

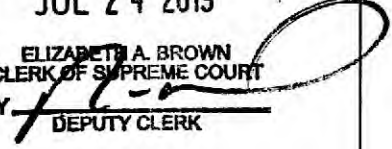
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS;
AND CANNON COCHRAN
MANAGEMENT SERVICES, INC.,
Appellants,
vs.
MICHELLE LUXTRUM, PERSONAL
REPRESENTATIVE,
Respondent.

No. 74632-COA

FILED

JUL 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

The Nevada Department of Corrections (NDOC) and Cannon Cochran Management Services, Inc., (CCMSI) appeal from a district court order denying judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Danny Luxtrum suffered a brown recluse spider bite on his neck while working as a corrections officer for NDOC. CCMSI, NDOC's third-party administrator, determined that the bite was an industrial injury and accepted Luxtrum's workers' compensation claim.

Over the ensuing months, Luxtrum experienced recurring infections of the bite wound, and underwent excision, debridement, multiple incisions and drainages, and several infusions of antibiotics. Several doctors who treated Luxtrum over this period speculated that he deliberately caused the infections to persist and recur, and noted drug-seeking behavior and narcotic dependency from chronic back pain.

In June 2014, Luxtrum suffered a stroke and "a cardiac episode." His treating physician noted that echocardiograms detected vegetation, and that Luxtrum's heart condition was secondary to the

bacterium affecting his heart. Luxtrum was diagnosed with tricuspid valve endocarditis and underwent heart surgery to repair the valve. His surgeon, Dr. Wiencek, attributed the need for surgery to the spider bite and resultant complications.

Luxtrum underwent extensive emergency medical care throughout July 2014 for fever, hypotension, chest pain, sepsis, and bacteremia. His treating physicians attributed his symptoms and his stroke and heart surgery to the spider bite and the resultant complications.

CCSMI sought further medical opinions to determine whether Luxtrum's heart condition and stroke were sequelae of the spider bite, and therefore compensable as part of the industrial injury. Based on the opinions of Dr. Boman, a cardiologist, Dr. Klausner, a psychiatrist and CCMSI's medical director, and Dr. Shah, a clinical infectious diseases specialist, CCSMI denied coverage for the heart condition and stroke and closed Luxtrum's workers' compensation claim.

Luxtrum appealed each of CCSMI's determinations. After successive hearings on each determination, a hearing officer issued an order reversing the determinations that denied coverage for the stroke and heart condition, and a separate order remanding the determination that closed Luxtrum's claim.

NDOC and CCMSI (collectively appellants) appealed both of the hearing officer's orders and notified Luxtrum of its determination to schedule a permanent partial disability (PPD) evaluation for scar tissue on his neck. Luxtrum appealed that determination, apparently seeking PPD compensation for the stroke and heart condition as well. The parties agreed to bypass the hearing and the hearing officer transferred the hearing to the appeals officer. The appeals officer consolidated the appeals.

Luxtrum died during the appeal's pendency before the appeals officer. His wife, Michelle Luxtrum, has since been substituted as his personal representative.

The appeals officer found that the stroke and heart condition were sequelae of the spider bite and thus compensable as industrial injuries. The appeals officer thus reversed each of CCMSI's determinations and affirmed the hearing officer's orders. The appeals officer further ordered that the PPD rating include the stroke, heart condition, neck injury from the spider bite, and other sequelae; that CCMSI cover all associated expenses; that CCMSI pay Luxtrum retroactive TTD benefits commencing with the stroke and heart condition; and that "Claimant shall receive all other appropriate benefits pursuant [to] NRS 616C."¹

Appellants petitioned the district court for judicial review of the appeals officer's decision. Finding that the appeals officer based his decision on substantial evidence, the district court denied judicial review.

On appeal, appellants argue that the appeals officer did not base his decision on substantial evidence, and erred by awarding "double payments" of death benefits and retroactive PPD benefits under NRS 616C.490(13). Luxtrum argues that substantial evidence supports the appeals officer's order and this court need not involve itself in a credibility determination, and that appellants waived the "double payments" argument by not raising it below.

¹"[A]ll other appropriate benefits under NRS 616C" include death benefits "to the surviving spouse of the deceased employee." NRS 616C.505(2).

Whether substantial evidence supports the appeals officer's decision

Appellants argue that the appeals officer and the district court “erred as a matter of law.” They argue that because Dr. Wiencek, the surgeon who performed Luxtrum’s heart surgery, “did not have a complete history of medical records to review before making his causation opinion,” he could not render his opinion “to a reasonable degree of medical certainty,” and the appeals officer erred by finding Dr. Wiencek to be the most credible of Luxtrum’s doctors. They argue that Luxtrum must have proved by a preponderance of the evidence that the stroke and heart condition were industrial injuries, but failed to do so because a greater quantity of evidence proved that Luxtrum had a preexisting heart condition or caused the heart condition and stroke by exacerbating the bite wound. They also argue that the district court failed to consider all of the evidence, including reports from treating physicians who noted that Luxtrum may have caused his infections to recur.

“This court, like the district court, reviews an appeals officer’s decision for clear error or abuse of discretion.” *Dickinson v. Am. Med. Response*, 124 Nev. 460, 465, 186 P.3d 878, 882 (2008). “A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal.” *Tighe v. Las Vegas Metro. Police Dep’t*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). “Although we independently review an appeals officer’s purely legal determinations, the appeals officer’s fact-based legal conclusions are entitled to deference and will not be disturbed if they are supported by substantial evidence. Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion.” *Dickinson*, 124 Nev. at 465-66, 186 P.3d at 882. We will “not substitute our judgment for

that of the appeals officer as to credibility determinations or the weight of the evidence on a question of fact. Our review is limited to the record before the appeals officer.” *Id.* at 466, 186 P.3d at 882 (footnote omitted).

The appeals officer supported his decision by citing Dr. Wiencek and other “treating physicians from the emergency rooms,” who “indicated the stroke and heart surgery were the result of the spider bite and its resultant effects.” He found that Dr. Boman’s report that Luxtrum did not demonstrate several symptoms that would present if infection had caused the heart condition was “simply wrong,” and that CCMSI “clearly tried to influence the opinion of Dr. Bowman [sic].” The appeals officer similarly found Dr. Klausner’s reporting “unpersuasive and not credible,” noted that he “is a [psychiatrist] and not a cardiologist,” and found that he “would seem to have a bias and/or conflict of interest in this case due to his position as [CCMSI’s in-house] medical director” and “merely repeats the same arguments of Dr. Bowman [sic]-which have been shown to be contrary to the actual medical records.” The appeals officer likewise found that “Dr. Shah’s reporting [was] not credible and not persuasive,” and concluded by finding the reports from Luxtrum’s treating physicians, on the other hand, “credible and persuasive.”

We conclude that a reasonable person could accept the evidence of the doctors’ opinions and reports as adequate support for the appeals officer’s conclusion that the spider bite caused Luxtrum’s stroke and heart condition, and we defer to the appeals officer’s fact-based determinations about which doctors were most credible. We therefore conclude that substantial evidence supports the appeals officer’s decision.

Whether the appeals officer erred by awarding retroactive PPD benefits and death benefits

Appellants argue that because NRS 616C.490(13) prohibits “double payments” via concurrent entitlement to death benefits and continuing PPD compensation, the appeals officer erred by awarding both to Luxtrum’s widow. They argue that if this court affirms the appeals officer’s finding that Luxtrum’s death was industrial, and thus that his widow is entitled to death benefits, then we must conclude that the appeals officer erred by also awarding PPD compensation.

Luxtrum answers that appellants may not raise this argument on appeal because they failed to raise it below. Appellants reply that they may raise this issue on appeal because this court reviews such issues de novo.


“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.” *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Nonetheless, we may review for plain error. See *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345, 793 P.2d 839, 842 (1990) (reviewing for plain error despite appellant’s failure to preserve the issue for appeal). An error is plain if “the error is so unmistakable that it reveals itself by a casual inspection of the record.” See *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973) (internal quotation omitted). NRS 616C.490, which governs compensation for PPD, “does not entitle any person to double payments for the death of an employee and a continuation of payments for a permanent partial disability.” NRS 616C.490(13) (emphasis added).

Appellants misconstrue NRS 616C.490(13), which prohibits double payments of death benefits and *continuing* PPD benefits. In other words, NRS 616C.490 does not entitle a surviving spouse to receive death benefits *and duplicate compensation* in the form of *continuing* PPD benefits. The appeals officer, however, determined that Luxtrum was entitled to a PPD rating for a retroactive period, which period began at the date of the spider bite and necessarily terminated at Luxtrum's death, *see Ryder v. Indus. Constr. Co.*, 616 So. 2d 857, 859 (La. Ct. App. 1993) (“[A]n employee's right to worker's compensation benefits terminates upon his death.”). PPD entitlement is therefore not “continu[ing]” and concurrent with the death benefits to which Luxtrum's widow is entitled.

We therefore conclude that the appeals officer did not err, plainly or otherwise, by determining that Luxtrum was entitled to a PPD rating irrespective of his widow's entitlement to death benefits. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Carolyn Worrell, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Allan P. Capps
Eighth District Court Clerk