IN THE SUPREME COURT OF THE STATE OF NEVADA

CONSTRUCTION INDUSTRY WORKERS' COMPENSATION GROUP, ON BEHALF OF ITS MEMBER, J.R. JACKS CONSTRUCTION,
Appellant,
vs.
RONALD UPSHAW AND LAKE MEAD CONSTRUCTORS,
Respondents.

No. 42170

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; Lee A. Gates, Judge.

On appeal, appellant Construction Industry Workers' Compensation Group, on behalf of its member, J.R. Jacks Construction, argues that (1) the appeals officer incorrectly held J.R. Jacks fully liable for respondent Ronald Upshaw's injury under the last injurious exposure rule; and (2) the appeals officer inappropriately denied its motion for joinder. 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

[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).

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 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]

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."[8] 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.'"[9] Carrier liability, however, depends upon how the injury is

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

[4]NRS 233B.135(3)(e) – (f).

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

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

characterized.[10] Successive accidental injuries are divided into three categories: "new injuries, aggravations of a prior injury, and recurrences."[11] 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.[12] 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."[13]

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."[14] Application of this rule eliminates the need to determine "'which employment was the "primary cause" of a work-related disease or injury."'[15] The rule, however, may cause harsh results for some employers.[16] Notwithstanding these harsh results, the rule serves the best interests of employees by removing their

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

[11]Id.

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

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

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

[15]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)).

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

burden of apportioning responsibility and spreading the risk between successive employers.[17]

Substantial evidence

Under the last injurious exposure rule, "[f]ull liability is placed upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability."[18] An appeals officer's designation of causation under the last injurious exposure rule is a fact-based conclusion of law entitled to deference and will be upheld if the record contains substantial evidence to support the agency's determination.[19] In certain cases, a witness' sworn testimony before an administrative agency constitutes substantial evidence.[20]

Here, substantial evidence supports the appeals officer's determination that Upshaw's work at J.R. Jacks significantly contributed to his carpal tunnel syndrome. After considering the parties' arguments, the appeals officer was unable to determine responsibility for Upshaw's injury. Consequently, the appeals officer requested an independent examination of Upshaw by Dr. Mary Ann Shannon.[21] Specifically, the appeals officer asked Dr. Shannon to answer two basic questions: (1) Is Upshaw's carpal tunnel syndrome a result of his work as a carpenter; and (2) if so, did Upshaw's work for J.R. Jacks contribute to his condition?

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[17]Id.

[18]Swinney, 103 Nev. at 19, 731 P.2d at 360.

[19]See id. at 20, 731 P.2d at 361.

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

[21]See NRS 616C.140(1) - 616C.360(3).

In answering these questions, Dr. Shannon stated that Upshaw's condition was the direct result of his work as a carpenter. Additionally, Dr. Shannon responded that Upshaw's condition was the result of a preexisting disease worsened by his employment at J.R. Jacks. Based on Dr. Shannon's opinion, the appeals officer determined that Upshaw's work at J.R. Jacks significantly contributed to his carpal tunnel syndrome. As a result, the appeals officer concluded that J.R. Jacks was liable for Upshaw's claim. The appeals officer's conclusion that J.R. Jacks was liable for Upshaw's claim is supported by substantial evidence and will not be disturbed.[22]

Apportioning liability

Apportioning liability under the last injurious exposure rule depends on whether the injury is categorized as a new injury, an aggravation, or a recurrence.[23] Recently, in Grover C. Dils Medical Center v. Menditto, we distinguished the difference between an aggravation and a recurrence.[24] 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, that independently contributes to the subsequent disabling condition."[25] Consequently, to qualify as an aggravation, the subsequent injury must be "more than 'merely the result of the natural

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

[23]Root, 116 Nev. 864, 869, 8 P.3d 143, 146 (2000).

[24]121 Nev. ___, ___ P.3d ___ (Adv. Op. No. 29, June 9, 2005).

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

progression of the preexisting disease or condition.'"[26] Rather, the persistence of an original injury without an additional specific and independent incident is merely a recurrence of the original injury.[27] Accordingly, "[e]vidence that an injury merely worsened is not sufficient to prove aggravation."[28]

In this case, Upshaw's condition was more than the natural progression of a preexisting condition.[29] Rather, although Upshaw experienced symptoms of carpal tunnel syndrome while employed with Lake Mead Constructors, he did not require or seek medical attention. In fact, Upshaw's condition remained essentially the same, with occasional numbness, until J.R. Jacks employed him. Furthermore, Dr. Shannon concluded that Upshaw's work at J.R. Jacks was the proximate cause of his carpal tunnel syndrome and the primary reason he sought medical treatment. Considering Dr. Shannon's opinion that Upshaw's work at J.R. Jacks significantly caused and contributed to his carpal tunnel syndrome, the appeals officer, in applying the last injurious exposure rule, found J.R. Jacks liable. While the appeals officer's decision appears harsh, this court recognizes that the application of the last injurious exposure rule, at times, has harsh results.[30] Substantial evidence and Nevada case law

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[26]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.

[27]Id.

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

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

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

support the appeals officer's conclusion that J.R. Jacks was responsible for Upshaw's condition.

Joinder

NRCP 19(a), in pertinent part, states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in [the person's] absence complete relief cannot be accorded among those already parties, or (2) [the person] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [the person's] absence may (i) as a practical matter impair or impede [the person's] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

This court, however, has never expressly permitted joinder in administrative proceedings. Yet, even if NRCP 19(a) were applied to administrative proceedings, appeals officers, like district court judges, would have "broad discretion to allow or deny joinder of parties."[31]

Here, the appeals officer concluded that J.R. Jacks bore responsibility for Upshaw's claim. The appeals officer made this determination based upon Dr. Shannon's opinion that Upshaw's condition was not affected by his employment at Aluma Systems, Inc. or J.A. Tiberti Construction. As to Aluma Systems, Upshaw testified that he did not experience any numbness during the three days he worked there.

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[31]Cummings v. Charter Hospital, 111 Nev. 639, 645, 896 P.2d 1137, 1140 (1995).

Further, J.R. Jacks was aware of Upshaw's employment history no later than the November 21, 2001, hearing date, but did not move for joinder until April 2002. For these reasons, the appeals officer did not err by denying joinder since there was evidence that Upshaw's subsequent employment contributed in no way to the causation of his injury.

CONCLUSION

We conclude that the district court properly denied J.R. Jack's petition for judicial review. Substantial evidence exists to support the appeals officer's determination that Upshaw's work at J.R. Jacks significantly contributed to his carpal tunnel syndrome. In addition, substantial evidence and Nevada case law support the appeals officer's conclusion that J.R. Jacks was responsible for Upshaw's condition. Further, the appeals officer did not err by denying joinder since there was evidence that Upshaw's subsequent employment contributed in no way to the causation of his injury.

Accordingly, we affirm the district court's order denying the petition for judicial review.

It is so ORDERED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Lee A. Gates, District Judge
J. Michael McGroarty, Chtd.
Nevada Attorney for Injured Workers/Las Vegas
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Clark County Clerk