IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE BEACH,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA AND GRANITE CONSTRUCTION COMPANY,
Respondents.

No. 38479

FILED

JUN 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's order denying Gene Beach's petition for judicial review of his administrative appeal regarding a work-related back injury.

Generally, we review an administrative decision for substantial supporting evidence.[1] When the agency's decision rests on questions of law, however, we conduct independent appellate review.[2]

Beach first contends that his out-of-state medical treatment was authorized under NRS 616C.157(2) because the Employers Insurance Company of Nevada ("EICON") failed to respond within five days to his letter requesting prior authorization. Beach further argues that, at the very least, EICON was required to respond to his request within thirty days under NRS 616C.315(2)(b), and, by failing to do so, it waived its objection to Beach's out-of-state treatment and was estopped from subsequently denying authorization.

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[1]United Exposition Service Co. v. SIIS, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993); see also NRS 233B.135.

[2]Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634-35, 877 P.2d 1032, 1034 (1994).

Beach's claim was closed after his permanent partial disability evaluation was completed, but the hearing officer reversed the closure for the limited purpose of determining whether Beach's condition required more treatment. Beach's request for out-of-state treatment was inconsistent with the status of his case, as it was not open for treatment at that time. Furthermore, NRS 616C.090(3) clearly mandates that an injured employee must select a treating physician according to the terms of the managed care organization's contract with the insurer, and NRS 616C.090(4) relieves the insurer from liability for payment of services rendered by physicians selected by the employee in disregard of the statute. It is clear that out-of-state treatment required prior authorization under the managed care organization's contract with EICON, which was not given.

Beach's reliance on the five-day response time set forth in NRS 616C.157(2) was improper because that statute applies to physicians who request prior authorization for treatment, not to injured workers.[3] Even if Beach properly relied on NRS 616C.157(2), EICON could

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[3]See NRS 616C.157(3), stating:

> If the insurer, organization for managed care or third-party administrator subsequently denies a request for authorization submitted by a provider of health care for additional visits or treatments, it shall pay for the additional visits or treatments actually provided to the injured employee . . . before the denial of authorization is received by the provider.

(Emphasis added.)

subsequently deny authorization under the statute.[4] It did so here by its March 21, 1998, letter, which Beach received before his surgeries. Because Beach was aware that EICON did not intend to authorize any out-of-state treatment, his waiver and estoppel arguments must fail.[5] We conclude that the administrative decision was not an arbitrary and capricious abuse of discretion.[6]

Next, Beach argues that the appeals officer abused his discretion by denying Beach temporary total disability benefits because EICON failed to authorize a treating physician upon Beach's request and because EICON's own physicians indicated that Beach could not work. He contends that he was inequitably left without any benefits due to EICON's inaction.

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[4]NRS 616C.157(2) provides: "If the insurer, organization for managed care or third-party administrator fails to respond to such a request within 5 working days, authorization shall be deemed to be given. The insurer, organization for managed care or third-party administrator may subsequently deny authorization."

[5]See Hudson v. Horseshoe Club Operating Co., 112 Nev. 446, 457, 916 P.2d 786, 792 (1996) (stating that "[w]aiver occurs where a party knows of an existing right and either actually intends to relinquish the right or exhibits conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished"); Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982) (stating that one of the elements of estoppel was that the party to be estopped intended his conduct to be acted upon or behaved in such a way that the party asserting estoppel could reasonably believe that it was so intended).

[6]Because we conclude that the appeals officer's determination was not an abuse of discretion and because the record was insufficient for adequate review of EICON's argument that Beach lacked standing, we decline to address that argument.

The record reflects that no authorized treating physicians certified Beach as disabled. NRS 616C.475(7)(c) requires a "treating physician . . . authorized pursuant to NRS 616B.527 or appropriately chosen pursuant to subsection 3 of NRS 616C.090" to sign a certificate of disability before an injured worker may receive temporary total disability benefits. Beach was required to choose a treating physician from the managed care organization's provider list but did not do so. While it is more than understandable that Beach sought health care with experts in spinal injuries given his deteriorating condition, Beach failed to comply with the statutory scheme regarding temporary total disability benefits. We therefore conclude that substantial evidence supported the appeals officer's decision.[7]

Next, Beach argues that since EICON's doctors agreed that Beach could not return to his pre-injury job without restrictions, it was EICON's duty to offer him rehabilitative maintenance benefits, and the appeals officer erred by failing to order EICON to do so. The appeals officer affirmed the hearing officer's determination that because Beach's condition had not been found stable and ratable and because he had not had a permanent partial disability evaluation after the reopening of his claim, EICON's assignment of Beach's claim to vocational rehabilitation services was premature. A treating physician's imposition of permanent restrictions on an injured worker's ability to perform the functions of his pre-injury job is a prerequisite to vocational rehabilitation benefits under

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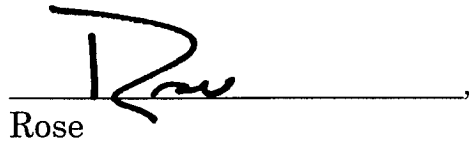
[7]Because EICON erroneously decided to pay temporary total disability benefits to Beach in the first place, it is unnecessary to address EICON's argument that benefits properly ceased because Beach's employer had light duty work available for him.

NRS 616C.590(1)(a). Beach's claim had been reopened for the limited purpose of determining whether further treatment was necessary, and to that end, EICON was ordered to schedule Beach for a functional capacity evaluation and independent medical evaluations. The functional capacity evaluation indicated that Beach could return to medium level work duties with restrictions, but did not indicate whether such restrictions were permanent, and Beach's last authorized treating physician, Dr. Peter Costa, agreed with the functional capacity evaluation. Dr. Charles Quaglieri and Dr. George Prutzman, the doctors who had conducted the independent medical evaluation, recommended temporary, medium level work restrictions and indicated that Beach's condition was not permanent and stationary in their joint independent medical evaluation report.

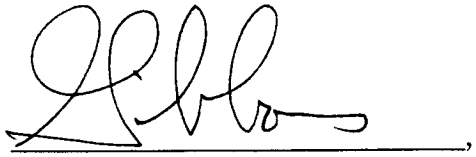
Under NRS 616C.590(1)(a), a treating physician must impose permanent restrictions on an injured employee's ability to perform the functions of his pre-injury job before the injured worker may be eligible for vocational rehabilitation benefits. Although EICON, in a March 7, 1998, letter to Beach, stated that the functional capacity evaluation had indicated that Beach had permanent restrictions with which Dr. Costa agreed, Dr. Costa was not Beach's treating physician at that time because he had ceased to be Beach's treating physician after Beach's claim was closed. Furthermore, Dr. Quaglieri and Dr. Prutzman, though not authorized treating physicians, indicated in their independent medical evaluation report that Beach's condition was probably temporary. Thus, because permanent restrictions had not been imposed by an authorized treating physician, substantial evidence supports the appeals officer's

determination that the referral to vocational rehabilitative benefits was premature.[8] For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons

cc: Hon. William A. Maddox, District Judge
Nevada Attorney for Injured Workers/Carson City
Beckett & Yott, Ltd./Las Vegas
Story & Sertic Ltd.
Carson City Clerk

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[8]Because we conclude that substantial evidence supports the appeals officer's determination that vocational rehabilitation benefits were premature, we need not reach the issue of whether Beach failed to cooperate or refused to participate in vocational rehabilitation, thereby permitting EICON to terminate his benefits under NRS 616C.590(7) and NAC 616C.577(2).

MAUPIN, J., concurring:

I take no issue with the technical resolution of the issues in this case. I write separately to lodge my protest to a workers' compensation system construct that has become so unwieldy and cumbersome that injured workers such as Mr. Beach routinely become caught up in a maelstrom of statutes, rules and regulations. This system literally requires that the injured worker retain counsel to negotiate these very troubled waters. While I can appreciate his frustration at having to learn arcane terms of art and an apparent inability to obtain needed treatment through a statutorily created bureaucratic morass of rules that seem designed to obstruct rather than to provide treatment to injured workers, his resort to out-of-state treatment was subject to a requirement of prior authorization.

Maupin, J.
Maupin