

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EUSEBIO DOMINGUEZ-CORONA,
Appellant,
vs.
FOCUS FRAMING, C/O SUN CITY
ELECTRIC,
Respondent.

No. 76333-COA

FILED

NOV 21 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Eusebio Dominguez-Corona appeals from a district court order denying a petition for judicial review of an administrative order denying workers' compensation benefits. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Dominguez-Corona worked for respondent Focus Framing as a homebuilder. While working on a home, he put his head into a small, confined space to nail a piece of metal to a wall using a nail gun.¹ Immediately after firing the gun once, he experienced pain and buzzing in his left ear. The following day, he visited a doctor to be examined, as directed by his employer. The doctor diagnosed a left ear injury but failed to indicate on the Form C-4 if Dominguez-Corona's injury was, or was not, caused by a workplace accident. The Form C-3, which is filled out by the employer, noted that the employer did not doubt the validity of Dominguez-Corona's workers' compensation claim. However, Focus Framing's insurer denied his claim, and Dominguez-Corona appealed to a hearing officer. The hearing officer remanded the case in order to obtain a medical opinion as to

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

whether the nail gun discharge caused Dominguez-Corona's hearing loss and tinnitus problems.

The insurer then scheduled an appointment with another doctor for Dominguez-Corona. This doctor did not provide an opinion to a reasonable degree of medical probability as to whether Dominguez-Corona's hearing problems were or were not connected to his use of the nail gun. The doctor only commented that Dominguez-Corona's hearing loss and tinnitus was "at least as likely as not a direct result of the injury from the pneumatic nail gun, occupational noise exposure, on February 5, 2014." The insurer denied his claim, and a hearing officer affirmed the denial. Dominguez-Corona then appealed to the appeals officer.

In front of the appeals officer, Dominguez-Corona was the only witness to testify. He explained what happened and how he believed his injury occurred and that he did not have a preexisting hearing problem. The insurer did not dispute any material facts of Dominguez-Corona's testimony and indicated that it did not believe this case to be a question of fact. The appeals officer found Dominguez-Corona testified credibly but denied his claim. The appeals officer found that the first doctor had failed to connect Dominguez-Corona's hearing problems to the use of the nail gun and the second doctor had been unable to opine to a reasonable degree of medical probability that the discharge of the nail gun in the confined space had caused the hearing problems. Dominguez-Corona filed a petition for judicial review with the district court, which was denied.

On appeal, Dominguez-Corona argues that the appeals officer abused his discretion by denying his claim because the decision was not based on substantial evidence, and if there was any uncertainty as to the doctors' opinions, the appeals officer should have sought clarification.

Additionally, he argues that the appeals officer erred as a matter of law for failing to require the insurer to ensure the Form C-4 was completely filled out. Further, he makes public policy arguments that this court should require the insurer (1) to delist physicians for failing to follow workers' compensation procedures and (2) to ensure that the insurer-provided doctors opine to the correct legal standard. Finally, he argues that this court should reform the workers' compensation system to require more transparency and a clearer standard for physicians.

The role of judicial review on appeal of an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Under NRS 233B.135, this court may set aside the final decision of an appeals officer if a petitioner's substantial rights have been prejudiced because the agency's final decision is "[a]ffected by an error of law," "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," or is "[a]rbitrary or capricious."

We conclude that the appeals officer's decision is affected by an error of law.² Under *United Exposition Service Co. v. State Industrial Insurance System*, claimants may meet their burden to establish that a current condition resulted from a workplace injury in two ways: (1) "[a] testifying physician must state to a degree of reasonable medical probability

²In light of our disposition, we do not address Dominguez-Corona's claims regarding the insurer's responsibilities pertaining to the Form C-4, maintaining physician lists, ensuring that the doctors it provides opine to the correct legal standard, and what instructions they provide to the doctors. Finally, any suggestions on how to improve the workers' compensation statutory system, including as to transparency and a clearer standard for physicians, should be brought to the Nevada Legislature. See Nev. Const. art. IV, § 1.

that the condition in question was caused by the industrial injury, or [(2)] sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury.” 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993).

Here, the appeals officer did not reference *United Exposition* in his order; while the appeals officer’s order essentially applies the first prong of *United Exposition*, it does not address the second prong. The appeals officer relied on the second doctor’s report to conclude that the doctor was unable to find causation to a reasonable degree of medical probability.³

However, the appeals officer failed to determine if the uncontroverted facts Dominguez-Corona presented were sufficient to warrant a compensation award. Dominguez-Corona presented testimony—which the appeals officer found credible—that he did not have hearing problems before the incident and then had hearing problems immediately after the firing of the nail gun in the confined space. Moreover, the second doctor confirmed an injury as Dominguez-Corona exhibited hearing loss in his left ear with his right ear appearing normal. The insurer did not dispute any testimony nor the doctor’s injury confirmation.


Thus, the appeals officer failed to apply both prongs of the test articulated in *United Exposition*. Specifically, the appeals officer focused

³The doctor, however, did not address whether causation was established to a reasonable degree of medical probability. Additionally, the doctor may not have understood that he was to address legal causation to a reasonable degree of medical probability. According to the doctor’s report, the doctor stated that the purpose of the visit was only to give “a second opinion as to the degree and severity of the hearing loss and to determine the course of treatment.” Determining legal causation was not mentioned as a purpose of the examination.

only on the perceived inability of the physicians to opine or sufficiently connect the ear condition to the workplace incident but failed to determine if the uncontroverted facts Dominguez-Corona presented were sufficient to warrant a compensation award. Upon remand, the appeals officer must apply *United Exposition's* second prong and consider if the facts presented by Dominguez-Corona as a whole⁴ were enough to grant him workers' compensation benefits by a preponderance of the evidence. Accordingly, we

ORDER the district court's order REVERSED and REMAND this matter to the district court to grant the petition and remand this matter to the appeals officer to conduct further proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kerry Louise Earley, District Judge
Law Offices of James J. Ream
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

⁴The medical evidence in this case may still be considered and applied under the second prong of *United Exposition* even if the terminology does not satisfy the medical standard as required in the first prong.