IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY HENTHORN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE HENTHORN,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA, AND ALLAN LOWSON BRICK CONTRACTOR,
Respondents.

No. 38436

ORDER OF REVERSAL AND REMAND

Judy Henthorn, as personal representative of George Henthorn's estate, appeals from a district court order entered on judicial review, which affirms an administrative determination that Henthorn is not entitled to workers' compensation for an occupational disease.[1] We conclude that the appeals officer's decision is not legally sound; therefore, we reverse and remand with instructions to remand this matter to the appeals officer for further proceedings.

Henthorn worked as a mason and bricklayer for more than forty years. During his career, Henthorn dry-sawed rebar, stones, cement blocks, bricks and mortar, or supervised others doing so, and was constantly exposed to various kinds of dust, including silica and silicates. Henthorn rarely wore a protective mask or respirator, which would have reduced the amount of dust he breathed into his lungs. Ultimately,

[1]Mr. Henthorn filed the appeal, but died while it was pending. Mrs. Henthorn was substituted as appellant under NRAP 43(a).

Henthorn developed a disabling respiratory illness that prevented him from working. When his original treating physician, Dr. Chris Wall, diagnosed silicosis and attributed the disease to Henthorn's occupation, Henthorn filed a workers' compensation claim for occupational disease under NRS 617.460.

The employer's workers' compensation carrier, Employers Insurance Company of Nevada (EICON), denied Henthorn's claim because additional tests revealed none of the fibrous nodules associated with silicosis.[2] Henthorn appealed, and a hearing officer reversed. By this time, EICON's independent medical examiner, Dr. Robert Farney, had ruled out silicosis and had diagnosed diffuse pulmonary fibrosis of nonspecific or unknown origin (also referred to as idiopathic pulmonary fibrosis or IPF), with a pattern most consistent with usual interstitial pneumonitis (UIP).[3] Dr. Farney recommended a biopsy.

Henthorn was admitted to the Veteran's Administration (VA) hospital in Reno for a lung biopsy. Dr. Pacita Manalo's pathology report noted the biopsy was "consistent with chronic interstitial pneumonitis with severe fibrosis and smooth muscle proliferation." Dr. Kevin Leslie, of

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[2]NRS 617.140 defines silicosis as "a disease of the lungs caused by breathing silica dust (silicon dioxide) producing fibrous nodules, distributed through the lungs and demonstrated by x-ray examination or by autopsy."

[3]It appears from documents in the record that usual interstitial pneumonitis (UIP) bears the same relationship to idiopathic pulmonary fibrosis (IPF) as squares to rectangles. In other words, UIP is a subcategory of IPF. In each case, however, the designation "idiopathic" or "usual" means there is too little information to identify a specific cause for the disease.

the Mayo Clinic in Arizona, agreed with Dr. Manalo's observations, and noted also that there were "scattered mixed dust polarizable silicates," but no evidence of silicosis. Dr. Leslie's partner, Dr. Thomas Colby agreed with Dr. Leslie's comments, and both doctors thought Henthorn likely had UIP. Dr. Colby did not think it was caused by dust. Dr. Wall concurred with the interstitial lung disease diagnosis, but certified it as job incurred. Based on the changed diagnosis, the hearing officer determined that Henthorn's lung disease resulted from his occupational exposure to dust and was compensable under NRS 617.470,[4] even though it was not silicosis compensable under NRS 617.4600. EICON and the employer appealed.

The primary issue before the appeals officer was not diagnosis—the doctors now all agreed that Henthorn had pulmonary fibrosis—but rather causation. Under NRS 617.440, Henthorn bore the burden of establishing by a preponderance of the evidence, that his pulmonary fibrosis arose out of and in the course of his employment. NRS 617.440 specifies how to accomplish this; the relevant requirements are:

> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:

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[4]NRS 617.470 provides, "All conditions, restrictions, limitations and other provisions of NRS 617.460 with reference to the payment of compensation or benefits on account of silicosis or a disease related to asbestos are applicable to the payment of compensation or benefits on account of any other occupational disease of the respiratory tract resulting from injurious exposure to dusts."

(a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;

(b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;

(c) It can be fairly traced to the employment as the proximate cause; and

(d) It does not come from a hazard to which workmen would have been equally exposed outside of the employment.

2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.

3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.

In addition to the many medical documents and reports submitted by the parties, the appeals officer heard extensive testimony from two experts on the question of whether Henthorn's pulmonary fibrosis arose out of his lifetime's work as a brick mason. The evidence established that workers who are constantly exposed to dust in the workplace have a higher risk of contracting respiratory diseases as a result of their employment, but the two experts disagreed whether dust caused Henthorn's disease.

These experts—EICON's independent medical examiner, Dr. Farney, and Henthorn's treating pulmonologist at the VA hospital, Dr. Peter Krumpe—were well matched in credentials. Dr. Krumpe is Chief of Pulmonary Medicine at the VA hospital in Reno, Nevada; board certified in internal, pulmonary and critical care medicine; and a professor at the

University of Nevada School of Medicine, teaching courses in these specialties. Dr. Farney is Medical Director of the Sleep Disorders Laboratory at LDS Hospital in Salt Lake City, Utah; board certified in internal, pulmonary and clinical polysomnography (measuring sleep data) medicine; and a former professor of medicine at the University of Utah College of Medicine in the pulmonary division. Dr. Krumpe concluded that Henthorn's occupational dust exposure caused his disease, while Dr. Farney concluded that the cause was unknown, but it was not occupational dust exposure. In reaching their conclusions, Dr. Krumpe and Dr. Farney both eliminated many possible causes of pulmonary fibrosis, such as smoking, drugs and infection. Dr. Farney could not conclusively eliminate dust as a cause, but according to Dr. Farney, UIP is not an occupational disease because it occurs just as frequently in persons who are not exposed to job-related dust as it does in exposed persons. According to Dr. Krumpe, the fact that UIP is not solely an occupational disease does not mean that Henthorn's exposure to dust did not cause his disease.

The record contains supporting evidence for both of these opinions, consisting of written medical reports, written expert opinions and excerpts from medical literature and treatises. Henthorn sought a second opinion from Dr. Robert McDonald, a board certified doctor in internal, pulmonary and critical medicine. Dr. McDonald agreed with Dr. Krumpe's diagnosis. Based on Henthorn's long history of heavy silicate exposure without protection, and his unusual disorder (chronic interstitial pneumonia), Dr. McDonald was "comfortable stating that Henthorn has an

occupational lung disease," specifically "pulmonary fibrosis due to pneumoconiosis as an occupational disease."[5]

The appeals officer reversed the hearing officer's decision. In her order, the appeals officer noted that, to meet his burden of proof under NRS 617.440(1)(a), our decision in Seaman v. McKesson Corp.[6] required Henthorn to "show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease." After summarizing the medical evidence, the appeals officer concluded:

> In this case, [Henthorn] did not sustain his burden to show the relationship between his employment and he did not rebut the idiopathic nature of his disease. All of the examining physicians reviewed his clinical condition and employment history and compared it to the known examples of silicosis, asbestosis and similar diseases. No doctor was able to casually [sic] relate the conditions of his job to the diagnosed disease with the certainty required for [Henthorn] to meet his burden of proof.

In reaching her decision, the appeals officer stated that she considered Dr. Krumpe's opinion "as the treating physician," but did not rely upon his opinion that Henthorn's disease was caused by his occupation. She further noted that Dr. McDonald also concluded that Henthorn's occupation caused his disease. The appeals officer rejected these opinions on the basis that they "do not[,] however, meet the standard for certainty

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[5]According to the record, pneumoconiosis is lung disease caused by dust exposure.

[6]109 Nev. 8, 10, 846 P.2d 280, 282 (1993).

and are not persuasive to determine causation." Henthorn unsuccessfully petitioned the district court for judicial review, then appealed to this court.

Our review of the appeals officer's decision is identical to that of the district court. We must confine our review to the record, and we may not substitute our judgment for that of the appeals officer as to the weight of the evidence on factual questions; however, we may remand if the appeals officer's decision is affected by prejudicial legal error, or is not supported by the evidence.[7]

Here, the record does not support the appeals officer's conclusion that no doctor was able to causally relate Henthorn's job conditions to his diagnosed disease with the certainty required by law. Doctors Krumpe and McDonald's opinions both meet Seaman's requirement that Henthorn "show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease."[8] Although the appeals officer was not required to give Dr. Krumpe's opinion more weight because he was Henthorn's treating physician,[9] her reason for eliminating these two opinions was not legally sound.

Furthermore, it appears that the appeals officer's conclusion that Henthorn did not sustain his burden of demonstrating a causal

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[7]NRS 233B.135.

[8]Seaman, 109 Nev. at 10, 846 P.2d at 282.

[9]McClanahan v. Raley's, Inc., 117 Nev. 921, 34 P.3d 573 (2001) (common law treating physician rule, which requires the trier of fact to give the treating physician's medical opinion deference, does not apply in Nevada).

relationship between his disease and his employment, and did not rebut the idiopathic nature of his disease, rests upon a misconception regarding the burden of proof. Henthorn was not required to eliminate all possible non-occupational causes of his disease. Here, Henthorn's evidence, if believed, proved that his disease was caused by his work, and specifically by long-term inhalation of dust containing silica, silicates and other unidentified particles. Henthorn did not have to rebut EICON's evidence that the cause of Henthorn's disease was unknown. That would have required him to eliminate all possible causes of pulmonary fibrosis, and the record suggests that is presently an impossible task.

Dr. Krumpe noted that the biopsy examined one very small part of Henthorn's right lung and the light microscopy used to examine the biopsy tissue sample was not sensitive enough to identify the lung's dust and fiber burden. He testified that additional testing could help resolve the causation question by identifying the particles that were present in Henthorn's lungs. For example, x-ray diffraction microscopy or scanning electron microscopy with elemental analysis could be used to identify the crystallography and specific mineralogy of the lung's particulate burden. A large lung tissue sample could be digested to remove the organic material and concentrate the inorganic material for analysis. These are not routine clinical tests, however, and Dr. Farney noted that although electron microscopy could be used to analyze the dust particles present in Henthorn's lung biopsy, such testing usually was not done unless a specific kind of fiber, like asbestos, was suspected. Dr. Krumpe also noted that persons with silicosis have characteristic autopsies after they die, as do persons with some other fibrotic diseases, and that autopsies can help confirm a diagnosis.

Henthorn was too sick to undergo a second lung biopsy during the administrative proceedings and, unfortunately, he died during this appeal. The autopsy performed after his death may enable the parties to conclusively determine whether Henthorn's job-related dust inhalation caused his pulmonary fibrosis. We may not consider the autopsy and we may not weigh the evidence in the record before us, but we may remand so that the appeals officer may reconsider the evidence, including the opinions of Doctors Krumpe and McDonald, under the correct standard of proof.[10]

Accordingly, we reverse the district court's order and remand with instructions that the district court remand this matter to the appeals officer to (1) reconsider Henthorn's claim, and (2) take additional evidence consisting of the autopsy and any evidence necessary to interpret or rebut it. While we are mindful that NRS 233B.131(2) authorizes the district court in a judicial review proceeding to order the administrative agency to take additional evidence, and does not specifically address our authority to do so, we note that our role in reviewing an administrative decision is the same as the district court's and this statute is the only mechanism that the Legislature has provided.[11] Here, the additional evidence is material and was not available in either the administrative proceeding or the judicial review proceeding. The appeals officer should have the

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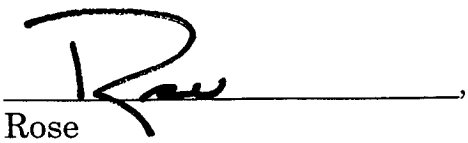
[10]Morrow v. Asamera Minerals, 112 Nev. 1347, 1354, 929 P.2d 959, 964 (1996).

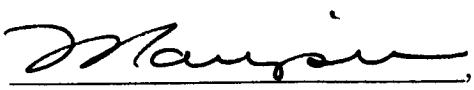
[11]Cf. Westergard v. Barnes, 105 Nev. 830, 833, 784 P.2d 944, 946 (1989) (remanding an administrative matter under a former version of the statute without addressing the statute's application to the supreme court).

opportunity to consider whether the autopsy establishes the cause of Henthorn's disease, particularly since a final affirmance of EICON's claim denial will bar Henthorn's dependents, if any, from filing a claim for compensation.[12]

It is so ORDERED.



_____, J.
Rose



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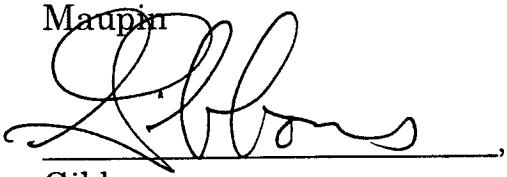

_____, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Nevada Attorney for Injured Workers/Carson City
Beckett & Yott, Ltd./Carson City
McDonald Carano Wilson LLP/Reno
Carson City Clerk

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[12]See NRS 617.344(2) (permitting a dependent to file a claim for compensation within one year of the employee's death); NRS 617.348(2) (barring a dependent's claim if the employee's claim was denied and the denial has become final).