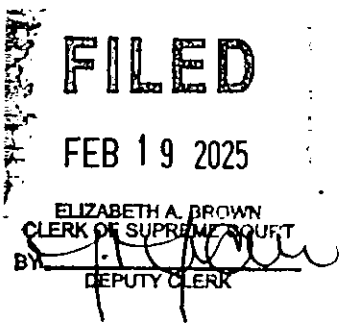
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STAFFMARK LAS VEGAS; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Appellants,
vs.
HARRY GIBSON,
Respondent.

No. 87990-COA




*ORDER OF AFFIRMANCE*

Staffmark Las Vegas and its third-party administrator Cannon Cochran Management Services, Inc. (CCMSI) appeal from a district court order granting a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Respondent Harry Gibson was hit by a forklift and injured while working for Staffmark. He received medical treatment at Concentra and filled out a C-4 form, listing various injuries, including his back. The physician diagnosis on his form was a "cervical/thoracic contusion/sprain." The diagnosing physician specified that the injury was directly connected as job incurred. CCMSI accepted other injuries not relevant to the instant appeal but denied acceptance of his cervical and thoracic spine injuries. Gibson appealed, and a hearing officer affirmed CCMSI's determination and declined to expand the scope of the claim. Gibson then appealed that decision.

At CCMSI's request, Gibson underwent an independent medical examination (IME) with Dr. Mark Rosen, a bone and joint



25-076040

specialist, for his thoracic and cervical spine. Following the IME, Dr. Rosen recommended MRIs of Gibson's thoracic and cervical spine. Based on the IME, CCMSI approved the recommended MRIs "on a rule out basis only." Following the completion of the MRIs, which reflected multiple findings for both the cervical and thoracic spine, CCMSI sent Dr. Rosen a letter asking him to address in a final report (1) which injuries were and were not industrially related, (2) whether Gibson had reached maximum medical improvement (MMI) on the industrially-related injuries, and if not, (3) his recommended treatment plan to bring Gibson to MMI status.

Dr. Rosen responded, answering each of CCMSI's questions. With respect to the first question, he opined that the MRI of the cervical spine showed a C3-4 protrusion and C6-7 disc protrusion, which were "likely related to the industrial injury," but that the other cervical findings on the MRI were likely degenerative in nature. He further opined that the MRI of the thoracic spine showed that, based upon the history and physical, a T7-T8 3mm central and right paracentral protrusion was likely related to the industrial injury, but that the other thoracic findings on the MRI were degenerative in nature. With respect to the second question, Dr. Rosen answered "[n]o," that Gibson was not at MMI on the industrial-related injuries. And, in answering the third question, Dr. Rosen recommended treatment for the spine injuries. He concluded his letter by noting that his opinions, conclusions, and recommendations were based upon reasonable medical probability. CCMSI did not expand the scope of Gibson's claim to include the cervical and thoracic injuries.

Following a hearing on Gibson's appeal, the appeals officer issued a written decision and order denying Gibson's request to expand the scope of the claim to include his cervical and thoracic spine injuries. The

appeals officer noted the injuries listed in Gibson's C-4 form and found the C-4 form reflected that the diagnosing physician indicated the diagnoses were directly connected to the work accident. The appeals officer also noted that Gibson's Concentra medical records consistently diagnosed the same body parts and showed that examinations and treatments were provided for Gibson's cervical sprain and thoracic sprain. Turning to Dr. Rosen's report, the appeals officer found that the report indicated Gibson's cervical and thoracic spine MRIs showed protrusions that were likely related to the industrial injury, while the other conditions noted by the MRI were likely degenerative in nature. Dr. Rosen further opined that Gibson had not reached MMI for the cervical and thoracic spine injuries and made treatment recommendations for those injuries. As the appeals officer found, Dr. Rosen's report concluded that his medical opinions were stated to a reasonable degree of medical probability.

Having made the above findings, the appeals officer concluded Gibson did not satisfy his burden of proof to establish that the cervical and thoracic spine protrusions should be included in his claim. Despite finding that the diagnosing physician who filled out Gibson's C-4 form directly connected the cervical and thoracic contusions/sprain as job incurred, the appeals officer made no mention of this fact in reaching her conclusion. Instead, the appeals officer focused only on Dr. Rosen's report, concluding that Dr. Rosen's finding that the cervical and thoracic spine protrusions were "likely" related to the work accident was not, in and of itself, legally sufficient to establish causation. As such, the appeals officer did not find Dr. Rosen's opinions persuasive and, therefore, determined that Gibson

failed to show, by a preponderance of the evidence, that his spine injuries were causally related to the industrial accident.[1]

Gibson timely petitioned for judicial review, and the parties briefed their arguments for the district court. Following a hearing, the district court entered a written order granting Gibson's petition for judicial review, reversing the appeals officer's decision, and remanding the matter back to the administrative level to order CCMSI to expand the scope of the claim to include Gibson's cervical sprain, thoracic sprain, C3-4 protrusion, C6-7 disc protrusion, and T7-T8 3mm central and right paracentral protrusion. In so doing, the district court found that the appeals officer's decision was clearly erroneous in view of the reliable, probative and substantial evidence, which demonstrated that the cervical and thoracic injuries should have been accepted body parts. The district court found that Dr. Rosen's use of the term "likely related," coupled with his statement that his opinions were stated to a reasonable degree of medical probability was sufficient to establish causation under NRS 616C.098. The district court also concluded that using "likely related" did not disturb the legal significance of the phrase to determine the causation of an industrial injury, and that the word "likely" can be defined as having a high probability of occurring or being true. This appeal followed.

On appeal, appellants contend the appeals officer correctly applied the law, and that her determination was supported by substantial evidence. They argue the appeals officer's determination was proper because Gibson failed to meet his burden to show that the scope of his claim should be expanded to encompass his cervical and thoracic spine injuries

[1]The appeals officer remanded the matter to CCMSI to accept other injuries not relevant to the instant appeal.

since Dr. Rosen's report merely stated that those injuries were "likely" related to the industrial injury rather than "more likely than not," and the preponderance standard requires something more than speculation and conjecture. Gibson disagrees.

"The standard for reviewing petitions for judicial review of administrative decisions is the same for [the appellate court] as it is for the district court." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). We review questions of law de novo, *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010), but we "shall not substitute [our] judgment for that of the agency as to the weight of evidence on a question of fact," NRS 233B.135(3). But we may reverse a final decision if the final decision of the agency was affected by an error of law, if it was "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," or if the decision was "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(e) & (f). Substantial evidence is "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4). Therefore, "[w]e defer to an agency's findings of fact as long as they are supported by substantial evidence." *Phillips*, 126 Nev. at 349, 240 P.3d at 4. In our review, this court does "not give any deference to the district court decision." *Warburton*, 127 Nev. at 686, 262 P.3d at 718.

Typically, an injured employee must establish by a preponderance of the evidence that their occupational injury arose out of and in the course of their employment to be entitled to receive workers' compensation benefits. NRS 616C.150. The injured worker "must show a causal nexus between the final condition and the industrial injury before [workers'] compensation benefits may be recovered." *United Exposition*

*Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). NRS 616C.098 provides that certain phrases relating to a claim for compensation for an industrial injury and used by a physician when determining causation of an industrial injury are deemed to be equivalent and may be used interchangeably. Those phrases are: "[d]irectly connect this injury or occupational disease as job incurred," and "[a] degree of reasonable medical probability that the condition in question was caused by the industrial injury." NRS 616C.098.

"An award of compensation cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co.*, 109 Nev. at 424, 851 P.2d at 425. When opining on causation in a workers' compensation claim, "[a] testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." *Id.* at 424-25, 851 P.2d at 425.

Having reviewed the appeals officer's decision in light of the foregoing standards, we conclude that the appeals officer's determination is not supported by substantial evidence. While appellants assert that Dr. Rosen's use of "likely related" in his report is not the same as "more likely than not," and therefore legally insufficient, under the specific facts of this case, we conclude that his determination that the subject injuries were "likely related" to the industrial accident is sufficient to establish causation when viewed in the context of Dr. Rosen's report as a whole and CCMSI's letter which prompted the report.

Here, appellants point to *United Exposition Service*, 109 Nev. 421, at 424, 851 P.2d at 425, to support their position that Dr. Rosen's

statement that the injuries were "likely related" to the industrial accident is insufficient. In *United Exposition Service*, the supreme court held that a physician's opinion that an injury "possibly could have been" related to an industrial injury was insufficient to establish causation. *Id.* But unlike the language used in *United Exposition Service*, in this case, the statement that the injury was "likely related" to the accident was more definitive. *Compare Possibly, Merriam-Webster's Dictionary* (11th ed. 2020) (defining possibly as "by merest chance") with *Likely, Merriam-Webster's Dictionary* (11th ed. 2020) (defining likely as "having a high probability of occurring or being true"). Moreover, to the extent there could be any ambiguity stemming from this phrasing, a review of the report demonstrates that Dr. Rosen was—in fact—concluding that the injury stemmed from the industrial accident as reflected in the headings used in the report and the fact that the report's responses to certain of the questions that CCMSI had posed would have been unnecessary if the injuries were not industrially related.

The record shows that in response to CCMSI's specific questions, Dr. Rosen was opining that the C3-4 protrusion, C6-7 disc protrusion, and T7-T8 3mm central and right paracentral protrusion were causally connected to the industrial injury to a reasonable degree of medical probability. Specifically, with respect to the first question, in a section of the report labeled "what is and is not industrially related," Dr. Rosen opined that the C3-4 protrusions were "likely related," while distinguishing the remaining findings reflected in the MRI as likely degenerative in nature. Similarly, with respect to the thoracic spine, Dr. Rosen again opined that the T7-T8 3mm central and right paracentral protrusion was "likely related" to the industrial injury but distinguished the remaining findings as degenerative in nature. These distinctions, together with the heading

"what is and is not industrially related" overarching this portion of the report, reflect that Dr. Rosen concluded that those injuries which were not degenerative were industrially related injuries to the thoracic and cervical spines.

Additionally, Dr. Rosen's responses to the remaining questions further demonstrate that he had, in fact, concluded that the cervical and thoracic injuries were industrially related. With respect to the second question, whether Gibson was at MMI on the industrial related issues, Dr. Rosen answered "No." But there would be no need to provide an answer to that question had none of the findings been causally linked to the industrial injury. And, answering that Gibson was not at MMI on the industrial issues necessarily reflects that, in Dr. Rosen's opinion, there were industrial injuries. Likewise, the third question need not have been answered if Dr. Rosen had found no industrially-related injuries. Instead, Dr. Rosen recommended treatment for Gibson's cervical and thoracic spine injuries to bring him to MMI status. Finally, the report made clear that Dr. Rosen stated his opinions to a reasonable degree of medical probability. *See* NRS 616C.098.

In addition to Dr. Rosen's report, other evidence in the record further demonstrates that the appeals officer's decision was not supported by substantial evidence. Notably, Gibson reported his back injuries on his C-4 form after seeking medical treatment at Concentra. And the Concentra physician diagnosed him with cervical and thoracic contusions/sprains and directly connected that injury as job incurred on the C-4 form, as the appeals officer found. Further, following the initiation of his claim, Gibson repeatedly sought treatment for his thoracic and cervical spine injuries and was consistently diagnosed with cervical and thoracic sprains, which the

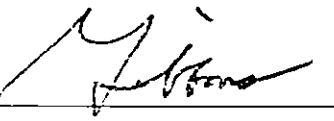
appeals officer also found, and which was supported by medical records. This is a stark contrast to the situation in *United Exposition Service*, where the record demonstrated there was significant evidence of other contributing factors to the claimant's final condition. 109 Nev. at 425, 851 P.2d at 425. In this case, the appeals officer did not note any other contributing factors and, in fact, her order notes the opposite—that the cervical and thoracic injuries were directly connected to the industrial accident by the Concentra physician and were consistently diagnosed and treated following the accident.

Consequently, Dr. Rosen's opinion, taken together with the questions posited by CCMSI and Gibson's C-4 form directly connecting his spine injuries to the industrial accident, were sufficient to demonstrate that the spinal injuries were caused by the industrial injury. *See United Exposition Serv. Co.*, 109 Nev. at 424-25, 851 P.2d at 425; NRS 616C.098. Although this court will not substitute its judgment for that of the agency as to the weight of the evidence, this court will reverse an agency decision that is clearly erroneous in light of the "reliable, probative, and substantial evidence on the whole record." *See* NRS 233B.135(3). Under the facts of this case, we conclude the appeals officer's determination was clearly erroneous in light of the record as a whole, and that the scope of Gibson's claim should have been expanded to include his cervical and thoracic spine injuries as the district court concluded in granting Gibson's petition for judicial review. *See United Exposition Serv. Co.*, 109 Nev. 421, at 425, 851 P.2d at 425-26 (reversing a district court's denial of judicial review, which affirmed the appeals officer's decision, where the appeals officer's determination was clearly erroneous in light of the record as a whole).

Accordingly, we conclude that the district court properly granted Gibson's petition for judicial review, and we therefore affirm that determination.

It is so ORDERED.[2]

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Chief Judge of the Eighth Judicial District Court
Eighth Judicial District Court, Department XIV
Hooks Meng & Clement
Edward M. Bernstein & Associates/Las Vegas
Eighth District Court Clerk

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