IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOROTHY LUBIN,
Appellant,
vs.
EXTENDED STAY AMERICA; AND BROADSPIRE,
Respondents.

No. 87368-COA

ORDER OF AFFIRMANCE

Dorothy Lubin appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In September 2019, Lubin was employed as a general manager at respondent Extended Stay America (Extended Stay) in Las Vegas when she was carrying trash bags down a stairway and a trash bag broke.[1] As she was cleaning up the spilled trash, she backed down the steps and a piece of plastic and/or tread covering of a step became loose and caused her to fall two or three steps backwards. Lubin was transported to Sunrise Hospital via EMS. In a handwritten medical form, her chief complaints were listed as "right leg pain, lower back pain, posterior head pain, -LOC, [and] numbness down [right] leg."[2] Lubin, who was 55 years old at the time, was admitted and remained in the hospital for four days while undergoing

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

[2]"LOC" is a common medical abbreviation for either "loss of consciousness" or "level of consciousness." It is unclear who completed this form. The dash ("-") preceding "LOC" would later become significant, because the Administrator argued that the dash signified that Lubin was "negative" for loss of consciousness. All medical records from Sunrise Hospital state that Lubin denied experiencing loss of consciousness.

testing. Medical records state that Lubin reported that she hit the back of her head and was unable to get up. Lubin also reported experiencing headaches with visual disturbances. Medical records show also that Lubin has a history of migraines with photophobia. Multiple CT scans of her brain were negative for intracranial abnormality, traumatic injury, and bleeding. A progress note from Sunrise Hospital's neurology department from the day following the accident states that Lubin continued to have knee pain "but neurologically she [was] intact." The progress note states that it was "okay to discharge [Lubin] from [the neurology department's] point of view" and recommended anti-inflammatories for migraines. Lubin was discharged from Sunrise Hospital with a walker four days after admission with instructions to follow up with her primary care provider. A C-4 form was not completed at the hospital.

Two weeks after she was discharged, Lubin was examined by a physician's assistant at a sports medicine clinic. Lubin indicated that she would like to seek workers' compensation benefits and the physician's assistant completed a C-4 form indicating that she was diagnosed with "cervicalgia, lumbar sprain, right knee pain, sprain of LCL right knee." Lubin's C-4 form does not list head injury as a diagnosis. The physician's assistant ordered an MRI of the right knee and physical therapy for Lubin's low back pain and cervical pain. The workers' compensation claims administrator, respondent Broadspire (the Administrator), authorized a consultation with an orthopedist, a knee MRI, and physical therapy.

In October 2019, the Administrator accepted Lubin's workers' compensation claim. The Administrator, however, limited the scope of the claim to cervical, lumbar, and right knee sprains. Lubin requested the inclusion of a head injury in the scope of her claim. The Administrator

informed Lubin that she would need to appeal the notice of acceptance in order to expand the scope of her claim to include a head injury. Lubin appealed the Administrator's denial of expansion of the scope in October 2019.

Lubin underwent MRIs for her knee and lumbar spine and began attending physical therapy sessions. In October 2019, Dr. Brandon Snead, a spine and sports medicine physician, reviewed Lubin's MRIs and diagnosed spondylosis, degenerative disc with minimal disc bulge from L3-S1. Lubin's right knee MRI showed chondromalacia and tendinosis. Dr. Snead stated that the findings on both MRIs were degenerative, and that Lubin's symptoms were consistent with the degenerative changes. Lubin continued to attend physical therapy sessions.

Lubin was seen by Dr. Snead again in November 2019. Dr. Snead issued his final report releasing Lubin from his care, stating that Lubin's injuries were not ratable, and that Lubin would be at maximum medical improvement after she completed her last three physical therapy sessions to treat "muscle strains related to the fall at work." Dr. Snead released Lubin to full-duty work without restrictions. Shortly thereafter, the Administrator issued a notice of intention to close Lubin's claim without a permanent partial disability (PPD) evaluation. In December 2019, Lubin appealed the Administrator's intent to close her claim, arguing claim closure would be premature.

Both appeals (expansion of scope and claim closure) were consolidated, and the parties agreed to bypass the hearing officer and present them directly to an appeals officer. Apparently, the Administrator did not have a copy of the C-4 form, because the appeals officer remanded the issue of scope to allow the Administrator to obtain a copy of the form

and to consider Lubin's request to include a head injury, concussion, and visual disturbance in her claim.[3] The Administrator declined to expand the scope of the claim based upon review of the C-4 form. Lubin appealed this determination, and the parties once again agreed to present the issue directly to an appeals officer.

In February 2020, Lubin sought an evaluation with neurologist Dr. Enrico Fazzini. It is unknown what records were provided to Dr. Fazzini, but he ordered a brain MRI. Lubin reported multiple problems that she attributed to striking her head when she fell in September 2019, including headaches and cognitive deficits. Lubin claimed that she was unconscious for approximately ten minutes after she fell. Lubin reported a prior head injury 20 years ago but stated that it did not require imaging. It appears that Lubin did not report her history of migraines to Dr. Fazzini.

The appeals officer heard argument in May 2020. Prior to the hearing, Lubin submitted a 90-page appendix containing medical records from Sunrise Hospital, Nevada Sports and Spine, Dr. Fazzini's February 2020 report, and the brain MRI she obtained in February 2020. The appeals officer determined that the issue of scope of the claim was a medical question and ordered Lubin to undergo an independent medical evaluation

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[3]Lubin objected to the admission of the C-4 form because it was completed by a physician's assistant, not a medical doctor. At the time, NRS 616.040(1) required that C-4 forms be signed by the treating physician or chiropractor. However, in 2021, NRS 616C.040(1) was amended to allow for a physician's assistant to sign C-4 forms. During the final administrative proceedings hearing in July 2021, Lubin presented this argument to the appeals officer, who then asked if Lubin was arguing that her entire workers' compensation claim should be invalidated based on a faulty C-4 form. Lubin stated that she disputed only the fact that the C-4 did not list a head injury diagnosis. The appeals officer correctly concluded that Lubin's argument "goes to scope" and not the validity of her C-4 form.

(IME) to determine the extent of her industrial injuries, whether further treatment was recommended, and whether Lubin had any residual impairment related to the injuries. The appeals officer's interim order stated,

> No party or their representative shall contact the physician or attend the evaluation without the prior permission of the Appeals Officer, except[ ] 1) the Employer/Administrator/Representative for the purpose of scheduling the evaluation, forwarding the appropriate documentation, arranging payment, and activities incidental thereto; and 2) the Claimant for purposes of attending the evaluation.

In June 2020, Lubin returned to Dr. Fazzini with her brain MRI. Dr. Fazzini opined that the MRI demonstrated "borderline evidence for the presence of a traumatic brain injury which may be significant in this clinical setting depending on the results of neuropsychological testing." Dr. Fazzini diagnosed a possible traumatic brain injury with various post-concussive symptoms, and cervical, thoracic and lumbar myofascial pain syndrome with disk protrusions in the cervical and lumbar spine, as well as a right knee internal derangement.

The parties agreed to select Dr. Gobinder Chopra to conduct the IME, and he evaluated Lubin in August 2020. Dr. Chopra was asked to offer his opinion regarding the proper scope of this claim after reviewing the medical records submitted by the parties. Dr. Chopra had multiple medical reports from the various doctors who treated Lubin, including Dr. Fazzini's February and June 2020 reports. Dr. Chopra noted that Lubin had denied loss of consciousness when she first presented to Sunrise Hospital, and that her neurological evaluation was normal at that time. Dr. Chopra reviewed and summarized Sunrise Hospital's neurology records and Dr. Fazzini's

report. Dr. Chopra also conducted his own neurological examination, which he determined was normal. Dr. Chopra noted that Dr. Fazzini's report mentions that Lubin complained of "cognitive deficits following borderline traumatic brain injury." Dr. Chopra diagnosed a painful neck, low back pain, and pain in the right knee. As to Lubin's complaint of a head injury, Dr. Chopra opined that Lubin had a minor head injury with no residual effects as a result of her industrial accident. Finally, Dr. Chopra opined that Lubin did not need any further treatment for her lumbar spine or knee industrial injuries, and she had no ratable impairment.

In November 2020, after Dr. Chopra issued his report, but before the parties returned for a hearing with the hearing officer, Lubin underwent a neuropsychological evaluation by psychologist Dr. Michael Elliott. Dr. Elliott determined that Lubin's evaluation scores, along with her self-reported symptoms and Dr. Fazzini's opinion of Lubin's brain MRI were consistent with a traumatic brain injury. Lubin had a prior history of head injury, and no imaging was performed at the time. Neither Dr. Fazzini nor Dr. Elliott stated, to a degree of reasonable medical probability, that Lubin's possible traumatic brain injury was caused by the industrial accident.

In December 2020, before the hearing with the appeals officer, but after Dr. Chopra issued his report, Lubin attempted to enter Drs. Fazzini's and Elliott's reports into evidence by filing a motion for leave to supplement the record.[4] The appeals officer denied her motion because

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[4]Lubin also sought to admit a declaration prepared by Flor Cifuentes, who was working at the Extended Stay's front desk on the day of the accident. In her declaration, Cifuentes stated that on the day of Lubin's injury, she received a call from a hotel housekeeper informing her that she

Lubin filed it only after the appeals officer issued his interim order for Lubin to undergo an IME, and Lubin never previously made requests to leave the record open or for a continuance to obtain additional documentation.

Also, before the hearing with the appeals officer, Dr. Chopra reviewed the additional Fazzini and Elliott reports and wrote a three-page addendum summarizing the reports.[5] At the hearing, Lubin attempted to enter the addendum into evidence. However, because the addendum was based on previously excluded evidence, the hearing officer denied Lubin's request.

In January 2022, the appeals officer issued a decision and order modifying the scope of the claim to include a minor head injury with no residual symptoms, to reflect Dr. Chopra's IME report. Further, the appeals officer affirmed the Administrator's determination to close the claim. In his decision and order, the appeals officer notes Dr. Fazzini's possible diagnosis of traumatic brain injury. However, he stated that he found Dr. Chopra's opinions credible and persuasive—that is, that Lubin had a minor head injury with no residual symptoms, that Lubin did not need additional treatment, and that there was no ratable impairment. The

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had found Lubin unconscious at the bottom of the rear stairwell next to a stair covering, presumably referring to tread covering. Cifuentes stated that she called 9-1-1 from her cellphone and that Lubin regained consciousness while waiting for an ambulance.

[5]It is unknown who provided these records to Dr. Chopra. At the hearing, Lubin's counsel denied sending them to Dr. Chopra, stating that Dr. Chopra "somehow . . . obtained some of these records." The appeals officer stated that "doctors don't usually pick up files out of the blue and do addendums. Something had to prompt him, so I'm not sure what that was."

order also noted that Lubin's C-4 form contained no diagnosis regarding a head injury.

In January 2022, Lubin petitioned the district court for review, which was denied. Lubin filed a motion for reconsideration, which the district court denied in September 2023. This appeal followed.

Lubin was not denied due process in the administrative proceedings

Lubin argues that the appeals officer denied her due process by excluding eyewitness evidence that she lost consciousness after she fell and additional medical records substantiating that Lubin was receiving ongoing treatment for her industrial injuries. The Administrator contends that after seeing Dr. Chopra's IME report, Lubin sought to gather evidence to address Dr. Chopra's opinion that she merely suffered from a minor head injury, and therefore, the appeals officer was correct to exclude additional records.

Nevada appellate courts review administrative agency decisions in the same capacity as the district court and, as such, give the district court's decision no deference. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An appellate court will not reweigh the evidence or substitute its judgment for that of the appeals officer on a question of fact. *Horne v. SIIS*, 113 Nev. 532, 537, 396 P.2d 839, 842 (1997). This court examines an administrative agency's decision for clear error or an abuse of discretion, independently reviewing purely legal issues and upholding fact-based conclusions when such conclusions are supported by substantial evidence. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005); *see also* NRS 233B.135(3); *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. "Substantial evidence" is that "which a reasonable mind might accept as adequate to support a conclusion," regardless of whether this court would have reached the same conclusion in

the appeals officer's place. *Horne*, 113 Nev. at 537, 936 P.2d at 842 (quoting *Schepcoff v. SIIS*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). The party attacking or resisting the decision has the burden of proof to show that the final decision is invalid. NRS 233B.135(2).

Here, after determining that there was a medical question at issue, the appeals officer ordered an IME to assist him in resolving the issue of claim scope. Both parties agreed to enlist Dr. Chopra to perform the IME. Dr. Chopra concluded that Lubin suffered a minor head injury with no residual effects and that she had no ratable impairment as a result of her other industrial injuries because they were resolved or degenerative in nature. It was only after Dr. Chopra issued his report—a report with which Lubin was apparently unsatisfied—that Lubin followed through with Dr. Fazzini's June 2020 recommendation to undergo neuropsychological testing. Lubin attempted to file additional evidence to counter the IME report by first asking for leave, which the appeals officer denied. As the May 2021 hearing approached (in which the appeals officer was set to render his opinion as to scope and closure after reviewing Dr. Chopra's report), Lubin filed Dr. Chopra's addendum summarizing the medical records which the appeals officer specifically excluded.[6]

Lubin argues that the appeals officer abused his discretion in excluding this additional evidence because NRS 616C.360(2) mandates that the "appeals officer must hear any matter raised before him or her on its merits including new evidence bearing on the matter." This argument,

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[6]NRS 616C.145 allows an injured employee to obtain an IME by the leave of a hearing officer or appeals officer after the denial of any therapy or treatment. This suggests that formal permission is typically required for introducing new medical evaluations into the record.

however, is deemed waived because it was not raised in the administrative proceedings and was first raised in Lubin's motion for reconsideration with the district court; therefore, this court need not consider it.[7] *See Highroller Transp., LLC v. Nev. Transp. Auth.*, 139 Nev., Adv. Op. 51, 541 P.3d 793, 800-03 (Ct. App. 2023) (addressing waiver in the administrative context); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Accordingly, we conclude that the appeals officer did not violate Lubin's due process rights when it denied her motion for leave to file additional evidence, because the appeals officer ordered Lubin to undergo an IME, which included the review of the medical records that were in front of the appeals officer at the time. Further, Dr. Chopra's addendum summarizing the excluded medical records was filed without a request for

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[7]If we consider the merits of Lubin's argument, we note that although Dr. Fazzini opined that Lubin's MRI together with the results of her neuropsychological evaluation scores demonstrate evidence "associated with a traumatic brain injury," Dr. Fazzini was aware that Lubin had a prior head injury and he never stated that Lubin's traumatic brain injury was, to "[a] degree of reasonable medical probability . . . caused by the industrial injury." NRS 616C.098(1). Therefore, the appeals officer acted within his discretion to weigh the opinions of Dr. Snead, Dr. Chopra, and Dr. Fazzini, along with emergency room medical records, and concluded that Dr. Chopra's and Dr. Snead's opinions were more credible.

We note that, in the administrative proceedings, Lubin argued that traumatic brain injuries may take time to develop. While this may be true, if Lubin's brain injury developed over the five-month period between her industrial injury and the time when she obtained a brain MRI, a possible path may be to file for claim reopening under NRS 616C.160, which lays out the procedure for seeking treatment for a "newly developed injury or disease" caused by the industrial injury. NRS 616C.160.

permission from the appeals officer, and therefore Lubin improperly submitted them. Finally, even if the appeals officer had considered the excluded medical records, and even if the appeals officer believed Dr. Fazzini's and Dr. Elliott's opinions were sufficient to establish that Lubin suffered a traumatic brain injury, their opinions did not establish that Lubin's brain injury was to "a degree of reasonable medical probability" caused by the industrial injury. NRS 616C.098.

Lubin's workers' compensation claim was not prematurely closed without a PPD rating

Lubin argues that her claim was prematurely closed because she was still receiving treatment for her industrial injuries.[8] The

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[8]In Lubin's appellate reply brief, she notes that in March 2024, the Division of Industrial Relations suspended Dr. Chopra from the panel of rating physicians because it "received credible information" that he never received a passing score on the Nevada Impairment Rating Skills Assessment Test (NIRSAT). Accordingly, Lubin argues, the appeals officer would not have issued the decision below had he known that Dr. Chopra was not qualified to perform an IME. Normally we would consider an argument raised for the first time in a reply brief on appeal as improper, and this court would not consider it. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983; *see also Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 199 (2005) (explaining that this court need not consider issues raised for the first time on appeal in an appellant's reply brief). However, because of the apparent recent disclosure of this information, we will briefly address the issue. This argument is unpersuasive on the merits because Dr. Chopra was on the panel of rating physicians at the time the parties agreed to enlist him to perform Lubin's IME. Further, Dr. Chopra was not asked to rate Lubin's impairment. Instead, he was asked to determine the extent of Lubin's industrial injuries, whether further treatment was recommended, and whether Lubin had any residual impairment related to the injuries. Further, while Dr. Chopra's suspension is based on "credible information" that he did not receive a passing score, a final determination as to his status is unclear. Therefore, the situation as described by Lubin does not change our overall conclusion. Nevertheless,

Administrator defends its decision to close Lubin's claim by pointing to Dr. Snead's November 2019 report, in which he released Lubin to full-duty work without permanent restrictions and stated that her injuries were not ratable.

NRS 616C.235 provides that the insurer has the authority to close a claim if it has determined that the claimant does not require further medical treatment for her industrial injuries, provided that the insurer sends a written notice of its intention to close the claim. "If there is a medical question or dispute concerning an injured employee's condition or concerning the necessity of treatment for which authorization for payment has been denied, the appeals officer may: (a) Order an independent medical examination . . . ." NRS 616C.360(3)(a). "The appeals officer may consider the opinion of an examining physician, . . . in addition to the opinion of an authorized treating physician, chiropractic physician, physician assistant or advanced practice registered nurse, in determining the compensation payable to the injured employee." NRS 616C.360(4).

Here, there is no dispute that the Administrator complied with the governing law in issuing the written notice of its intention to close Lubin's claim. The parties dispute only the need for further treatment for Lubin's industrial injuries. The Administrator determined that closure was appropriate after Dr. Snead re-evaluated Lubin and reviewed her lumbar and knee MRIs in November 2019. Dr. Snead stated that the findings on both MRIs were degenerative and that Lubin's symptoms were consistent with degenerative changes. Dr. Snead also stated that "[t]his is not a ratable injury" and that Lubin would be at maximum medical improvement

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we make no determination as to what impact Dr. Chopra's situation might have in future proceedings.

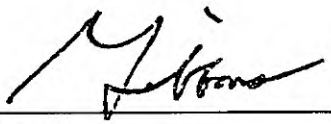
after she completed her last three physical therapy sessions to treat "muscle strains related to the fall at work." Dr. Snead released Lubin to full-duty work without restrictions. Shortly thereafter, the Administrator issued a notice of intention to close Lubin's claim without a permanent partial disability (PPD) evaluation.

Lubin appealed the Administrator's decision to close her claim and the appeals officer ordered Lubin to undergo an IME. The parties agreed to have Dr. Chopra perform the IME, and Dr. Chopra agreed with the opinions of Sunrise Hospital neurologists and Dr. Snead, but also opined that Lubin suffered a minor head injury as a result of her industrial accident. Although the appeals officer did not consider Dr. Fazzini's most recent reports and Dr. Elliott's psychological assessments, Drs. Fazzini and Elliott did not state to the required standard of "a reasonable degree of medical probability" that Lubin's traumatic brain injury was caused by her industrial accident. *See* NRS 616C.098. Finally, the appeals officer found Dr. Chopra's opinions "credible and persuasive," and modified the scope of Lubin's claim to include a minor head injury.

Although there was conflicting evidence regarding medical questions, we conclude that the appeals officer acted within his discretion to resolve questions of fact, and his decision was based on substantial evidence. And because this court will not reweigh the evidence or substitute its judgment for that of the appeals officer on a question of fact, *Horne*, 113 Nev. at 537, 936 P.2d at 842, we affirm the appeals officer's decision.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[9]



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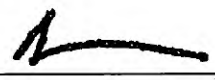

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Susan Johnson, District Judge
Gerald F. Neal
Hooks Meng & Clement
Eighth District Court Clerk

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[9]Insofar as Lubin has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.