IN THE SUPREME COURT OF THE STATE OF NEVADA

CONSTRUCTION INDUSTRY WORKERS' COMPENSATION GROUP, ON BEHALF OF ITS MEMBER, TAB CONTRACTORS,
Appellant,
vs.
KENNETH MCNALLY AND EMPLOYERS INSURANCE COMPANY OF NEVADA,
Respondents.

No. 38852

FILED

AUG 19 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order that denied a petition for judicial review and affirmed the appeals officer's application of the last injurious exposure rule to hold appellant liable for the injured worker's disability.

Respondent Kenneth McNally sustained three different industrial injuries to his left knee. The first injury, a torn medial meniscus, occurred on July 30, 1980, while he was employed by Grove, Inc. The insurer, the State Industrial Insurance System (SIIS) (now Employers Insurance Company of Nevada (EICON)), accepted the industrial insurance claim. The claim was ultimately closed with a four percent permanent partial disability award.

The second injury to McNally's left knee occurred on August 22, 1984, while American Electrical Corporation employed him. EICON accepted the industrial insurance claim. The industrial insurance claim was closed in March 1985, with an additional four percent permanent partial disability award.

McNally's third injury occurred on October 16, 1998, while TAB Construction (TAB) employed him. TAB's insurer, Construction Industry Workers' Compensation Group (CIWCG) accepted the claim. McNally was initially diagnosed with a left knee contusion, but an infection later developed and was treated.

On November 10, 1998, an MRI performed on the left knee indicated a marked degeneration of the knee. A total knee replacement was recommended. The question presented in this appeal is which employer is liable for the knee replacement.

The standard of review for an administrative agency's decision is the same for this court as the district court.[1] The court should determine "whether the agency's decision was clearly erroneous or an arbitrary abuse of discretion," but "shall not substitute its judgment for that of an agency in regard to a question of fact."[2] The agency's decision on questions of fact must be affirmed unless the decision is contrary to substantial evidence in the record.[3]

Further, judicial review is confined to the record.[4] "We cannot consider matters not properly appearing in the record on appeal."[5]

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[1]Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997).

[2]Id.

[3]See SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987); see also NRS 233B.135(3)(e).

[4]NRS 233B.135(1)(b).

[5]Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

CIWCG, in its appellate brief, attached new evidence that was not part of the record before the appeals officer or the district court. We cannot consider this new evidence.

In SIIS v. Jesch, this court adopted the last injurious exposure rule for successive-employer occupational disease cases.[6] The rule "'places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.'"[7] Under this rule, the claimant must only show that the employment environment "could have been a contributory cause of the disease."[8]

In SIIS v. Swinney, this court extended the last injurious exposure rule to successive injury cases.[9] Successive injuries are "divided into three types--new injuries, aggravations of a prior injury, and recurrences--with the question of who is liable often depending on how the injury is characterized."[10]

If the successive injury is characterized as a new injury or an aggravation of a prior injury, the employer at the time of the last injury is "liable for all the claimant's benefits even if the second injury would have been much less severe in the absence of the prior condition, and even if the

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[6]101 Nev. 690, 709 P.2d 172 (1985).

[7]Id. at 696, 709 P.2d at 176 (quoting 4 A. Larson, The Law of Workmen's Compensation § 95.20 (1984)).

[8]Id. at 697, 709 P.2d at 177 (citing Forest Fiber Products Co., 605 P.2d 1175, 1178 (Or. 1980) (emphasis in original)).

[9]103 Nev. 17, 731 P.2d 359 (1987).

[10]Id. at 19, 731 P.2d at 361 (citing 4 Larson Workmen's Compensation Law § 95.11 (1986)).

prior injury contributed to the final condition."[11] If, however, the subsequent injury is characterized as a recurrence of the earlier injury and "does not contribute even slightly to the causation of the disabling condition, the insurer/employer covering the risk at the time of the original injury remains liable for the second."[12]

In this case, the appeals officer found, and the district court affirmed, that McNally's October 16, 1998, injury was a new industrial injury that aggravated his pre-existing industrial condition and was not merely a recurrence of the prior injuries. This factual determination was based on an independent medical examination, where the doctor concluded that although the earlier industrial injuries were the primary cause of the severe degenerative arthritic condition, "[t]here was an aggravation of that by the [October 16, 1998] injury." In addition, there was testimony that McNally had not had any reoccurrence of the problems with his left knee nor had he received any medical treatment for the knee from the time his claim was closed in March 1985, until the new injury on October 16, 1998.

As we previously stated, the last injurious exposure rule eliminates the burden of allocating responsibility for a disability and "forestalls any determination regarding which employment was the

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[11]Id. at 19-20, 731 P.2d at 361 (citing 4 Larson Workmen's Compensation Law § 95.21 (1986)).

[12]Id. at 20, 731 P.2d at 361 (citing 4 Larson Workmen's Compensation Law § 95.23 (1986)).

'primary cause' of a work-related disease or injury."[13] Therefore, regardless of whether McNally's prior industrial injuries were the primary cause of the need for a total knee replacement, there is substantial evidence in the record to support the appeals officer's finding that there was an aggravation of a previous injury. Therefore, the last injurious exposure rule applies in this case and CIWCG and TAB are responsible for all of McNally's benefits.

"Although the [last injurious exposure] rule may sometimes produce harsh results for an employer, this court has concluded that it serves the best interests of employees, avoids the difficulties of attempting to apportion responsibility between successive employers and spreads the risks between employers overall."[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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[13]Las Vegas Hous. Auth. v. Root, 116 Nev. 864, 869, 8 P.3d 143, 146 (citing Collett Electric v. Dubovik, 112 Nev. 193, 197, 911 P.2d 1192, 1195 (1996); Warpinski v. SIIS, 103 Nev. 567, 569, 747 P.2d 227, 229 (1987)).

[14]Id. at 869, 8 P.3d at 167-47 (citing Collett Electric, 112 Nev. at 197, 911 P.2d at 1195).

cc: Hon. Mark R. Denton, District Judge
J. Michael McGroarty, Chtd.
Beckett & Yott, Ltd./Carson City
Greenman Goldberg Raby & Martinez
Clark County Clerk