

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CITY OF HENDERSON,
Appellant,
vs.
TIMOTHY DONNELLY,
Respondent.

No. 73302

FILED

JUL 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

The City of Henderson appeals from a district court order denying a petition for judicial review of five administrative decisions. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.¹

Timothy Donnelly, a police officer, was diagnosed with heart disease in 2010, which Cannon Cochran Management Services, Inc. (CCMSI), on behalf of the City, accepted as a claim under the Nevada Heart and Lung Act (NHLA) (2010 claim).² Four years later, Donnelly was shot in the hip, developed sepsis, and suffered symptoms of heart disease, which CCMSI accepted as a claim under general industrial injury statutes (2014 claim). CCMSI thereafter closed the 2010 claim after determining that Donnelly's heart problems post-gunshot were substantially related to the gunshot. Relatedly, CCMSI denied Donnelly's decision to elect permanent total disability (PTD) benefits under the NHLA because his heart disease was being treated under the 2014 claim. In late 2014, Donnelly again suffered symptoms of heart disease. Donnelly filed a new claim with

¹The Honorable Abbi Silver, Chief Judge, voluntarily recused herself from participation in the decision of this matter.

²We do not recount the facts except as necessary to our disposition.

CCMSI, which CCMSI denied. Donnelly appealed the administrator's determinations, waived the hearing at the hearing officer level, and proceeded directly to the appeals officer.³ Pertinent to this appeal, the district court denied the City's petition for judicial review, thereby affirming the appeals officer's findings and decision that the 2010 claim was improperly closed and the request for PTD benefits was improperly denied. The City appeals, arguing that the closure of the 2010 claim and the denial of PTD benefits were proper.

"When reviewing an agency's decision, we, like the district court, consider whether the decision was affected by an error of law or was an arbitrary and capricious abuse of discretion." *Sierra Packaging & Converting, LLC v. Chief Admin. Officer of OSHA*, 133 Nev. ___, ___, 406 P.3d 522, 524 (Ct. App. 2017) (internal quotation marks omitted). Our review is limited to the record before the agency, *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 282, 607 P.2d 581, 582-83 (1980), and we will not overturn the agency's factual findings if they are supported by substantial evidence, *City of N. Las Vegas v. Warburton*, 127 Nev. 682,

³Donnelly appealed from and the appeals officer addressed five determinations by CCMSI. Specifically, determinations made on February 24, 2015 (liability for a new claim for heart disease), January 8, 2015 (denial of PTD benefits), January 6, 2015 (closing 2010 claim), December 18, 2014 (payment for medications), October 14, 2014 (email regarding treatment). The appeals officer issued a decision and ordered (1) the administrator's February 24, 2015 determination denying the third claim "affirmed," (2) the administrator's January 8, 2015 determination denying PTD "reversed," (3) the administrator's January 6, 2015 determination closing the 2010 claim "reversed," (4) the administrator's December 18, 2014 determination denying payment for medications "affirmed," and (5) the appeal from the October 14, 2014 email "dismissed." The City addressed the last three decisions in its opening brief, but because Donnelly does not address or dispute the last three decisions, we need only address the first two.

686, 262 P.3d 715, 718 (2011); see NRS 233B.135(3)(e), (f). Substantial evidence is that “which a reasonable mind might accept as adequate to support a conclusion.” *Nev. Pub. Emps.’ Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013) (quoting *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). But the issue of whether an individual is entitled to receive disability benefits under a statute is a question of law that this court is free to address without deference to an agency decision. *Mirage Casino-Hotel v. Nev. Dep’t of Admin. Appeals Officer*, 110 Nev. 257, 259, 871 P.2d 317, 318 (1994).

First, we consider whether the appeals officer properly found that CCMSI improperly closed Donnelly’s 2010 claim, and thus required Donnelly’s subsequent heart problems to be covered under the 2014 claim. The City contends that the appeals officer erred by relying only on Donnelly’s doctor’s later statement that his heart condition should be considered an occupational disease, instead of that doctor’s prior statements that the post-gunshot heart problems were related to the gunshot wound.

Under the NHLA, NRS 617.457 (2011) states, in relevant part:

1. Notwithstanding any other provision of this chapter, diseases of the heart of a person who, for 5 years or more, has been employed in a full-time continuous, uninterrupted and salaried occupation as a firefighter, arson investigator or police officer in this State before the date of disablement are conclusively presumed to have arisen out of and in the course of the employment.

Here, the record supports the appeals officer’s decision that the 2010 claim should not have been closed. Donnelly was diagnosed with “a disease of the heart” in 2010. Later, he suffered from an exacerbation of that heart disease again in mid- and late-2014. Further, although Donnelly’s doctor originally reported that the exacerbation of the heart disease after the

gunshot did not cause a re-aggravation of his preexisting heart condition, his opinion evolved after the third incident when he reported to CCMSI that it is likely that the advancement of the heart disease diagnosed in 2010 will recur in the future. Accordingly, as the appeals officer found and the record supports, we conclude that treatment for Donnelly's heart disease should be covered under the 2010 claim.⁴

Next, we consider the appeals officer's finding that Donnelly's request for PTD benefits was improperly denied. Under NRS 617.457(11) (2011),⁵

11. A person who is determined to be:

(a) Partially disabled from an occupational disease pursuant to the provisions of this section; and

(b) Incapable of performing, with or without remuneration, work as a firefighter, arson investigator or police officer,

⁴Additionally, the City argues the last injurious exposure rule should apply here. However, we find this argument unpersuasive because the issue is whether an exacerbation of an injury should be covered under an original claim or a subsequent claim; whereas the last injurious exposure rule determines which employer or insurance carrier is liable for the coverage. *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 696, 709 P.2d 172, 176 (1985) (“[T]he last injurious exposure rule in occupational disease, successive-employer cases ‘places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.’” (quoting 4 A. Larson, *The Law of Workmen’s Compensation* § 95.20 (1984)); see also *Las Vegas Hous. Auth. v. Root*, 116 Nev. 864, 869, 8 P.3d 143, 146 (2000) (applying rule in successive injury cases).

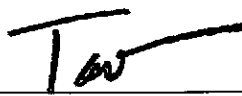
⁵The substance of this provision was not changed by subsequent amendments. See 2017 Nev. Stat., ch. 551, § 5, at 3894 (current); 2011 Nev. Stat., ch. 124, § 2, at 585.

may elect to receive the benefits provided under NRS 616C.440 for a permanent total disability.

Here, because we conclude that the appeals officer properly found that the 2010 claim should not have been closed, it also correctly found that Donnelly's request for PTD benefits should not have been denied. The appeals officer found and the record supports that Donnelly's doctor advised CCMSI in November 2014 that Donnelly's condition would prevent him from full-time duty as a police officer. And the City informed Donnelly in January 2015 that it did not have an appropriate open position for him, thus medically separating Donnelly from his employment. Therefore, substantial evidence supports that Donnelly was "[p]artially disabled from an occupational disease" and he was "[i]ncapable of performing" his duties as a police officer. NRS 617.457(11)(a), (b) (2011). Accordingly, the appeals officer correctly found that Donnelly's request for PTD benefits was improperly denied.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kerry Louise Earley, District Judge
Carolyn Worrell, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Nevada Attorney for Injured Workers/Carson City
Nevada Attorney for Injured Workers/Las Vegas
Eighth District Court Clerk