

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT; AND CANNON
COCHRAN MANAGEMENT SERVICES,
INC.,
Appellants,
vs.
WILLIAM MARX,
Respondent.

No. 83626-COA

FILED

NOV 23 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Las Vegas Metropolitan Police Department (LVMPD) and Cannon Cochran Management Services, Inc. (collectively appellants), appeal a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

William Marx was employed with LVMPD for 21 years and was a member of the SWAT team during the last ten years of his employment.¹ In August 2018, Marx was involved in a shooting with an armed and barricaded suspect. According to Marx's testimony, the suspect was barricaded inside the bathroom of an apartment unit for about 14 hours. Police officers and negotiators repeatedly contacted the suspect by telephone, attempting to get him to surrender, but the suspect continually refused and hung up the phone each time. As the day went on, the suspect fired shots towards the responding officers

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

Once officers were able to evacuate 20 people from the other units in the apartment complex, Marx and another SWAT officer breached the apartment unit and entered the bathroom where the suspect was barricaded. The suspect pointed his firearm in the direction of Marx and the other responding officer. Marx fired two shots at the suspect's face and killed him.

Following the shooting incident, Marx was immediately placed on paid administrative leave and required to see a department psychologist, Dr. James Tenney. Dr. Tenney was tasked with determining whether Marx would be fit for duty and could be released back to work. Dr. Tenney's report indicated Marx had been involved in fatal shootings in 2001, 2006, 2011, 2015, and this incident in 2018. In each of the shootings before 2018, Marx was determined to be fit for duty and released back to work. Dr. Tenney did not reach a formal conclusion in relation to the most recent shooting and recommended that Marx see Dr. Paul Nguyen for a psychiatric evaluation to determine the next step.

Marx initially visited Dr. Nguyen in March 2019. Dr. Nguyen's report noted Marx complained of PTSD signs and symptoms since 2006 but that Marx had never been treated for PTSD, nor had he apparently been formally diagnosed with the condition. According to Dr. Nguyen, Marx's most recent shooting incident and subsequent symptoms rendered him unable to work. Dr. Nguyen ultimately recommended medical retirement. Marx medically retired in July 2019 and soon after completed an Employee's Claim or Compensation/Report of Initial Treatment (C-4) form with Dr. Nguyen's assistance. Neither Dr. Tenney nor Dr. Nguyen specifically addressed whether the August 2018 shooting incident was directly related to Marx's PTSD. The C-4 form reported that Marx was

diagnosed with PTSD and indicated that the injury occurred because of an officer involved shooting.

Cannon Cochran denied Marx's claim, stating that there was "no evidence that shows causation for your [Marx's] injury to have arisen out of an in the course of your employment." After reviewing the medical treatment documentation, Cannon Cochran further concluded that multiple incidents were described during Marx's treatment and were noted as the reason for his retirement. Marx appealed the denial with the Department of Administration. The department, through a hearing officer, affirmed Cannon Cochran's claim denial. The hearing officer agreed with Cannon Cochran that the medical evidence showed that Marx was involved in multiple shootings since 2001 and that Marx's mental condition was an accumulation of gradual mental stimulus over his years of employment. Thus, Marx's claim was barred under NRS 616C.180(2) preventing him from receiving workers' compensation benefits.²

Marx again appealed and requested a hearing before an appeals officer. Marx's supplemental evidence packet included a letter sent to Dr. Nguyen from Marx's counsel. The letter asked two questions, one being the following: "Based on your examination of the claimant [Marx], at what point did you determine that his PTSD was directly related to his August 4, 2018 incident?" Dr. Nguyen's response to the question was "[o]n his 1st visit Mar. 12, 2019." Marx's packet also included a psychological evaluation by Dr. Susan Vincent conducted in 2020 in which Marx was the sole historian. Dr.

²NRS 616C.180(2) states: "Any ailment or disorder caused by any gradual mental stimulus, and any death or disability ensuing therefrom, shall be deemed not to be an injury or disease arising out of and in the course of employment."

Vincent's evaluation noted the following: Marx has a history of multiple officer involved shootings; his traumatic experiences and PTSD are associated with multiple officer involved shootings, suicide by cop, and fatalities from as early as 2002 to as recent as 2018; and "all providers have diagnosed him with industrial-related PTSD." However, Dr. Vincent did not address nor determine whether Marx's current PTSD diagnosis was primarily caused by the August 2018 shooting.

Following a hearing before the appeals officer, which included testimony from Marx and examination of documentary evidence presented, the appeals officer reversed the denial of Marx's claim and issued a decision and order concluding that Marx satisfied his burden under NRS 616C.180³ and had thereby established a compensable workers' compensation claim. The appeals officer determined that Dr. Nguyen's psychiatric reports were "most persuasive in establishing the causal connection" between Marx's PTSD and his employment, that Dr. Nguyen assessed the PTSD was causally connected to Marx's work in the C-4 form, and that it was not until February 2020, in responding to the letter from Marx's counsel, that Dr. Nguyen clarified that Marx's PTSD was directly caused by the August 2018 shooting.

³NRS 616C.180 was amended in June 2019 (with the new subsections codified as NRS 616C.180(4)-(8)) to allow compensation if an officer witnessed death, therefore appellants' defense regarding gradual mental stimulus no longer applies under the amended version of the statute. The appeals officer, however, noting that the date of the officer involved shooting was August 4, 2018, applied the version of NRS 616C.180 as it existed in 2018. Because neither party disagrees with the appeals officer's application, we apply the pre-2019 version of the statute. See 2019 Nev. Stat., ch. 312, at 1900.

Further, the appeals officer stated that “although both psychologists [Dr. Tenney and Dr. Vincent] referred to the Claimant’s multiple police involved shootings and fatalities, neither [] directly discussed whether the Claimant’s PTSD diagnosis was due to the accumulation of these past events or only due to the August 4, 2018 event.” The appeals officer determined both doctors “referring to and noting past events” was insufficient to demonstrate that Marx’s PTSD was a result of gradual mental stimulus. Finally, the appeals officer concluded that “Dr. Nguyen’s psychiatric reports provided substantial evidence showing the Claimant’s [Marx’s] injury arose from” the August 2018 event. Marx’s employer was directed to accept Marx’s claim under NRS 616C.180 and to issue him all appropriate benefits.

Appellants subsequently filed a petition for judicial review. The district court denied the petition and agreed with the appeals officer that Marx met the legal requirements to establish a compensable claim under NRS 616C.180 because he showed that his mental injury arose from a specific instance, the August 2018 shooting. Appellants now seek review by this court, arguing that (1) the appeals officer incorrectly concluded that Marx established a compensable workers’ compensation claim by clear and convincing evidence under NRS 616C.180 and (2) substantial evidence in the record does not support the appeals officer’s conclusion. We disagree and address each argument in turn.

We review an appeals officer’s decision for “clear error or an arbitrary and capricious abuse of discretion.” *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008) (footnote omitted). An agency’s findings of fact are entitled to deference when supported by substantial evidence. *Id.* at 362, 184 P.3d at 383-84.

Similarly, an agency's conclusions of law are given deference and "will not be disturbed if they are supported by substantial evidence." *State Indus. Ins. Sys. v. Montoya*, 109 Nev. 1029, 1031-32, 862 P.2d 1197, 1199 (1993) (quoting *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)). "Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion." *Id.* at 1032, 862 P.2d at 1199 (citing *State Emp. Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986), *superseded by statute on other ground as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)). *The appeals officer's decision and order permissibly concluded that Marx offered clear and convincing evidence to establish a compensable workers' compensation claim*

Appellants argue that the record lacks clear and convincing evidence to establish a compensable workers' compensation claim under NRS 616C.180. Specifically, appellants state that Dr. Nguyen's opinion is not clear and convincing evidence to show that the August 2018 incident is the primary cause of Marx's injury. Appellants further argue that the appeals officer misapplied the controlling legal standard under NRS 616C.180(3).⁴ Appellants contend the appeals officer applied the lower legal standard of substantial evidence, rather than clear and convincing

⁴To establish a compensable claim for a mental injury under NRS 616C.180, an employee must first show that the injury or disease he sustained arose out of and in the course of his employment. To show that the injury or disease arose out of and in the course of employment, an employee must prove by clear and convincing medical or psychiatric evidence that (a) he has a mental injury caused by extreme stress in time of danger; (b) the primary cause of injury was an event that arose out of and during the course of his employment; and (c) the stress was not caused by his layoff, the termination of his employment or any disciplinary action taken against him. NRS 616C.180(3).

evidence, when concluding Marx satisfied his burden under NRS 616C.180. Marx disagrees and responds that Dr. Nguyen's medical reporting provides substantial evidence that his PTSD arose from the August 2018 incident.

In arguing that the evidence supporting the appeals officer's conclusion is not clear and convincing, appellants seemingly urge us to reweigh the evidence on appeal and conclude that Marx's PTSD was the result of a gradual mental stimulus rather than primarily the 2018 shooting incident. However, the appeals officer, after conducting an evidentiary hearing on these issues, determined Marx's mental injury arose from a specific instance. We decline to reweigh the evidence or the appeals officer's credibility determinations on appeal. *See Law Offices of Barry Levinson*, 124 Nev. at 362, 184 P.3d at 383-84 (stating that this court does not reweigh evidence or revisit an appeal's officer's credibility determinations on appeal and may not reweigh evidence when an agency's conclusions of law are supported by substantial evidence).

Further, when determining whether an employee may receive workers' compensation for stress-related injuries or diseases, the Nevada Supreme Court has stated that NRS 616C.180 "does not permit a claim for stress built up over the course of multiple incidents, but instead requires a claimant to demonstrate that his or her stress was caused by a discrete, identifiable occurrence." *McGrath v. State Dep't. of Public Safety*, 123 Nev. 120, 126, 159 P.3d 239, 243 (2007). Additionally, the supreme court concluded that the statute's plain language creates a "dichotomy" between injuries brought on by a single incident and injuries caused by gradual stress. *Id.*

The appeals officer could permissibly find that Marx presented clear and convincing evidence that the August 2018 shooting event is the

discrete, identifiable instance that gave rise to Marx's PTSD. We also note that after each of the other identified shootings Marx was cleared to return to full time employment without restriction. Here, Dr. Tenney and Dr. Vincent offered no opinion as to whether Marx's PTSD was the result of a gradual mental stimulus during his years as a police officer and SWAT team member or if the PTSD was primarily caused by the August 2018 incident. Appellants state that Marx's doctors identified officer involved shootings that occurred before 2018 and argue that these events caused Marx's PTSD through a gradual mental stimulus, rather than an identifiable event. But Marx's doctors merely identified four other fatal officer involved shootings before 2018. The doctors did not conclude that any of these previous shooting events was the primary cause of Marx's PTSD, nor that Marx's PTSD was caused by a gradual culmination of these past incidents.

Dr. Nguyen, on the other hand, offered his medical opinion in a response to a letter from Marx's counsel. Dr. Nguyen's medical opinion was that Marx's PTSD and the August 2018 shooting event were directly related. Thus, the only causal connection from the record is that Marx's PTSD was the result of the August 2018 incident, especially due to the lack of any medical evidence stating otherwise. As the appeals officer's decision and order indicated, merely identifying other past shootings involving Marx does not constitute sufficient evidence to show that Marx's condition was caused by a gradual escalation of mental stress.

Appellant's argument is also controverted by the record. The appeals officer clearly indicated that to meet his burden under NRS 616C.180, Marx must prove all statutory elements by clear and convincing evidence. *See* NRS 616C.180(3). She then concluded that the evidence was sufficient to meet each element and discussed how Dr. Nguyen's reports

provided substantial evidence that Marx's PTSD arose from the August 2018 event. The appeals officer also mentioned the corroborating evidence from Dr. Tenney's and Dr. Vincent's reports.

We acknowledge appellants are correct that the appeals officer's used the word "substantial" when referring to the evidence. Such use was misguided if it was intended as a statement of the burden of proof. However, when taken in context with all the findings of law and fact, we conclude that it was not a statement of the burden of proof, and the appeals officer applied the correct statutory standard.

We also point out that NRS 616C.180(3) only requires that the incident causing a claimant's injury be the primary cause of the injury, not the exclusive cause. The appeals officer's conclusion meets the evidentiary standard in light of the totality of the evidence, including the appellants' failure to present any evidence contradicting or limiting Dr. Nguyen's medical opinions. Thus, the appeals officer's conclusion that Marx presented clear and convincing evidence to establish a workers' compensation claim based primarily on the 2018 incident is not clearly erroneous, arbitrary or capricious, or an abuse of discretion.

Substantial evidence in the record supports the appeals officer's conclusion that Marx's PTSD was not the result of a gradual mental stimulus

Appellants additionally argue that the appeals officer incorrectly concluded that Marx's PTSD was not caused by a gradual mental stimulus. Appellants assert that although Dr. Nguyen agreed that the August 2018 was directly related to Marx's PTSD, the August 2018 event is still not the primary cause of Marx's injury, and therefore Marx's claim is barred. On the other hand, Marx argues that Dr. Nguyen's medical reports and opinion, along with the lack of any diagnosis or treatment of PTSD

before the August 2018 shooting, are sufficient to affirm the appeals officer's decision and order. We agree with Marx.

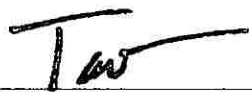
Although Marx's doctors identify his prior officer involved shootings that may have impacted Marx in some way over the years, there is little to no medical evidence stating that Marx's diagnosed PTSD in 2019 is causally connected to any shooting incident prior to 2018, or the result of any gradual mental stimulus over time. The appeals officer highlighted that the mere reference to past shooting events by Marx's doctors is insufficient evidence to show that Marx's PTSD resulted from a gradual escalation of stress. Marx also had no previous formal diagnosis or treatment for PTSD before Dr. Nguyen diagnosed him with PTSD following the August 2018 fatal shooting, though he had expressed that he had suffered from some of the symptoms associated with PTSD. However, Marx's descriptions of work-related stress before 2018 do not establish that Marx in fact suffered from PTSD before being diagnosed with it in March of 2019 following the 2018 shooting. Finally, after required meetings with a department psychologist, Marx was cleared as fully fit for duty and was able to return to work following each previous officer involved shooting before the one in August 2018—the only time Marx was not cleared to return to work was following the August 2018 incident.

Thus, the totality of the medical evidence in the record, particularly Dr. Nguyen's medical opinion, provides substantial evidence to support the appeals officer's determination that Marx's PTSD was not the result of a gradual mental stimulus but primarily caused by the August 2018 incident, supporting an award of workers' compensation benefits.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Janet Trost, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Greenman Goldberg Raby & Martinez
Eighth District Court Clerk