

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANNA HENDERSON,
Appellant,
vs.
GREEN VALLEY RANCH/STATION
CASINOS, INC.; AND YORK RISK
SERVICES GROUP, INC.,
Respondents.

No. 74072-COA

FILED

DEC 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Anna Henderson (“Henderson”) appeals from a district court order granting York Risk Services Group, Inc. (“York”) and Green Valley Ranch/Station Casinos Inc.’s (“GVR”) (collectively “respondents”) petition for judicial review, and denying her cross-petition for judicial review. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Henderson worked as a server at Green Valley Ranch Resort, Spa & Casino in 2013.¹ In July of that year, while working in the buffet service area, Henderson slipped and fell on a water spill. Henderson reported the incident to GVR and initiated a worker’s compensation claim for injuries she sustained in the incident. The next month, York, the third-party administrator, issued a notice of claim acceptance. The scope of the claim was limited to “cervical/right knee/right ankle/right shoulder/strain & right great toe.” Over the next few years, while Henderson was receiving treatment for her injuries, the extent of the injury to her right knee became a point of contention. Initially, her

¹We do not recount the facts except as necessary to our disposition.

treating physicians diagnosed her with various conditions, including right knee sprain/strain, pes anserine bursitis, a right knee contusion, and cervical musculoligamentous sprain/strain with myofascial pain. But later, other physicians concluded that she suffered a right knee meniscus tear, and eventually conducted surgery to repair it.

During the course of Henderson's industrial injury claim, the appeals officer consolidated four separate appeals into one, which is the basis of the appeal before this court. Following a hearing on the consolidated appeals, the appeals officer ordered that an Independent Medical Evaluation ("IME") be conducted regarding Henderson's injuries. Dr. Bernard Ong, who conducted the IME, opined that Henderson had in fact suffered a right knee lateral meniscus tear, that the surgery performed on her right knee was necessary, and that she had reached maximum medical improvement. In May 2016, the appeals officer issued his decision, expanding the claim to include the meniscus tear diagnosis and surgery, and concluding that Henderson was entitled to all appropriate benefits. Later, respondents filed a petition for judicial review with the district court, which it granted, and Henderson filed a cross-petition for judicial review, which the district court denied.

On appeal, Henderson argues that: 1) the district court erred when it granted respondents' petition for judicial review, 2) the district court erred when it denied her cross-petition for judicial review, and 3) respondents waived the right to administer her claim once claim closure was noticed.²

²The district court's order does not explicitly deny Henderson's cross-petition, and the district court case summary does not show any order
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First, we consider whether the district court erred in granting respondents' petition for judicial review. Henderson contends that the appeals officer properly expanded the scope of her claim to include her meniscus tear and argues that the district court erred by reversing the appeals officer's decision. Respondents counter that the district court correctly reversed the appeals officer's decision because it was not supported by substantial evidence and/or because the appeals officer committed legal error. We agree with Henderson.

In reviewing an agency's decision, this court, like the district court, considers whether the agency's decision was an arbitrary and capricious abuse of discretion. *Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). This court's review is limited to the agency's record, and it may not substitute its judgment for that of the agency on questions of fact. *Dubray v. Coeur Rochester Inc.*, 112 Nev. 332, 334, 913 P.3d 1289, 1290 (1996); *see also* NRS 233B.135(3). Instead, this court "must affirm the decision of the administrative agency on questions of fact if the decision is supported by substantial evidence in the record." *Nev. Employment Sec. Dep't. v. Holmes*, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996) (quoting *Gandy v. State ex rel Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980)). "Substantial evidence has been defined as

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being entered denying the cross-petition. Nonetheless, "[t]he absence of a ruling awarding the requested expenses constitutes a denial of the claim." *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000). Also, Henderson and respondents treated the cross-petition as denied throughout their briefing.

that which a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 280, 914 P.2d at 614 (internal quotation marks and citation omitted). And, this court may set aside the agency’s decision if it rests on an error of law and the petitioner’s substantial rights have been prejudiced. *State v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013). This court may address purely legal questions without deferring to an agency’s decision. *Mirage Casino-Hotel v. Nev. Dep’t. of Admin. Appeals Officer*, 110 Nev. 257, 259, 871 P.2d 317, 318 (1994).

Here, before the appeals officer, Henderson had the burden of proving that her claim should be expanded to include the meniscus tear by a preponderance of the evidence. See NRS 616C. 150(1).³ This “does not require an injured worker to offer a greater number of expert witnesses who express opinions in his favor to establish that an injury arose out of and in the course of his employment. Rather, “preponderance of the evidence merely refers to [t]he greater weight of the evidence.” *McClanahan v. Raley’s Inc.*, 117 Nev. 921, 925, 34 P.3d 573, 576 (2001) (internal quotation marks omitted). Here, the appeals officer considered differing opinions from Drs. Dettling, Fouse, Thomas, Yee, and

³Henderson argues that NRS 616C.160 governs the claim expansion. However, the meniscus tear was not a “newly-developed injury” as contemplated by that statute; rather, it is an injury that purportedly existed from the outset of Henderson’s claim, but was missed by her treating physicians. Accordingly, NRS 616C.150, with its preponderance-of-evidence standard, governs this issue. While the appeals officer does not explicitly state that Henderson met this standard, nothing in the record suggests that he applied the incorrect standard when expanding Henderson’s claim. Thus, we conclude that the appeals officer did not commit legal error.

Sutherland, as well as Dr. Ong's IME, before finding that "substantial and reliable documentary evidence confirms that the claimant sustained a right lateral meniscal tear as a result of her industrial injury and that a surgical repair of the tear was reasonable and necessary." Therefore, it was appropriate to expand Henderson's claim to include the meniscus tear. Thus, substantial evidence supported the appeals officer's decision, and this court, like the district court, cannot substitute its judgment for that of the appeals officer's in weighing this competing evidence. Accordingly, the district court erred when it reversed that decision.⁴

Next, we consider whether the district court abused its discretion when it denied Henderson's cross-petition. Henderson argues that her lumbar spine injury should have been included from the outset of her claim. Respondents argue only that Henderson's cross-petition was untimely.⁵ We conclude that Henderson has failed to demonstrate that

⁴At oral argument, respondents asserted that Henderson's argument regarding her meniscus tear was procedurally barred from being considered by the appeals officer because she voluntarily dismissed an administrative appeal regarding liability for the knee surgery. However, that dismissal concerned Dr. Thomas's recommendation for diagnostic arthroscopy that was denied, which is different from the meniscectomy that Dr. Yee performed to repair the meniscus tear. Thus, that dismissal had no bearing on the question of claim expansion before the appeals officer.

⁵As a preliminary matter, we conclude that Henderson's cross-petition was timely filed. NRS 233B.130(2) requires that cross-petitions be filed within 10 days after service of the petition for judicial review. Because the statute does not provide how to compute those 10 days, NRCP 6(a) governs the computation. *See Williams v. Clark County Dist. Attorney*, 118 Nev. 473, 478, 50 P.3d 536, 539 (2002). Under NRCP 6(a), the last day that Henderson could have timely filed her cross-petition was

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the appeals officer erred when he did not expand her claim to include her lumbar spine injury.

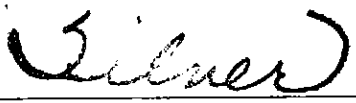
Here, evidence in the record available to the appeals officer suggested that Henderson's lumbar spine condition predated the slip-and-fall incident at GVR. The record also demonstrated that Henderson did not complain of a lumbar spine injury in her initial report; rather, she reported injuries only to her knees, hand, wrist, and neck. It was not until weeks later that Henderson complained of back pain on her C-4 form. But two days after that, Dr. Frederic Johnson specifically noted that Henderson reported upper back pain from the fall and also that she was currently taking medication prescribed by a different physician for chronic lower back pain. In addition, the appeals officer conducted a hearing where Henderson testified regarding why her lumbar spine injury should have been included from the outset of her claim. Moreover, in a letter to Henderson's counsel, the appeals officer made clear that the IME did not support expanding her claim to any other injury except her right knee meniscus tear. Thus, the appeals officer's decision not to expand Henderson's claim to include the lumbar spine injury was supported by substantial evidence, and we will not substitute our judgment as to that evidence. Accordingly, the district court did not abuse its discretion when it denied Henderson's cross-petition for judicial review.⁶


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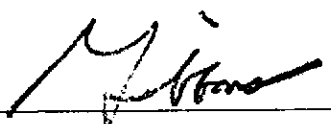
July 6, 2016. Henderson filed her cross-petition on July 1, 2016, and thus it was timely filed.

⁶Because we agree that the district court abused its discretion in reversing the appeals officer's decision to expand Henderson's claim to
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Based on the foregoing, we
ORDER the judgment of the district court AFFIRMED IN
PART AND REVERSED IN PART.

, C.J.
Silver

, J.
Tao

, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Janet Trost, Settlement Judge
Michael Paul Wood
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

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include her right knee meniscus tear, we need not consider her waiver
argument.