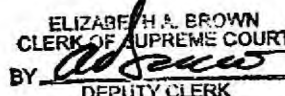
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERNANDO HARO, III,
Appellant,
vs.
BOUCHON AT THE VENETIAN; AND REPUBLIC INDEMNITY,
Respondents.

No. 80133-COA



MAY 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Fernando Haro, III appeals the district court's denial of his petition for judicial review of an agency decision affirming an insurer's denial of a workers' compensation claim. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Haro began work as a chef de partie in the bakery at Bouchon, a French restaurant in the Venetian Resort, on November 11, 2014.[1] A large part of Haro's job duties included the production of macarons. Part of this process involved piping cookie batter, which required Haro to repetitively squeeze dough out of piping bags. After a couple months working in the bakery, Haro developed pain in both of his arms and wrists.

Haro had an acrimonious relationship with Bouchon management and staff. He filed a complaint with the Equal Employment Opportunity Commission (EEOC) for discrimination, harassment, and retaliation. In April 2015, Haro told Bouchon's human resources officer, Lorena Guerrero, that he was going on medical leave. Haro provided a note to Guerrero from a doctor who diagnosed him with stress and panic attacks

[1]We recount the facts only as necessary for our disposition.

21-15000

associated with his work at Bouchon. Guerrero reassured Haro "we continue to have you on leave status" and "[y]ou are still an active employee."

While on medical leave, Haro stopped receiving wages from Bouchon. He took an additional job for a brief time as a line cook at El Segundo Sol. Sometime in November 2015, Haro quit his job at El Segundo Sol. One month later, he moved to California.

The pain in Haro's arms exacerbated to the point where he had difficulty holding objects and opening jars. He sought medical care for the pain. On February 1, 2016, Dr. Kwan Tan, Haro's primary-care physician in California, examined Haro and referred him to a neurologist for a nerve test. The nerve test revealed that Haro suffered from bilateral carpal tunnel syndrome. Haro informed the neurologist that he experienced tingling in both arms for either the past four years or the past year,[2] but did not mention any debilitating pain before working at Bouchon.

Dr. Tan reviewed the neurology report and referred Haro to an orthopedic surgeon, Dr. Andrew Wassef. On April 14, 2016, Dr. Wassef examined and formally diagnosed Haro with bilateral carpal tunnel syndrome and lateral epicondylitis in his right arm. Dr. Wassef asked Haro about his work history. Haro said he previously held several cooking jobs and worked as a baker at Bouchon. Dr. Wassef believed that the work in the Bouchon bakery caused Haro's diseases.[3]

The day after meeting with Dr. Wassef, Haro emailed Guerrero to inform her of his diagnoses and that he would be filing a workers'

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[2]The parties dispute when Haro first developed the tingling sensation in his arms and what he told his doctor.

[3]It is unclear to what extent Dr. Wassef understood the nature of Haro's work at Bouchon and his subsequent work at El Segundo Sol.

compensation claim. Haro attached a C-1 notice form to his email along with a letter from Dr. Wassef to Dr. Tan that detailed Haro's diagnoses.

Haro took a C-4 form to Dr. Tan for him to complete the portion designated for treating physicians. Dr. Tan confirmed that Haro's diagnoses were work related by checking the "yes" box next to the question on the form that asked, "From information given by the employee, together with medical evidence, can you directly connect this injury or occupational disease as job incurred?" He additionally listed that Haro incurred his diseases between November 2014 and April 2015. Both the C-1 and C-4 forms mentioned Haro's carpal tunnel but failed to note the epicondylitis.

On May 4, 2016, Haro filed a formal workers' compensation claim via the C-4 form with Bouchon's insurer, Republic Indemnity (RI). RI denied the claim as untimely under NRS 617.344 and NRS 617.342. Haro contested the denial with the Hearings Division of the Nevada Department of Administration. The hearing officer affirmed the denial of coverage on the same grounds. Shortly thereafter, the EEOC dismissed Haro's discrimination claim for lack of probable cause. On November 30, 2016, Bouchon formally terminated Haro's employment, noting the closure of the EEOC case.

Haro appealed the hearing officer's decision and an appeals hearing was scheduled. While preparing for the appeals hearing, Haro noticed that his C-1 and C-4 forms omitted epicondylitis. At RI's direction, Haro filed a new claim for his epicondylitis, which RI denied as untimely. Haro appealed the denial of his second claim, and the parties agreed to consolidate the administrative appeals for both claims.

Haro presented a letter from Dr. Wassef at the hearing. It stated, "I do believe to a reasonable degree of medical probability that Mr.

Haro's bilateral carpal tunnel syndrome and right lateral epicondylitis are related to his employment duties. The patient had no prior symptoms until he worked as a macaroon chef."

At the appeals hearing, Haro testified that he was the sole employee at Bouchon who produced macarons and that he hand piped between 2,000 and 5,000 macarons per shift. He testified that the pain from his carpal tunnel and epicondylitis first arose while working at Bouchon. He described his job duties at El Segundo Sol as less strenuous, less demanding, and not requiring the same repetitive motions. On cross-examination, Haro admitted that on a handful of occasions, he made baked goods outside of work for colleagues, friends, and family. Haro maintained that he gave Dr. Wassef a full description of his work history, including his tenure at Bouchon and El Segundo Sol.

Scott Wheatfill, Haro's supervisor, testified that Haro was not solely responsible for making macarons and rarely worked a full workweek. He stated that Haro repeatedly called in sick or was told not to come into work when the restaurant was having a slow day. Additionally, Wheatfill testified that the bakery produced roughly 1,000 to 1,100 macarons per day and sold 9,000 per month on average.[4] Not all macarons produced were ultimately sold due to spoliation or failure to take the desired form. On cross-examination, Wheatfill conceded that he did not work directly with Haro and could not describe all of Haro's actions and behaviors.

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[4]Haro did not clarify if he piped 2,000 to 5,000 completed macarons or just the shells. If the former were the case, then he would have hand-piped 4,000 to 10,000 shells per day. If the latter, then this would be more in accord with the approximate 1,000 to 1,100 macarons produced each day.

The director of operations at Bouchon, Brian Cochran, testified that Haro's last day of work at Bouchon was April 1, 2015. Cochran denied any knowledge of Guerrero's emails to Haro but stated that Haro "quit showing up to work and then he went to the EEOC to file a [c]laim so we said he hasn't been terminated. The job is still here. He just quit showing up."

At the conclusion of the hearing, the appeals officer affirmed the order of the hearing officer affirming RI's denial of Haro's claim. The appeals officer issued the decision in a letter to the parties, which instructed Bouchon to prepare the formal written order. The formal order found that Haro's testimony contained too many inconsistencies for the appeals officer to accept Haro's account; Haro did not inform Dr. Tan of his work at Bouchon; Haro did not adequately inform Dr. Wassef of his job at El Segundo Sol or his work duties at Bouchon; and Haro's termination date was April 2015, when he went on medical leave. Based on these findings, the appeals officer concluded that Haro's second claim was untimely filed and Haro provided untimely notice; Haro failed to rebut the presumption under NRS 617.358(2); Haro failed to establish direct causation between his diseases and his work at Bouchon; and the last-injurious-exposure rule exempted Bouchon from liability. Haro petitioned the district court for judicial review, which denied the petition. This appeal followed.

On appeal, Haro contends that (1) the appeals officer erroneously concluded that Haro's first workers' compensation claim for carpal-tunnel syndrome was untimely submitted and applied the wrong statute to determine the timeliness of his claim;[5] (2) the appeals officer erroneously

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[5]Bouchon and RI do not directly address this contention. *See* NRAP 31(d)(2) ("The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter

applied the rebuttable presumption under NRS 617.358; (3) the appeals officer's decision that Haro did not suffer carpal tunnel syndrome as an occupational disease, caused by his work at Bouchon, was not supported by substantial evidence; (4) the appeals officer erred in applying the last-injurious-exposure rule; (5) the appeals officer abused her discretion by not ordering Haro to undergo an independent-medical examination under NRS 616C.360;[6] and (6) the second workers' compensation claim was a nullity and

made."). During oral argument, Bouchon conceded that the first claim was timely filed. In the appeals officer's letter announcing the decision, the appeals officer specifically found that Haro's first claim provided *timely* notice under NRS 617.342 (requiring that an employer receive notice of a claim within seven days after the worker learns that the disease might be work-related). It thus appears that the appeals officer implicitly found that Haro first gained knowledge of his carpal tunnel on the day he was formally diagnosed. Based on this implicit finding, we can logically infer that the appeals officer found that Haro timely filed his first claim under NRS 617.344 (requiring a worker to file his or her claim within 90 days after gaining knowledge that the disease might be work-related). *See Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981) ("[T]his court will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment."). Thus, we need not address this issue further.

[6]Haro misinterprets the appeals officer's role in ordering an independent-medical examination under NRS 616C.360. NRS 616C.360(3)(a) uses the term "may" to grant an appeals officer permissive power to order an independent-medical examination, and it is not an abuse of discretion for an appeals officer not to exercise that power. *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994) ("It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory."). However, we take no position on whether an independent-medical examination is appropriate on remand.

is an extension of the first claim, so it should be considered part of the first claim.[7]

Haro requests a new hearing before a different appeals officer. We agree that a new administrative hearing is warranted.

Standard of Review

Our review of an administrative agency's decision is identical to that of the district court, so we give no deference to the district court. NRS 233B.135(3); *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We "evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion" and defer to an agency's findings of fact and "fact-based conclusions of law . . . if they are supported by substantial evidence." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008) (citation omitted) (internal quotation marks omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion," and we will "not reweigh the evidence or revisit an appeals officer's credibility determination." *Id.* at 362, 184 P.3d at 384; *see also* NRS 233B.135(3)-(4). However, we review purely legal questions de novo, such as issues of statutory interpretation and agency conclusions concerning judicially created rules in workers' compensation matters. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014); *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006); *State Indus. Ins. Sys. v. Foster*, 110 Nev. 521, 523, 874 P.2d 766, 768 (1994).

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[7]Haro cites no relevant authority in support of this contention. We thus decline to consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Nevada's workers' compensation statutes

Nevada's workers' compensation statutes are provided in NRS Chapters 616A to 617. NRS Chapters 616A to 616D govern workers' compensation rights and protections for accidents or injuries that occur in the workplace. The Nevada Occupational Diseases Act (NODA), found in NRS Chapter 617, provides workers who suffer occupational diseases arising out of their employment the same workers' compensation rights and protections as provided in NRS Chapters 616A to 616D, except where inconsistent with a specific provision within the NODA. *See* NRS 617.010; NRS 617.015.

There are two NODA statutes primarily at issue in this case. First, the rebuttable presumption. If a worker provides notice to an employer after termination of his or her employment, there is a rebuttable presumption that the worker's diseases did not arise out of and in the course of employment. NRS 617.358. Second, for an occupational disease to be compensable, it must satisfy several requirements, found in NRS 617.440, including that the disease was directly caused by the worker's employment. Degenerative joint diseases, like carpal tunnel and epicondylitis, are types of diseases that are compensable under the NODA. *See Desert Inn Casino & Hotel v. Moran*, 106 Nev. 334, 337, 792 P.2d 400, 402 (1990).

Whether the rebuttable presumption under NRS 617.358(2) applies

Haro contends that the appeals officer erred in applying the rebuttable presumption under NRS 617.358(2) because Bouchon terminated his employment on November 30, 2016, roughly eight months after he provided timely notice to Bouchon on April 15, 2016. Bouchon and RI (collectively "Bouchon" hereafter) counter that Haro stopped physically working at and receiving income from Bouchon in April 2015, and started a new job at El Segundo Sol, so Haro was effectively terminated at this time.

Under the NODA, if an employee "files a notice of an occupational disease pursuant to NRS 617.342 *after* his or her *employment* has been *terminated* for any reason, there is a rebuttable presumption that the occupational disease did not arise out of and in the course of his or her employment." NRS 417.358(2) (emphases added). When the rebuttable presumption applies to a workers' compensation matter, an employee seeking benefits has an additional evidentiary hurdle to overcome. In *Law Offices of Barry Levinson, P.C., v. Milko*, the Nevada Supreme Court held that NRS 616C.150(2)'s rebuttable presumption provision—the sister statute to NRS 617.358(2) that deals with isolated injuries and accidents for workers' compensation statutes—"create[s] a presumption that the injury was caused by an event that occurred *outside* the course of employment." 124 Nev. at 367, 184 P.3d at 387 (emphasis added).[8] Thus, because the language of the two statutes is nearly identical, we give NRS 617.358(2) the same interpretation as NRS 616C.150(2). *See Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 283, 449 P.3d 479, 483 (Ct. App. 2019) (construing statutes with similar language and purpose in a similar fashion).

When interpreting Nevada workers' compensation statutes, the Nevada Supreme Court has "consistently upheld the plain meaning of the statutory scheme . . . ." *SIIS v. Prewitt*, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997). The legislative declarations of Nevada's workers' compensation

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[8]Similarly, in an unpublished disposition addressing the rebuttable presumption under NRS 617.358(2), the Nevada Supreme Court concluded that because the rebuttable presumption language in NRS 617.358(2) is nearly identical to that in NRS 616C.150(2), the *Milko* holding controls the interpretation of NRS 617.358(2)'s rebuttable presumption provision. *Caesars Palace v. Birnbaum*, Docket No. 53796 (Order of Reversal and Remand, September 22, 2010).

laws, including the NODA, require a balanced interpretation that does not favor the worker over the employer, or vice versa. NRS 616A.010(1), (2); *Star Ins. Co.*, 122 Nev. at 777 n.9, 138 P.3d at 510 n.9. This principle is known as the "neutrality rule." *See Milko*, 124 Nev. at 363, 184 P.3d at 384-85.

The crucial inquiry here is what it means for an employee to be "terminated" under NRS 617.358(2). Neither the NODA nor any of Nevada's workers' compensation statutes define this term. There is similarly no definition of when a worker has "employment" status with an employer.

Haro and Bouchon both advance different interpretations of NRS 617.358(2). Haro argues that an employee who goes on unpaid leave status without ever receiving a formal declaration of termination is not "terminated"; rather, there must be a complete severance of the employer-employee relationship. He argues severance was incomplete here due to Haro's email exchange with Guerrero and the fact that Bouchon treated Haro as an employee throughout the pendency of his EEOC claim. On the other hand, Bouchon effectively argues that an employee is terminated from employment when the employee stops showing up for work shifts and is no longer receiving paychecks. However, we need not provide a definitive definition of "termination," as the facts of this case are dispositive.

Applying Bouchon's requested interpretation of "terminate" under these facts would undermine the neutrality rule. Bouchon fails to address the fact that Haro had a medical excuse for taking time off from work for his mental health. Nor do they address the fact that Cochran essentially admitted during the appeals hearing that he and Bouchon told the EEOC that Haro was still an active employee. They also do not address how a person who is on medical leave is terminated from employment even though, as Cochran testified, "the job was still here" for Haro, Guerrero told Haro

that he remained on medical leave, and *no one* told Haro that he was terminated until he received his employee file. Allowing an employer to treat an employee as terminated for one purpose (a workers' compensation matter) and employed for another (the EEOC hearing) is a non-neutral application of NRS 617.358. As such, Bouchon has effectively conceded these points. *See Fitzpatrick v. Floriano*, 92 Nev. 18, 18, 544 P.2d 895, 895 (1976) ("Respondent's . . . failure to have an adequate brief filed with this court amounts to a confession of error.").

Bouchon's requested interpretation could render an employee "terminated" from employment even if on maternity or paternity leave under the Family and Medical Leave Act, which would lead to an unreasonable result. *See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (explaining that appellate courts will "avoid absurd or unreasonable results"). A person on medical leave is generally not considered "terminated" for purposes of his or her employment. *See* 29 U.S.C.A. § 2601 (explaining that the purpose of the FMLA is to provide employees the ability "to take reasonable leave for medical reasons"). Bouchon's desired interpretation would permit an employer to elude its workers' compensation obligations, even if the employee plans to return to work. Thus, this interpretation is contrary to the neutrality rule, *see Star Ins. Co.*, 122 Nev. at 777, 138 P.3d at 510 (resolving statutory ambiguities under a neutral approach, pursuant to NRS 616A.010), and also goes against a plain definition of "terminate" as it is generally understood in employment statutes, *see Prewitt*, 113 Nev. at 619, 939 P.2d at 1055 (favoring plain language interpretation of a statute); *see generally* NRS 50.070 ("Termination or threat of termination of employment . . ."); NRS 193.105 ("Termination of employment . . ."); NRS 608.050 ("Wages to be paid at termination of service"); NRS 608.1585 ("Notice

to employee upon termination of employment . . . "); NRS 613.075(4) ("Upon termination of employment . . . "); NRS 618.9912 ("[T]ermination for failure to comply").

By concluding Haro was terminated in April 2015 and applying the rebuttable presumption under NRS 617.358(2), the appeals officer improperly held Haro to a higher evidentiary burden. The officer required Haro to prove not only that his carpal tunnel arose out of his employment with Bouchon, but that his disease was not caused by events occurring outside the course of employment. *See Milko*, 124 Nev. at 367-68, 184 P.3d at 387-88. This error alone warrants reversal and remand for a new appeals hearing. Applying the rebuttable presumption infected the proceedings by holding Haro to a higher-than-required evidentiary burden and requiring evidence and argument from Haro beyond what was legally necessary. *See* NRS 233B.135(3)(a), (b), (d) ("The court may remand or affirm the final decision or set it aside in whole or in part if . . . the final decision of the agency is . . . [i]n violation of constitutional or statutory provisions . . . [i]n excess of the statutory authority of the agency; [a]ffected by other error of law"). We thus conclude that the appeals officer erred in applying NRS 617.38(2)'s rebuttable presumption.

Whether substantial evidence supports the appeals officer's determination that Haro did not suffer an occupational disease

Haro argues that substantial evidence did not support the appeals officer's decision that Haro did not suffer an occupational disease caused by his work at Bouchon. More specifically, Haro argues that the medical evidence from Drs. Tan and Wassef, the nerve test, and the affirmations on the C-4 form provide prima facie evidence of a compensable occupational disease under NRS 617.440, and that Bouchon did not offer any

evidence to the contrary. Bouchon counters that there was substantial evidence to support the appeals officer's final decision and order.

At oral argument, Bouchon noted a passage from the appeal officer's letter announcing the decision (that is not in the order) that stated "[e]ven if the presumption did not apply, I nevertheless find that Mr. Haro has not established that his bilateral carpal tunnel syndrome arose out of and in the course of his employment with Bouchon. My decision is based on the totality of the evidence presented." Bouchon argued that even without the application of the rebuttable presumption, Haro failed to satisfy the requirements for a compensable occupational disease.

Under the NODA, an employee must prove by a preponderance of the evidence that his occupational disease "arose out of and in the course of his or her employment." NRS 617.358(1). To do so, the employee must prove, among other things, that "there is a direct causal connection between the conditions under which the work is performed and the occupational disease." NRS 617.440(1)(a). Evidence from a physician is sufficient to establish direct causation. *Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 537-38, 936 P.2d 839, 842 (1997) (quoting *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993)). The "physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury . . . ." *United Exposition*, 109 Nev. at 424-25, 851 P.2d at 425. In both *Horne* and *United Exposition*, the Nevada Supreme Court held that a physician's letter stating that it is "possibl[e]" that an employee's job caused his or her disease was too speculative to establish direct causation. *Horne*, 113 Nev. at 538, 936 P.2d at 843; *United Exposition*, 109 Nev. at 425, 851 P.2d at 425. To constitute

sufficient proof of causation, the physician must proffer a more definite opinion. *Id.*

Even assuming the appeals officer did not apply the rebuttable presumption under NRS 617.358, substantial evidence did not support the decision and order that Haro failed to prove he had a compensable occupational disease under NRS 617.440(1). The appeals officer made several findings contrary to the evidence to ultimately conclude that Haro's carpal tunnel was not an occupational disease. The only credibility determination the appeals officer made with respect to Haro's testimony was that he was inconsistent, but this general statement about Haro's credibility is insufficient in light of the medical evidence presented at the hearing. *See Horne*, 113 Nev. at 537-38, 936 P.2d at 842.

First, the appeals officer found that Dr. Tan offered no evidence to causally link Haro's carpal tunnel with his work at Bouchon. But this connection was first made when Dr. Tan completed the C-4 form on May 4, 2016, wherein he checked the "yes" box verifying that he can "directly connect this injury or occupational disease as job incurred." Dr. Tan completed this form after Haro advised him of Dr. Wassef's medical conclusions, including Dr. Wassef's medical conclusion that the carpal tunnel—as well as the lateral epicondylitis—was work-related based in part on information from Haro. The appeals officer did not discredit this evidence or assign any lesser weight to it.

Next, the appeals officer found that Haro did not inform Dr. Wassef of his employment at El Segundo Sol. However, Haro testified that he informed Dr. Wassef of his other employment at El Segundo Sol. There was no evidence in the medical documents that Haro did not provide a complete history to Dr. Wassef, and Bouchon did not provide contradictory

evidence. The letter that Dr. Wassef wrote for Haro to present at the appeals hearing indicates that he was fully advised of Haro's work history. Finally, the order found that Haro admitted he never provided a detailed work history of his duties at El Segundo Sol to Drs. Tan or Wassef. However, Haro testified that he told Dr. Wassef about his job duties at both Bouchon and El Segundo Sol, and nearly all of his prior cooking positions.

The appeals officer relied in part on these findings to support the conclusion that Haro failed to prove his carpal tunnel was compensable under NRS 617.440. In addition to these apparent factual inaccuracies, the only medical evidence presented at the hearing was Dr. Wassef's medical conclusions. His letter stated, "I do believe to a reasonable degree of medical probability that Mr. Haro's bilateral carpal tunnel syndrome and right lateral epicondylitis are related to his employment duties." This letter was not impermissibly speculative. *See Horne*, 113 Nev. at 539, 936 P.2d at 843; *United Exposition*, 109 Nev. at 425, 851 P.2d at 425. Therefore, we conclude that substantial evidence did not support the appeals officer's decision, and reverse with instructions to remand for a new appeals hearing. *See* NRS 233B.135(3)(e) (explaining that a court may remand an appeals officer's decision when "[c]learly erroneous in view of the reliable, probative[,] and substantial evidence on the whole record").

Whether the appeals officer's conclusion under the last-injurious-exposure rule was erroneous

Haro avers that the appeals officer erred in applying the last-injurious-exposure rule. Haro further contends that the appeals officer was required to apply the standard set forth in NRS 617.366, which he alleges partially shifts the evidentiary burden to Bouchon. Bouchon counters that substantial evidence supported the appeals officer's finding that the last-injurious-exposure rule barred Haro from recovery. Bouchon asks for

affirmance given "the aggravation of [Haro's] symptoms after his new employment with El Segundo Sol."

The last-injurious-exposure rule—a judicial creation—precludes appeals officers from determining which of two employers was the "primary cause" of a work-related disease and places full liability on an employee's most recent employer. *DeMaranville v. Emp'rs. Ins. Co. of Nev.*, 135 Nev. 259, 263, 448 P.3d 526, 530 (2019); *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 284, 112 P.3d 1093, 1098 (2005); *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1030, 944 P.2d 819, 823 (1997); *Collett Elec. v. Dubovik*, 112 Nev. 193, 197, 911 P.2d 1192, 1195 (1996). This rule applies only in successive employer cases—where a worker had successive employers that each could be liable for the claim—rather than an employee who is working for two employers simultaneously. *Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1016-17, 145 P.3d 1024, 1029 (2006); *Riverboat Hotel Casino*, 113 Nev. at 1030, 944 P.2d at 823. Additionally, the last-injurious-exposure rule applies only to new injuries or aggravations of a previous injury; it does not apply to a mere recurrence. *Menditto*, 121 Nev. at 284, 112 P.3d at 1098.

An "aggravation" is "a subsequent, intervening injury or cause" that makes a prior injury or disease worse than before. *Id.* at 286, 112 P.3d at 1099. An aggravation must be "the result of a specific, intervening work-related trauma . . . that independently contributes to the subsequent disabling condition." *Id.* at 286-87, 112 P.3d at 1099. Conversely, a "recurrence" is the mere persistence of an original injury or "the natural progression of the preexisting disease or condition[ ] *which becomes increasingly painful* . . . ." *Id.* at 287, 112 P.3d at 1099 (internal quotation marks omitted) (emphasis added). With a recurrence, there must be "no specific incident [that] can independently explain the worsened condition."

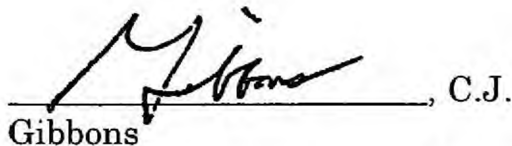
Id. In sum, a successive employer is liable for new injuries or aggravations of a prior injury, whereas the former employer remains liable for a mere recurrence. *Id.* at 284, 112 P.3d at 1098. Accordingly, the critical inquiry here is whether Haro's carpal tunnel syndrome was a new or aggravated injury, or a recurrence of a prior injury.

We may address last-injurious-exposure rule in this context despite our determination that Haro was not terminated from his employment at Bouchon as a matter of law until Bouchon formally terminated his employment at the closure of his EEOC claim, which was after he quit he job at El Segundo Sol. The "terminated" language of NRS 617.358 is not incorporated into the last-injurious-exposure rule. This rule looks to the order in which a worker was employed with two different employers at two separate times with no overlap, which is more of a temporal focus. Because Haro physically worked at El Segundo Sol after he went on medical leave with Bouchon, analyzing Haro's claims under the last-injurious-exposure rule was proper. However, the legal conclusions that the appeals officer reached in that analysis were erroneous.

The appeals officer concluded that the last-injurious-exposure rule denied recovery because Haro reported worsening symptoms after he went on medical leave. However, this finding describes a mere recurrence rather than an aggravation or new disease. Haro testified that his pain worsened shortly after he left Bouchon. There is no evidence in the record of any work-related trauma or event that would constitute an aggravation or new disease, and the appeals officer did not find anything to this effect. Therefore, we hold that the appeals officer's legal conclusions under the last-

injurious-exposure rule were erroneous and also reverse on this alternative basis.[9] Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court with instructions to grant Haro's petition for judicial review and refer the matter back to the Division of Industrial Relations of the Department of Business and Industry for proceedings consistent with this order.[10]



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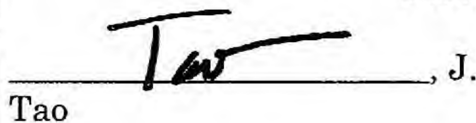

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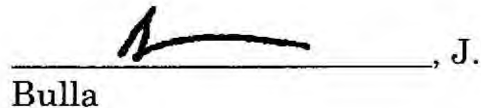

_______________, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Kemp & Kemp
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

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[9]In light of our disposition under the last-injurious-exposure rule, we need not reach Haro's contentions regarding the applicability of NRS 617.366. On remand, the parties are not foreclosed from addressing the applicability of this statute.

[10]We decline to address Haro's request to have this case assigned to a different appeals officer on remand. Haro has not demonstrated a statutory basis for disqualifying the appeals officer. *See* NRS 616C.340 ("If an appeals officer determines that he or she has a personal interest or a conflict of interest, directly or indirectly, in any case which is before him or her, the appeals officer shall disqualify himself or herself from hearing the case."). A new assignment should be administratively considered in the first instance by the Division of Industrial Relations of the Department of Business and Industry in light of its policies, procedures and regulations.