

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

YAVUZ ERDUN,
Appellant,
vs.
BALLY TECHNOLOGIES; AND YORK
RISK SERVICES GROUP, INC.,
Respondents.¹

No. 68317

FILED

JAN 18 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
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; Kathleen E. Delaney, Judge.

Appellant Yavuz Erdun was injured during his employment with respondent Bally Technologies² when a slot machine he was moving tipped off of a cart, causing Erdun to use his body to brace the machine while it was placed back on the cart. As a result of this incident, Bally accepted Erdun's workers' compensation claims for his left shoulder and, after further medical visits, for his cervical spine. Erdun also received temporary total disability benefits (TTD) because he was temporarily unable to work as a result of his injuries. Erdun later sought to expand his claim to include neurological issues such as dizziness, vertigo, and tinnitus, but Bally declined to expand the claim, which the appeals officer affirmed. After further appeals, the Nevada Supreme Court ultimately

¹We direct the clerk of the court to amend the caption of this case to conform to the caption on this order.

²This order shall use Bally to refer to both Bally Technologies and respondent York Risk Services Group, Inc.

remanded the case to the appeals officer for her to consider a medical report by Dr. Christopher Danner. *See Erdun v. Bally Techs.*, Docket No. 58902 (Order of Reversal and Remand, November 20, 2013).

On remand, the appeals officer considered Dr. Danner's report and found that it did not support expanding Erdun's claim. She also denied Erdun's request for additional TTD based on his cervical spine issues. The district court denied Erdun's subsequent petition for judicial review 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. 618, 624, 310 P.3d 560, 564 (2013).

On appeal, Erdun first argues that the appeals officer erred in failing to find that Erdun's neurological issues were causally related to his industrial accident and refusing to expand his claim to include those issues. He asserts that Dr. Danner opined to a reasonable degree of medical probability that the neurological issues were caused by the industrial accident and that no evidence contradicted that opinion, such that the appeals officer erred in not relying on it to expand the scope of

Erdun's claim. Bally disagrees. In her amended decision and order, the appeals officer found Dr. Danner's report to include the most credible explanation for Erdun's neurological complaints—that he suffered from migraine headaches. But the appeals officer also concluded that Dr. Danner failed to make a causal connection between Erdun's migraines (and the related neurological issues) and his industrial injuries because that opinion was based solely on Erdun's statement that he did not suffer from neurological problems before the accident rather than on medical evidence as required by NRS 616C.160(2).³ Furthermore, no other doctor opined that Erdun's neurological issues were causally connected to his industrial injuries.

For a newly developed injury to be included in a workers' compensation claim, a doctor must "establish[] by medical evidence a causal relationship between the injury . . . for which treatment is being sought and the original accident." *Id.* We agree with the appeals officer that Dr. Danner's report failed to rely on medical evidence to make a causal connection between Erdun's neurological symptoms and his industrial injuries. As detailed above, Dr. Danner ultimately relied only on Erdun's statement regarding the time of onset of his symptoms to establish this connection, rather than basing this conclusion on actual medical evidence such as a medical determination that injuries like the one Erdun suffered could result in or cause neurological issues in line with

³Specifically, Dr. Danner opined that "Mr. Erdun states he was asymptomatic prior to the injury and the [neurological] symptoms occurred after [the] injury. It does stand within medical probability that his [neurological] symptoms . . . are related to his injury based on the temporal relationship of his injury and onset of symptoms."

what Erdun was experiencing. *See, e.g., Clements v. Apfel*, 76 F. Supp. 2d 599, 603 (E.D. Pa. 1999) (concluding that an administrative judge properly rejected a medical opinion offered as evidence because it “was almost entirely based on the claimant’s subjective complaints of pain rather than on objective medical evidence”); *Norton v. N. Syracuse Cent. Sch. Dist.*, 874 N.Y.S.2d 302, 304 (App. Div. 2009) (providing that, to prove causation based on medical evidence, the opinion “must signify a probability as to the underlying cause of the claimant’s injury which is supported by a rational basis” (internal quotation marks omitted)).⁴

We note that Dr. Danner’s initial report stated that there was a causal connection between the accident and the neurological symptoms because “[t]he blunt head injury sustained during the accident and the resulting shear forces placed on his brain may have predisposed him to develop migraines and related balance complaints.” But in his final report Dr. Danner omitted, and thus seemingly receded from, this statement and, although he still opined that there was a causal connection, that opinion was based solely on Erdun’s statements regarding the onset of symptoms as quoted above.

⁴While the Nevada Supreme Court has declined to require objective medical evidence specifically for soft tissue injuries, *see Bally’s Grand Hotel & Casino v. Reeves*, 113 Nev. 926, 936, 948 P.2d 1200, 1207 (1997), because soft tissue injuries are not at issue here and because the *Reeves* case does not identify what statute it makes this determination under, much less purport to define what constitutes “medical evidence,” that case does not provide guidance on the issue presented to this court. And without any further definition of “medical evidence” provided by statute or the supreme court, we may turn to other jurisdictions for guidance. *See Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 642, 289 P.3d 201, 205 (2012) (looking to other jurisdictions for guidance when Nevada has no law on the topic).

Moreover, relevant to both Dr. Danner's initial take on the accident and his ultimate reliance on Erdun's statement regarding the time of onset of symptoms, in making her decision on remand, the appeals officer expressly found Erdun was not credible and that he provided Dr. Danner with a different description of the accident than he had provided to other doctors. Indeed, the record demonstrates that Erdun told Dr. Danner that the slot machine fell on his head in addition to his shoulder, rather than that it rested against his head or that he used his head to balance the machine after it fell as he told the doctors that initially treated him. The record further reveals that Erdun gave Dr. Danner a different description of his injuries by stating that he began experiencing the migraines and neurological symptoms shortly after the incident, but Erdun had not reported those symptoms to the doctors that first treated him. On these points, we will not reweigh the appeals officer's finding regarding Erdun's credibility.⁵ See *Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 209, 955 P.2d 188, 192 (1998) (providing that appellate courts are not to substitute their judgment regarding the weight or credibility given to evidence and testimony).

Thus, because, as detailed above, Dr. Danner did not rely on medical evidence in opining that Erdun's neurological issues were related

⁵While Erdun suggests it was improper for the appeals officer to reweigh his credibility on remand, when the supreme court only instructed her to consider Dr. Danner's report, Erdun presents no relevant caselaw indicating that it was improper to reweigh his credibility under the circumstances presented here, and thus we do not consider this assertion. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider claims that are not supported by relevant authority).

to the industrial accident as required by NRS 616C.160(2), we conclude the appeals officer did not err or abuse her discretion in concluding that Erdun failed to establish a causal connection between his neurological issues and his original injuries and refusing to expand the scope of Erdun's claim on this basis. See NRS 233B.135(3)(d), (f); *State Tax Comm'n*, 127 Nev. at 385-86, 254 P.3d at 603.

Erdun next argues that he is entitled to additional TTD based on his cervical spine issues.⁶ Specifically, he asserts that multiple doctors opined he should be on light duty, and because Bally never made him a light duty job offer, he is entitled to TTD for the period of time he was restricted to light duty. Bally argues that the appeals officer properly weighed the evidence in coming to the conclusion that Erdun was not entitled to additional TTD. After addressing all the evidence, the appeals officer concluded that Erdun was entitled to TTD for the period of April 23, 2009, to December 9, 2009,⁷ but denied Erdun's request for TTD from October 27, 2007, going forward.

A claimant who suffers an industrial injury is entitled to TTD until a doctor determines the employee is physically capable of

⁶Because we affirm the denial of claim expansion for his neurological issues, we need not address Erdun's argument that he is entitled to additional TTD based on the neurological issues. Erdun also asserts that, if he is not entitled to additional TTD, he would at least be entitled to additional temporary partial disability benefits. But because Erdun failed to cogently argue this point or support it with citations to relevant authority, we do not consider it. See *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

⁷Erdun had already been granted TTD from February 22, 2007, to June 26, 2007, and from July 13, 2010, going forward.

employment “for which the employee is suited” or the employer makes a valid light-duty job offer.⁸ NRS 616C.475(1), (5). Having considered the parties’ arguments and reviewed the record, we conclude that Erdun’s argument is without merit, as substantial evidence, including medical reports and Erdun’s testimony as to his job duties, supports the appeals officer’s determination that Erdun was capable of performing his pre-injury duties. *See Langman*, 114 Nev. at 209, 955 P.2d at 192; *see also Nev. Pub. Emps. Ret. Bd.*, 129 Nev. at 624, 310 P.3d at 564. Even though some of the doctors opined that Erdun had physical limitations as a result of his industrial injuries,⁹ substantial evidence supports the appeals officer’s conclusion that those limitations would not interfere with Erdun performing his pre-injury duties. *See Langman*, 114 Nev. at 209, 955 P.2d at 192; *see also Nev. Pub. Emps. Ret. Bd.*, 129 Nev. at 624, 310 P.3d at 564. Because substantial evidence supports these findings and there is no

⁸Erdun attempts to argue that he is entitled to additional TTD simply because Bally never made him a valid light-duty job offer. This argument fails, however, because even if Erdun was entitled to TTD for the periods he claims, Bally has the option to either pay the TTD or make a valid light-duty job offer. *See* NRS 616C.475(8) (providing that an employer may make a light-duty job offer to an employee that has been deemed to have a temporary physical limitation or restriction); *see also Amazon.com v. Magee*, 121 Nev. 632, 637, 119 P.3d 732, 736 (2005) (recognizing that an employer’s offer of a valid light-duty job may enable the employer to cease paying TTD). Here, because the appeals officer found that Erdun was not entitled to TTD for the time periods specified, Bally had no reason to make a light duty job offer, nor is it required to do so by statute. *See* NRS 616C.475(8).


⁹Some doctors also gave Erdun work restrictions based on his neurological issues, but because we affirm the appeals officer’s refusal to expand Erdun’s claim to include the neurological issues, those restrictions do not form a basis on which to award Erdun additional TTD.

clear error or abuse of discretion, we do not overturn that determination. See NRS 233B.135(3)(e), (f); *City of N. Las Vegas*, 127 Nev. at 686, 262 P.3d at 718.

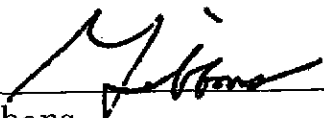
In an attempt to show that the appeals officer's decision regarding TTD is not supported by substantial evidence, Erdun asserts that a job site analysis conducted at the appeals officer's direction and allegedly relied on by the appeals officer to find that Erdun was capable of performing his pre-injury duties was not reliable. Erdun failed, however, to identify what purportedly incorrect findings in the job site analysis the appeals officer relied on, and, in fact, the decision and order makes no mention of the job site analysis as evidence supporting any of the appeals officer's decisions. Furthermore, even without the job site analysis, substantial evidence still supports the appeals officer's decision regarding TTD, as stated above. See *Nev. Pub. Emps. Ret. Bd.*, 129 Nev. at 624, 310 P.3d at 564. As a result, we conclude Erdun's argument regarding the job site analysis does not support a reversal of the appeals officer's decision.

In sum, the appeals officer did not err in denying Erdun's request to expand his claim to include neurological issues and also did not err in refusing to grant him additional TTD. Accordingly, we affirm the district court's denial of Erdun's petition for judicial review challenging the appeals officer's decisions.

It is so ORDERED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Janet Trost, Settlement Judge
Law Office of Daniel S. Simon
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk