

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES F. KELLY,
Appellant,
vs.
THE SANTA FE GAMING
CORPORATION/SANTA FE HOTEL
AND CASINO,
Respondent.

No. 40611

FILED

JUN 2 2004

JANETTE M. BLOO
CLERK OF SUPREME COURT
BY *JMB*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This case involves an appeal from a district court order denying James Kelly's petition for judicial review in a workers' compensation case.

Kelly was injured in an industrial accident on December 21, 1988. Kelly's injury was diagnosed as a strain or sprain of his lower back and neck. Kelly continued working while undergoing treatment until July 24, 1989, when he started receiving temporary total disability payments. Kelly continued treatment and had multiple surgeries. Eventually, he had a permanent partial disability evaluation and received a 10 percent permanent partial disability rating.

Santa Fe Gaming Corporation calculated Kelly's disability benefits based on his average monthly wage at the time of his injury, December 21, 1988. However, Kelly requested that Santa Fe recalculate his disability benefits based on the date of his disability, July 24, 1989. Santa Fe denied his request, and Kelly appealed. The parties submitted Kelly's appeal directly to the appeals officer, and the appeals officer affirmed Santa Fe's denial of Kelly's request to recalculate his benefits. Thereafter, Kelly sought judicial review, and the district court affirmed the appeals officer's ruling.

The question before this court is one of statutory construction, namely, whether the appeals officer properly interpreted the workers' compensation statute applicable to this case. We must independently review an agency decision when its decision rests on questions of law, such as statutory construction.¹

NRS 616C.425 sets forth the date from which a claimant's benefits must be calculated:

Except as otherwise provided by a specific statute:

1. The amount of compensation and benefits and the person or persons entitled thereto must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date.

At the time of Kelly's injury and disability, this language appeared in NRS 616.625. This court interpreted NRS 616.625 in State Industrial Insurance System v. Harrison.² Harrison fell from a ladder and injured his knee in 1975, and then in 1983, Harrison underwent emergency surgery consisting of an above-the-knee amputation of his leg, which was necessary due to an infection that had developed at the site of the 1975 leg injury.³ The insurer calculated Harrison's 1983 disability benefits based upon his 1975 wage because that was the year in which he suffered his injury. This court agreed with the district court's conclusion that under NRS 616.625, Harrison's 1983 infection and amputation was a separate injury that had to be compensated based on the maximum wage allowed in

¹Diamond v. Swick, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001).

²103 Nev. 543, 746 P.2d 1095 (1987).

³Id. at 544-45, 746 P.2d at 1096.

1983, the year in which Harrison's leg had to be amputated.⁴ This court held that "when an industrial accident and disability do not occur simultaneously, the rate in effect at the time the disability arises, rather than at the time of accident, governs."⁵

Subsequent to this court's holding in Harrison, the Legislature amended NRS 616.625, now NRS 616C.425. The Legislature added the following provision:

If the employee incurs a subsequent injury or disability that primarily arises from a previous accident or injury that arose out of and in the course of his employment, the date of the previous accident or injury must be used to determine the amount of compensation and benefits to which the claimant is entitled.⁶

Apparently, the Legislature added this provision to clarify how disability benefits should be calculated when a subsequent injury, relating to a prior accident or injury, occurs. NRS 616C.425(2) essentially abrogates our holding in Harrison by stating that the date of the initial accident/injury controls even when the employee suffers a subsequent injury arising from the first accident/injury.

Kelly argues that the law at time of his injury should apply, i.e., our interpretation of NRS 616.625 in Harrison. "The general rule is that statutes are prospective only, unless it clearly, strongly, and imperatively appears from the act itself that the legislature intended the

⁴Id. at 546, 746 P.2d at 1097.

⁵Id.


⁶NRS 616C.425(2).

statute to be retrospective in its operation.”⁷ In this case, no such retroactive intent appears in the amendments to the statute. In fact, the Reviser’s Note states: “The amendatory provisions of NRS 616.625 [now NRS 616C.425] must not be applied to reduce the amount of compensation and benefits that a claimant is entitled to receive for a subsequent injury or disability that occurred before June 18, 1993.” Based on this statement, we conclude that NRS 616C.425(2) is not applicable here.

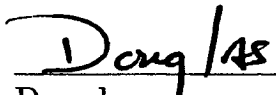
Applying NRS 616.625 and this court’s decision in Harrison, we conclude that the calculation of Kelly’s disability benefits was not erroneous. Kelly claims that because he continued to work until July 1989, after his accident in December 1988, his average monthly wage in 1989 should be used to calculate his benefits. Unlike in Harrison, however, Kelly suffered only one injury to his back and neck in December 1988, and though he continued to work, Kelly was being treated for these injuries. His subsequent designation as permanently partially disabled in June 1989, was not due to a second injury; rather, his condition worsened to a point where he could no longer perform his job. Hence, we conclude that the calculation of Kelly’s benefits was properly based on his average monthly wage in 1988. Accordingly, we

⁷Matter of Estate of Thomas, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000).

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Alan R. Johns
Moran & Associates
Clark County Clerk