IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARGO GROUP,
Appellant,
vs.
CHRISTINE HORTON,
Respondent.

No. 81568-COA

ORDER REVERSING AND REMANDING

Argo Group appeals from a district court order granting Christine Horton's petition for judicial review of an agency decision in a workers' compensation matter. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Horton was an imaging technician for MedSmart Inc. when she suffered an industrial injury to her right knee when she tripped over a wet floor sign as she backed a gurney out from a hospital room.[1] An MRI revealed a likely meniscus tear, as well as severe degenerative joint disease (DJD), otherwise known as arthritis, in her right knee. Horton eventually underwent arthroscopic surgery after conservative treatment failed to improve her condition.

After several months of postoperative physical therapy, Horton reached maximum medical improvement and was referred to Dr. Firooz Mashhood for an impairment evaluation. Dr. Mashhood opined that Horton lost 17 percent of the range of motion in her right knee due to DJD, which he also opined was unrelated to her industrial injury. He therefore excluded the range of motion data from his impairment calculation and concluded

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

that Horton's occupational injury caused a 2-percent whole person impairment.

Shortly thereafter, Horton completed an independent medical evaluation (IME) to confirm the accuracy of Dr. Mashhood's impairment rating. Dr. Robert Patti performed the IME and opined from his review of the medical records, specifically X-rays that he ordered, that Horton had advanced DJD, and that the DJD was likely the cause for her ongoing symptoms. He noted that Horton had lost cartilage and there was bone-on-bone contact. He did not include in his report any discussion of Dr. Mashhood's impairment rating, nor did he provide his own rating.

Argo Group, the insurance carrier, offered Horton compensation based on the permanent partial disability (PPD) rating in Dr. Mashhood's and Dr. Patti's findings. After Horton administratively appealed Argo's offers, an appeals officer entered an interim order that required the parties to obtain another impairment evaluation. Dr. Andrei Razsadin performed this evaluation and opined that Horton had lost 18 percent of the range of motion in her right knee, which equated to an 18-percent impairment rating. However, Dr. Razsadin opined that the nonindustrial degenerative changes in her right knee caused 50 percent of her current impairment, and the other 50 percent was due to the industrial injury. Thus, pursuant to NAC 616C.490, he apportioned the impairment rating, reducing it by 50 percent, from 18-percent to 9-percent whole person impairment.

Argo issued an amended PPD award offer reflecting the 9-percent impairment rating, but Horton refused it. Horton again appealed the offer, and the appeals officer affirmed the apportionment of the nonindustrial injury, as well as the overall 9-percent impairment rating. The appeals officer found that there was substantial medical evidence and a sufficient basis to support the apportionment pursuant to NAC 616C.490(5)

and (6). The appeals officer noted the X-rays and MRI both showed advanced degenerative changes to Horton's right knee, which existed prior to the occupational injury. Further, the appeals officer found that all three evaluating physicians noted Horton's degenerative condition and opined that her DJD was likely responsible for her current symptoms.

Horton petitioned for judicial review, which the district court granted, finding that Dr. Razsadin's apportionment was improper under NAC 616C.490(8). The district court found that Dr. Razsadin "cited to no documentation, medical records, imaging studies, or any other documentation 'concerning the scope and the nature of the impairment [if any] which existed before the industrial injury.'" (Alteration in original.) Horton submitted several years of her medical records but the records did not reflect any knee impairment. The district court determined that "[t]he doctor's apportionment decision is speculation based only upon documentation that shows [that Horton] had arthritis prior to the industrial injury, but not showing the nature and scope of any impairment that existed prior to the industrial injury as required by the regulations." The district court ordered Argo to award Horton the full 18-percent PPD. Argo now appeals.

Standard of review

The appellate court's role in reviewing 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). The appellate court, therefore, gives no deference to the district court's decision. *Id.* The appellate court will "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) (internal quotation marks omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion," and the appellate court 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). Appellate review of an agency determination is confined to the record and evidence as it existed before the agency. NRS 233B.135(1); *Milko*, 124 Nev. at 362, 184 P.3d at 384.

We review purely legal questions de novo. *Milko*, 124 Nev. at 362-63, 184 P.3d at 383-84; *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006). "Although statutory construction is generally a question of law reviewed de novo, this court 'defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute,'" including the appeals officer's determinations. *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (alteration in original) (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)); *see also White v. State, Div. of Forestry*, 135 Nev. 505, 507, 454 P.3d 736, 738 (2019).

Documentation of the impairment is not required to predate the industrial injury

At issue in this case is the interpretation of Nevada's workers' compensation regulation regarding apportionment of an impairment rating. If an employee suffers a permanent impairment that is "due in part" to both an industrial injury and a preexisting condition, the rating physician shall determine what portion of the impairment is "reasonably attributable" to the industrial injury and what portion is "reasonably attributable" to the preexisting condition. NAC 616C.490(1). The injured employee may then

receive compensation only for the portion of the impairment that is reasonably attributable to the industrial injury and not the preexisting condition. *Id.*

If there is a "preexisting permanent impairment or intervening injury, disease or condition," the PPD rating must be apportioned.[2] NAC 616C.490(2). Further, if the employee suffers from a "preexisting condition[ ], including . . . degenerative arthritis, . . . the apportionment must be supported by documentation concerning the scope and nature of the *impairment which existed before the industrial injury or the onset of disease*." NAC 616C.490(6) (emphasis added). The rating physician must explain the basis for the apportionment. NAC 616C.490(7). If no such documentation exists, then "the impairment may not be apportioned." NAC 616C.490(8). NAC 616C.490(6) is the primary provision at issue between the parties.

The first issue the parties raise is whether the dependent clause, "which existed before the industrial injury or the onset of disease," is intended to modify the preceding term "documentation," "impairment," or both. *See* NAC 616C.490(6). Horton argues that the clause attaches to documentation, at a minimum. This would mean that there must be *documentation* concerning the nature and scope of her right knee impairment that *predates* her industrial injury. The record reflects no such documentation; therefore, under this interpretation, apportionment would be improper. However, Argo interprets the clause to modify "impairment," meaning that the documentation does not need to predate the industrial

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[2]NAC 616C.490(3)-(5) then only apply if the injured employee underwent a previous impairment evaluation and rating to the same injured body part. Nothing in the record supports that Horton ever underwent a previous impairment evaluation for her right knee. Therefore, NAC 616C.490(3)-(5) do not apply to this case.

injury, but only that there needs to be documentation at some point opining that the impairment predated the industrial injury. We conclude that the plain meaning of the regulation does not require documentation that predates the industrial injury.

"When interpreting a statute, we first look to its plain language." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). "When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words" used in the statute. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). If a statute is unambiguous, the court is not permitted to look beyond the statute for alternative meaning and interpretations. *Erwin v. State*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995). "It is well settled that, in interpreting a statute, this court must examine the statute as a whole." *Clark County v. S. Nev. Health Dist.*, 128 Nev. 651, 658, 289 P.3d 212, 216 (2012).

Furthermore, when interpreting Nevada workers' compensation statutes, the supreme court has "consistently upheld the plain meaning of the statutory scheme." *State Indus. Ins. Sys. v. Prewitt*, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997). The legislative declarations of Nevada's workers' compensation laws require an interpretation according to the plain meaning of the statute that does not favor the worker over the employer, or vice versa. *See* NRS 616A.010. This principle is known as the "neutrality rule." *See Milko*, 124 Nev. at 363, 184 P.3d at 384 (noting that the "neutrality rule" under NRS 616A.010 superseded the former policy of liberally construing workers' compensation statutes in favor of the worker).

The "rule of the last antecedent" states that when there is a limiting phrase, it should be read to modify the antecedent that it immediately follows. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Thus, in our case, the phrase "which existed before the industrial injury or the

onset of the disease" would modify the noun of the phrase it immediately follows—here, "impairment." *See Ransier v. State Indus. Ins. Sys.*, 104 Nev. 742, 744 n.1, 766 P.2d 274, 275 n.1 (1988) (construing a regulation containing the same phrase as NAC 616C.490(6)). Therefore, the plain language of this regulation requires documentation supporting the scope and nature of the preexisting impairment; not documentation predating the industrial injury.[3]

Impairment does not necessarily require impediment of function, and the AMA Guides are instructive

Second, the parties dispute the meaning of "impairment," among other terms.[4] Argo looks to the American Medical Association *Guides*

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[3]We note that Horton's application of the regulation may lead to an unreasonable or absurd result. *See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("[S]tatutory interpretation should avoid absurd or unreasonable results."). If the regulation requires that an impairment may only be apportioned if documentation of the preexisting condition or injury predates the industrial injury, the employer may then be required to compensate injured employees for preexisting conditions that were clearly not the result of any industrial injury or occupational disease. This application belies the regulation. NAC 616C.490(1) plainly states that the injured employee "may not receive compensation for that portion [of the impairment] which is reasonably attributable to the preexisting or intervening injury, disease or condition."

[4]Argo argues that the district court and Horton improperly used the term "disability" in place of "impairment" when it interpreted NAC 616C.490. Argo directs this court to the AMA *Guides*' definitions of each term. Horton points to NRS 616C.490(1), which states that "impairment of the whole person" and "disability" are equivalent terms, for her argument that "impairment" and "disability" should be used synonymously. Horton does not direct this court to a particular definition of "disability" to supplant "impairment" under NAC 616C.490.

However, NRS 616C.490(1) limits "impairment of the whole person" and "disability" from being used other than synonymously only in "this

to the Evaluation of Permanent Impairment, Fifth Edition (AMA *Guides*) definition of "impairment" to argue that Horton's preexisting DJD was undoubtedly an impairment under NAC 616C.490, and that there was sufficient documentation of the impairment to support apportionment. Argo claims that even though no medical evidence supports the notion that Horton physically felt the degenerative changes, the record clearly indicates Horton had DJD prior to the industrial injury and thus apportionment was appropriate. Horton interprets "impairment" under NAC 616C.490 as something akin to physical "pain, injury, or dysfunction" that impedes a person's day-to-day activities, as opposed to an ailment that exists but is never felt. Horton argues that there is no evidence to support the theory that the DJD caused her any *impairment* prior to her industrial injury; therefore, apportionment was improper under NAC 616C.490.

Nevada's workers' compensation statutes, regulations, and precedent do not define "impairment" as it is used throughout the workers' compensation statutory scheme. We conclude that the term "impairment" can be defined using its plain meaning and is not limited to a physical ailment that impedes an individual's ability to function in day-to-day life. This court may look to the plain meaning definition of "impairment" in any number of dictionaries. *See Taniguchi v. Kan Pacific Saipan*, 566 U.S. 56,

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section," meaning that the two are only equivalent under NRS 616C.490 and not necessarily NAC 616C.490. There is no other statute or regulation, and Horton provides no authority for the assertion that NRS 616C.490(1) applies to all workers' compensation statutes and regulations. Because the DIR may promulgate its own regulations to execute the workers' compensation statutes, the NAC may give "impairment" a different meaning than "disability." *See* NRS 616A.400. Therefore, this court is not constrained to use the term "impairment" synonymously with "disability" in interpreting NAC 616C.490.

566 (2012) (looking to various dictionary definitions to find the plain meaning of an undefined term in a statute); *see also Jones v. Nev., State Bd. of Med. Exam'rs*, 131 Nev. 24, 28-29, 342 P.3d 50, 52 (2015).

We first consider the AMA *Guides* because NRS 616C.110(1) requires its adoption for use in all impairment evaluations. *See also* NAC 616C.002(1) (adopting by reference the AMA *Guides* for PPD purposes under NRS 616C.490); *see also* NRS 616C.110(2)(a) (providing that adopted regulations must be consistent with the AMA *Guides*). The AMA *Guides* define "impairment" as "a loss, loss of use, or derangement of any body part, organ system, or organ function." Under this definition, the degenerative changes in Horton's knee constitute impairment because the MRI and X-rays confirmed that prior to her industrial injury, she lost cartilage in her right knee, which resulted in bone-on-bone contact that impaired her knee's range of motion. Furthermore, the degenerative changes affected the knee organ system to the extent that she would need a total knee replacement in the future.

Furthermore, *Black's Law Dictionary* is instructive and broadly defines "impairment" as "[t]he quality, state, or condition of being damaged, weakened, or diminished." *Impairment*, *Black's Law Dictionary* (11th ed. 2019). Applying this definition yields the same result as when applying the AMA *Guides*: Horton's preexisting DJD is an impairment because it caused her knee to be damaged, weakened, or diminished. Accordingly, apportionment of Horton's claims under NAC 616C.490(6) is appropriate if it is supported by documentation concerning the scope and nature of the loss, loss of use, or derangement of any body part, organ system, or organ function, which existed before the industrial injury, regardless of when the documentation is produced.

Substantial evidence supports the appeals officer's finding that Horton had a preexisting impairment for which apportionment is appropriate

We now turn to whether substantial evidence supports the appeals officer's finding of sufficient documentation in Horton's case. The parties dispute whether there is substantial evidence to support the scope and nature of the preexisting impairment. Argo believes that the medical reports from Horton's industrial injury, including the MRI, X-Rays, and medical opinions from the three rating physicians, provide the substantial evidence to support apportionment in this case. Horton argues there is not substantial evidence to support the apportionment because there is no documentation that describes the scope or nature of a preexisting impairment in her right knee.

The appeals officer found that there was substantial medical evidence and a sufficient basis to support the apportionment pursuant to NAC 616C.490(6).[5] *See City Plan Dev., Inc. v. Office of the Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005) ("While this court reviews purely legal questions de novo, a hearing officer's conclusions of law, which will necessarily be closely tied to the hearing officer's view of the facts, are entitled to deference on appeal."). The appeals officer looked to the X-rays and MRI taken shortly after the industrial injury. Both showed advanced degenerative changes to Horton's right knee, resulting in a limited range of motion and a loss of cartilage. The severity of the degenerative changes indicated that they existed prior to, and were not the result of, the industrial

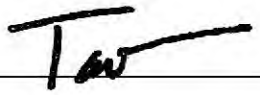
[5]The appeals officer cited to NAC 616C.490(5) and (6) in support of its decision. As discussed above, NAC 616C.490(5) is not applicable in this case. While the appeals officer incorrectly cited to this subsection in support of its decision, the appeals officer also correctly cited to NAC 616C.490(6) in support of apportionment.

injury. Furthermore, all three of the rating physicians opined that Horton's DJD is responsible for her current symptoms and at least 50 percent of her current impairment. Dr. Razsadin's impairment evaluation and apportionment considered Horton's entire medical history and explained that the DJD was responsible for at least 50 percent of Horton's current impairment. This constitutes substantial evidence supporting the appeals officer's decision that apportionment was appropriate and, thus, the district court erred when it granted judicial review.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao

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Bulla

cc: Hon. Mary Kay Holthus, District Judge
Hooks Meng & Clement
Kemp & Kemp
Eighth District Court Clerk