing and remanding a workers' compensation matter for the appeals officer to make necessary findings).

It is so ORDERED.[4]

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Joanna Kishner, District Judge
Carolyn Worrell, Settlement Judge
Law Office of James R. Cox
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

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[4]Based on our conclusions herein, we need not address Gottula's additional argument that the record as a whole does not support the appeals officer's decision. We have also considered Gottula's remaining arguments regarding errors in the record, and we find them to lack merit.