IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED PARCEL SERVICES,
Appellant,
vs.
STEVEN PARCE AND EMPLOYERS INSURANCE COMPANY OF NEVADA,
Respondents.

No. 42168

FILED

JUN 15 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation case. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On appeal, appellant United Parcel Services (UPS) argues that the appeals officer incorrectly concluded that respondent Steven Parce's 2000 injury constituted an aggravation of a 1992 injury under the last injurious exposure rule. We disagree.

Standard of review

"The function of this court in reviewing an administrative decision is identical to the district court's."[1] Typically, the district court is free to decide pure legal questions without deference to the agency.[2] In reviewing questions of fact, however, this court is prohibited from substituting its judgment for that of the agency.[3] The standard for evaluating questions of fact is whether the agency's decision was clearly

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

[2]Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

[3]NRS 233B.135(3).

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erroneous or an arbitrary abuse of discretion.[4] Accordingly, the agency's conclusions of law, that are closely related to the agency's view of the facts, "are entitled to deference, and will not be disturbed if they are supported by substantial evidence."[5] Substantial evidence exists if a reasonable person could find adequate evidence to support the agency's conclusion.[6] In making this determination, the reviewing court is confined to the record before the agency.[7] Therefore, this court's review is limited to determining whether there was "substantial evidence in the record to support the agency's ruling."[8]

The last injurious exposure rule

The last injurious exposure rule provides the "means of assigning liability when two successive employers are both potentially liable for a claimant's injury or occupational disease."[9] The rule states that full responsibility "'is placed upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.'"[10] Carrier liability, however, depends upon how the injury is

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[4]NRS 233B.135(3)(e) – (f).

[5]Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986), quoted in Schepcoff, 109 Nev. at 325, 849 P.2d at 273.

[6]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

[7]SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990).

[8]Id.

[9]Riverboat Hotel Casino, 113 Nev. at 1029-30, 944 P.2d at 822-23.

[10]Id. at 1030, 944 P.2d at 823 (quoting SIIS v. Swinney, 103 Nev. 17, 19, 731 P.2d 359, 360 (1987)).

characterized.[11] Successive accidental injuries are divided into three categories: "new injuries, aggravations of a prior injury, and recurrences."[12] The employer/insurer at the time of a new injury or an aggravation of a prior injury is liable for all the claimant's benefits.[13] This is true even if the subsequent "injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed to the final condition."[14]

Conversely, the employer/insurer covering the risk at the time of the original injury remains liable if the subsequent injury (1) "is merely a recurrence of the first [injury]"; and (2) "does not contribute even slightly to the causation of the disabling condition."[15] Application of this rule eliminates the need to determine "'which employment was the 'primary cause' of a work-related disease or injury.'"[16] The rule, however, may cause harsh results for some employers.[17] Notwithstanding these harsh results, the rule serves the best interests of employees by removing their

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[11]Las Vegas Hous. Auth. v. Root, 116 Nev. 864, 869, 8 P.3d 143, 146 (2000).

[12]Id.

[13]Swinney, 103 Nev. at 19, 731 P.2d at 361.

[14]Id. at 19-20, 731 P.2d at 361.

[15]Root, 116 Nev. at 869, 8 P.3d at 146.

[16]Riverboat Hotel Casino, 113 Nev. at 1030, 944 P.2d at 823 (quoting Collett Electric v. Dubovik, 112 Nev. 193, 197, 911 P.2d 1192, 1195 (1996)).

[17]Collett Electric, 112 Nev. at 197, 911 P.2d at 1195.

burden of apportioning responsibility and spreading the risk between successive employers.[18]

Substantial evidence

An appeals officer's determination that an employee's subsequent injury is an aggravation of a previous injury is a fact-based conclusion of law that is entitled to deference[19] Accordingly, the classification of a condition as an aggravation will be upheld if the record contains substantial evidence to support the agency's determination.[20] Substantial evidence is defined as evidence which "'a reasonable mind might accept as adequate to support a conclusion.'"[21] In certain cases, a witness's sworn testimony before an administrative agency constitutes substantial evidence.[22]

Recently, in Grover C. Dils Medical Center v. Menditto, we distinguished the difference between an aggravation and a recurrence.[23] In Dils, we recognized that "an 'aggravation' under the last injurious exposure rule is the result of a specific, intervening work-related trauma, amounting to an 'injury' or 'accident' under workers' compensation law,

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[18]Id.

[19]See Swinney, 103 Nev. at 20, 731 P.2d at 361.

[20]Christensen, 106 Nev. at 87-88, 787 P.2d at 409.

[21]Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), quoted in Hilton Hotels, 102 Nev. at 608, 729 P.2d at 498.

[22]Washoe Co. v. John A. Dermody, Inc., 99 Nev. 608, 611, 668 P.2d 280, 281 (1983).

[23]121 Nev. ___, ___ P.3d ___ (Adv. Op. No. 29, June 9, 2005).

that independently contributes to the subsequent disabling condition."[24] Consequently, to qualify as an aggravation, the subsequent injury must be "more than 'merely the result of the natural progression of the preexisting disease or condition.'"[25] Rather, the persistence of an original injury without an additional specific and independent incident is merely a recurrence of the original injury.[26] Accordingly, "[e]vidence that an injury merely worsened is not sufficient to prove aggravation."[27]

Here, substantial evidence exists to support the appeals officer's determination that Parce's 2000 injury was an aggravation of the 1992 injury. After conducting a hearing and considering the parties' arguments, the appeals officer was unable to determine responsibility for Parce's condition. For this reason, the appeals officer issued an interim order requesting Dr. Margaret Goodman to perform an independent medical examination of Parce.[28] In particular, the interim order requested that Dr. Goodman answer nine specific causation questions relating to Parce's current condition. In answering those questions, Dr. Goodman stated that Parce was experiencing disc degeneration resulting in lumbar radiculopathy. When asked if the lumbar radiculopathy was attributable to the 2000 incident, Dr. Goodman responded that Parce's

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[24]Id. at ___, ___ P.3d at ___.

[25]Id. at ___, ___ P.3d at ___ (quoting SIIS v Kelly, 99 Nev. 774, 776, 671 P.2d 29, 30 (1983)), superceded by statute, NRS 616C.175.

[26]Id.

[27]Id. at ___, ___ P.3d at ___ (quoting Truck Ins. Exchange v. CAN, 624 N.W.2d 705, 711 (S.D. 2001)).

[28]See NRS 616C.140(1); NRS 616C.360(3).

condition was most likely the result of the "preexisting injury in 1992, worsened by the 2000 injury." Dr. Goodman definitively concluded that the 2000 incident was an aggravation of Parce's 1992 lower back injury.

A second opinion by Dr. Bevins Chue also supports the appeals officer's decision. After examining Parce, Dr. Chue opined that the 2000 injury related to and exacerbated Parce's 1992 injury. Consequently, Dr. Chue also concluded that Parce's current condition was an aggravation of his previous injury. The opinions expressed by Dr. Goodman and Dr. Chue corroborate the determinations of Dr. R. Kirby Reed, the physician who initially examined Parce in 1992. At the time of the initial injury, Dr. Reed determined that if Parce continued employment as a driver for UPS he would "be at risk for future back problems." Therefore, it is no surprise that Parce experienced an aggravation of his 1992 injury while working as a driver for UPS.

As a result of these medical opinions, the appeals officer found that the 2000 incident occurred. In light of this specific and independent incident, the district court concluded that the "April 25, 2000, incident was clearly an aggravation/exacerbation of the 1992 incident and not merely a recurrence of the 1992 problem." Applying Parce's condition as an aggravation to the last injurious exposure rule, the appeals officer found that UPS, not respondent Employers Insurance Company of Nevada (EICN), was liable for his claim. The appeals officer's conclusion that Parce's injury constituted an aggravation of his 1992 injury is supported by substantial evidence and will not be disturbed.

"No new injury" language

Generally, the last injurious exposure rule places responsibility upon the employer insuring the employee at the time of the most recent injury.[29] Employer liability, however, depends upon how the injury is characterized.[30] The rule divides successive accidental injuries into three categories: "new injuries, aggravations of a prior injury, and recurrences."[31] The appeals officer's classification of a subsequent injury, however, is a fact-based conclusion of law that is entitled to deference.[32] Accordingly, the classification of a condition will be upheld if the record contains substantial evidence to support the agency's determination.[33]

In this case, UPS attempts to fuse two different issues: (1) whether the 2000 incident occurred; and (2) whether the 2000 incident constituted a new injury, an aggravation, or a recurrence under the last injurious exposure rule. Contrary to UPS's first argument, however, the appeals officer found that a separate incident occurred. In her findings of fact, the appeals officer concluded:

> On April 25, 2000, while carrying an awkward package to his delivery vehicle while employed by UPS, claimant sustained a second incident. Claimant complained at that time that he felt a sharp pain that radiated from his lower back to

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[29]Riverboat Hotel Casino, 113 Nev. at 1029-30, 944 P.2d at 823.

[30]Root, 116 Nev. at 869, 8 P.3d at 146.

[31]Id.

[32]Swinney, 103 Nev. at 20, 731 P.2d at 361.

[33]Christensen, 106 Nev. at 87-88, 787 P.2d at 409.

> his legs and he sought medical treatment as a result of the incident. . . .

(Emphasis added.)

The appeals officer was also persuaded by Dr. Goodman's opinion that the 2000 injury affected and aggravated Parce's 1992 injury. UPS further argues that the appeals officer's assignment of liability was improper because her decision stated that Parce did not suffer an accident or injury in 2000. The "no new injury" language, however, does not appear as a finding of fact but as a conclusion of law. Consequently, the appeals officer uses this language to support her legal analysis that Parce experienced an aggravation and not a new injury under the last injurious exposure rule. Her analysis is evident in the paragraph following the language in question where she states:

> However, this matter falls under the "last injurious exposure rule", [sic] not under the standards of the reopening statutes or the claim acceptance statutes. Thus, Dr. Kline's opinion of no objective signs of worsening are not applicable here. As the claimant has suffered an aggravation of his 1992 injury, under Root and Swinney, it is UPS, and not EICN, who must accept the claim. The claimant has demonstrated the requisite causal relationship between his employment at UPS and the aggravation. The medical evidence does not support the notion that the pain the claimant is currently experiencing is merely a continuation or recurrence of the industrial injury . . . .

Nothing indicates that the appeals officer intended to conclude that Parce did not suffer an injury in 2000. Rather, the appeals officer used the disputed language to show only that Parce's injury was not categorized as a new injury under the last injurious exposure rule.

NAC 616C.306 violation

Pursuant to NAC 616C.306(1), "[a]n appeals officer may order a party to prepare proposed findings of fact and conclusions of law." When such an order is issued, the drafting party has ten days to provide the opposing party a copy of the proposed document.[34] Upon receiving this copy, the opposing party has five days to file "a motion to amend the proposed findings of fact and conclusions of law" with the appeals officer.[35] An error in this procedure, however, will not compel reversal if the error does not affect the outcome of the hearing.[36] Rather, such technical defects constitute harmless error.[37]

Here, the appeals officer requested EICN to draft proposed findings of fact and conclusions of law. EICN, however, failed to provide a copy of this document to UPS within the required ten days. As a consequence, UPS was unable to file its motion to amend the proposed findings of fact or conclusions of law until after the appeals officer's decision was filed.

This motion, however, merely constituted a restatement of UPS's prior arguments that Parce did not experience a separate injury in 2000 and that his current condition did not qualify as an aggravation. In

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[34]NAC 616C.306(2)(b).

[35]NAC 616C.306(3)(a). NAC 616C.306 is silent as to the consequences of failing to serve the proposed findings of fact and conclusions of law on the opposing party.

[36]See Olivero v. Lowe, 116 Nev. 395, 402, 995 P.2d 1023, 1028 (2000).

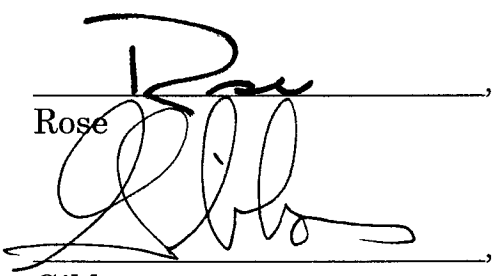
[37]See El Cortez Hotel, Inc. v. Coburn, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971).

fact, the motion's contentions are almost identical to those made before this court and the district court. Since the appeals officer had already considered those arguments, UPS's motion, even if timely, would not have affected the outcome of the proceedings. UPS, therefore, was not prejudiced by this technicality. Further, nothing suggests that the proposed findings of fact and conclusions of law were drafted in conflict of the appeals officer's requests since she ultimately signed and filed them as her own. Although EICN violated NAC 616C.306, this technical defect does not compel reversal since the error did not affect the outcome of the appeals officer's proceedings.

CONCLUSION

We conclude that the district court properly denied UPS's petition for judicial review. Substantial evidence supports the appeals officer's conclusion that Parce's 2000 injury constituted an aggravation of his 1992 injury. Further, although EICN violated NAC 616C.306, this technical defect does not compel reversal since the error did not affect the outcome of the appeals officer's proceedings. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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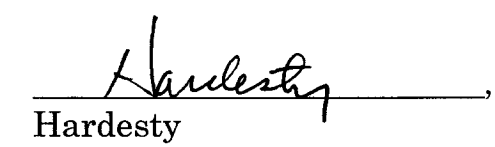

_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
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