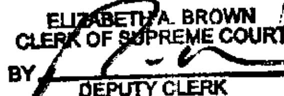
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AMELIA NUNEZ,
Appellant,
vs.
CANNERY CASINO,
Respondent.

No. 74913-COA

FILED

JAN 25 2019



ORDER OF AFFIRMANCE

Amelia Nunez appeals from a district court order denying a petition for judicial review of an administrative decision in a workers' compensation matter. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Nunez suffered injuries to her left hip, knee, and ankle while working as a kitchen steward for Cannery Casino.[1] Cannery's insurer, Employers Insurance Company of Nevada (the Insurer), accepted Nunez's subsequent workers' compensation claim with respect to contusions/strains of the hip and knee, as well as a labral tear in the hip and an ankle sprain. Nunez treated with multiple doctors and ultimately underwent hip surgery to repair the labral tear. Despite continued complaints of hip pain following surgery, Nunez's surgeon concluded that there were no objective indications of any remaining pathology, and the Insurer closed her claim with respect to the hip. Some of Nunez's other treating physicians recommended surgery for both her knee and ankle, but they concluded that she had reached maximum medical improvement (MMI) with respect to the industrial components of her injuries to those body parts and that her need for surgery

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

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stemmed instead from preexisting conditions. The Insurer then closed the remainder of her claim.

Nunez challenged the insurer's decision to close her claim (among various other decisions) before a hearing officer and then an appeals officer, who affirmed and ordered that Nunez undergo an impairment evaluation for her left hip and ankle only. Nunez then petitioned the district court for judicial review of the appeals officer's decision. The district court denied the petition and affirmed the underlying decision.

On appeal, Nunez argues that the appeals officer: (1) erred as a matter of law in issuing deficient written findings to support the decision; (2) erred as a matter of law in failing to apply the last injurious exposure rule to hold the Insurer liable for Nunez's continued knee and ankle treatment where she had prior industrial injuries to those body parts; and (3) erred in ordering impairment evaluations for her hip and ankle, but not her knee, and failing to grant retroactive temporary total disability (TTD) benefits. We disagree.

When an aggrieved party "appeal[s] from a district court order denying a petition for judicial review of an administrative decision, this court examines the administrative decision for clear error or abuse of discretion." *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). While we review purely legal questions de novo, we defer to an appeals officer's "fact-based conclusions of law" and will not disturb them if supported by substantial evidence. *Id.* Substantial evidence is "that which a reasonable person might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). We will not reweigh the evidence or substitute our judgment for that of the appeals officer on an

issue of credibility. *Id.* at 283-84, 112 P.3d at 1097. We may consider only the record before the appeals officer. *Id.*

First, we consider whether the appeals officer's written findings were deficient as a matter of law. Nunez argues that the appeals officer failed to reference any of the medical reporting in the record to support her findings of fact, and thus the findings fell short of the mandatory standard set forth in NRS 233B.125. Cannery counters that the appeals officer supported her findings with substantial and methodical references to the facts in the record and the applicable law.

NRS 233B.125 states, in relevant part, as follows:

> A decision or order adverse to a party in a contested case must be in writing or stated in the record. . . . [A] final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

"Each and every clause in this statute contains mandatory instruction for the appeals officer, leaving no room for discretion." *Poremba v. S. Nev. Paving*, 133 Nev. 12, 20, 388 P.3d 232, 238-39 (2017). Factual findings made in accordance with NRS 233B.125 facilitate judicial review, help to ensure that appeals officers engage in reasoned decision making, and allow courts to "evaluate the administrative decision without intruding on the agency's fact-finding function." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 785, 312 P.3d 479, 482 (2013).

Here, the appeals officer issued a detailed written decision setting forth multiple pages of factual findings and legal conclusions. While the appeals officer did set forth most of her medically-related factual

findings in the section of the decision labeled "Conclusions of Law," any alleged error in doing so was harmless. *See* NRCP 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *State Indus. Ins. Sys. v. Romero*, 110 Nev. 739, 741-42, 877 P.2d 541, 542 (1994) (conducting harmless-error review in the context of a workers' compensation appeal). In spite of any technical failure to support the "Findings of Fact" section of the decision with references to the relevant medical evidence, the appeals officer drafted the decision with enough detail for this court to ensure that it was supported by substantial evidence and free of legal error.[2] *See State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982) (holding that when an agency's legal conclusion "itself gives notice of the facts on which the [agency] relied," the appellate court "may imply the necessary factual findings, so long as the record provides substantial evidence to support the [agency's] conclusion"); *Bowman v. Tisnado*, 84 Nev. 420, 421-22, 442 P.2d 899, 900 (1968) (holding that a trial judge's mislabeling a finding of fact as a conclusion of law is not reversible error "where the substance of the trial judge's holding is clearly ascertainable").

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[2]We note that the appeals officer did not cite any of the medical reporting in the record to support her conclusion that Nunez had not established that she was entitled to further treatment for her hip. Nevertheless, Dr. Craig Tingey's opinion that there was no objective indication of pathology remaining in Nunez's hip following surgery and that her hip was at MMI constitutes substantial evidence to support the appeals officer's identical conclusion. Thus, any error in failing to make a more specific factual finding was harmless. *See Nguyen v. Boynes*, 133 Nev. 229, 235 n.3, 396 P.3d 774, 780 n.3 (2017) ("We hold that substantial evidence supports the district court's material, factual findings, and to the extent there was error, it was harmless error.").

Next, we consider whether the appeals officer erred as a matter of law in failing to apply the last injurious exposure rule. Nunez argues that her knee and ankle injuries aggravated prior industrial injuries to those same body parts that she also suffered while working for Cannery. Therefore, she contends, the Insurer must pay for further treatment and surgery for those body parts. We disagree.

"In successive injury/successive employer cases, the last injurious exposure rule places full liability upon the carrier covering the risk at the time of the most recent injury or aggravation of a prior injury that bears even a slight causal relation to the disability." *Menditto*, 121 Nev. at 284, 112 P.3d at 1097-98. However, if the most recent injury is merely a recurrence of the first—meaning it "does not contribute even slightly to the causation of the disabling condition"—then "the carrier covering the risk at the time of the original injury remains liable for the subsequent injury." *Id.* at 284, 112 P.3d at 1098 (internal quotation omitted). The purpose of the last injurious exposure rule is to "free[ ] the employee from the burden of allocating responsibility for his disability," as well as to "avoid[ ] the difficulties of attempting to apportion responsibility between successive employers and spread[ ] the risks between employers overall." *Las Vegas Hous. Auth. v. Root*, 116 Nev. 864, 869, 8 P.3d 143, 146-47 (2000).

As a preliminary matter, we note that the last injurious exposure rule does not apply to the facts of this case, where Nunez's prior industrial injuries occurred when she was working for Cannery, as there is no problem of apportionment between successive employers or insurance

carriers for which the rule is specifically tailored.[3] *See Wells v. Swalling Constr. Co.*, 944 P.2d 34, 37 (Alaska 1997) ("[I]n cases not involving successive employers or insurers, [apportionment] concerns are irrelevant."). Moreover, even if the rule did apply, it is not clear from the record that the preexisting conditions attributed for Nunez's need for surgery were industrial in nature. While the parties do not appear to dispute that Nunez suffered prior industrial injuries to her knee and ankle, there is no evidence in the record demonstrating exactly what those injuries were or the extent to which they were accepted as industrial, which Nunez had the burden to prove.[4] *See United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993) ("The claimant has

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[3]There is no evidence in the record demonstrating—and Nunez does not allege—that a different insurer covered the risk at the time of her prior injuries.

[4]With respect to Nunez's knee, the record reveals simply that she suffered an industrial injury and that she underwent surgery for it. Moreover, while there is some medical reporting in the record showing the extent of Nunez's prior foot/ankle injury—Dr. Troy Watson noted "[l]eft foot pain of unknown etiology with some mild subtalar joint arthritis and peroneus brevis tendinosis"—nothing demonstrates whether the Insurer accepted liability for this injury or what part of the injury/diagnosis was ultimately determined to be industrial in nature. To the extent that Nunez's testimony at the hearing before the appeals officer might have shed some light on this issue, we note that she failed to include a transcript of that hearing in the record on appeal. Accordingly, we presume that her testimony supports the appeals officer's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

the burden of showing that the claimed disability or condition was in fact caused or triggered or contributed to by the industrial injury and was not merely the result of the natural progression of a preexisting disease or condition."). Consequently, we conclude that Nunez's argument on this point is without merit, and the appeals officer properly closed all of Nunez's claims for medical treatment.[5] Should she wish to seek workers' compensation benefits on grounds that her prior industrial injuries have caused further disablement, her remedy lies in reopening those prior claims to demonstrate changed circumstances warranting an increase or rearrangement of compensation. *See* NRS 616C.390 (governing claim reopening); *cf. Warpinski v. State Indus. Ins. Sys.*, 103 Nev. 567, 569, 747 P.2d 227, 229 (1987) (noting that a claim cannot be reopened in cases where subsequent injuries aggravate prior injuries and the last injurious exposure rule applies).

Finally, we consider whether the appeals officer erred in failing to award Nunez retroactive TTD benefits and in ordering a new PPD evaluation for her hip and ankle but not her knee. Nunez argues that she is entitled to TTD benefits because she had been placed on light-duty work restrictions and because no medical evidence supports the appeals officer's

[5]We have also considered Nunez's alternative argument that she met her burden under NRS 616C.175 to show that her most recent injuries aggravated preexisting conditions and that the Insurer did not meet its burden to prove that the injuries were not substantial contributing causes of Nunez's current condition. This argument is without merit; even assuming Nunez met her burden, there is substantial medical reporting in the record demonstrating that her most recent injuries to her knee and ankle did not substantially contribute to her need for surgery.

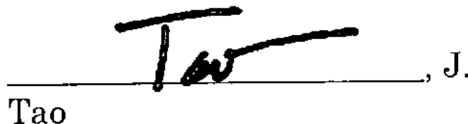
conclusion that she was able to return to full duty. She also argues that no evidence in the record rebuts Dr. Francisco Villanueva's prior PPD evaluation wherein he rated all three of Nunez's injured body parts.[6]

We note that Nunez failed to support these arguments with any relevant authority, and thus we need not consider them. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). However, even on the merits, Nunez's arguments fail. With respect to TTD benefits, the appeals officer properly concluded that no evidence in the record demonstrates that light-duty work was unavailable to Nunez. *See* NRS 616C.475(5) (stating that TTD benefits must cease when a physician determines that the employee is capable of gainful employment or when the employer offers the employee light-duty work accommodating any restrictions). Moreover, it was appropriate for the appeals officer to order a new PPD evaluation for Nunez's hip and ankle only, because the appeals officer ultimately concluded that Nunez suffered industrially-related impairments as to those body parts, and those conclusions are supported by substantial medical reporting in the record.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_______________, A.C.J.
Douglas



_______________, J.
Tao

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Gibbons

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[6]The record reveals that Dr. Villanueva rated all three body parts even though the Insurer requested only a hip evaluation.

cc: Hon. William D. Kephart, District Judge
Bertoldo Baker Carter & Smith
Hooks Meng Schann & Clement
Eighth District Court Clerk