IN THE SUPREME COURT OF THE STATE OF NEVADA

FREEMAN DECORATING,
Appellant,
vs.
DONALD HINTON,
Respondent.

No. 42556

FILED

JUL 25 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Rinaudo
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; David Wall, Judge.

In 1999, respondent Donald Hinton injured his back during the course and scope of his employment with appellant Freeman Decorating. While seeking treatment for the injury, Hinton's doctor, Dr. John S. Thalgott, discovered significant degenerative disease in Hinton's back. At the time of the injury, Hinton was 65 years old and had been employed in heavy labor for all his life. Dr. Thalgott opined on several occasions that it was unlikely that Hinton would ever return to work.

Eventually, Dr. Thalgott declared that Hinton's 1999 injury was stable and ratable and that it had reached maximum medical benefit. However, Dr. Thalgott recommended that Hinton continue to seek treatment for the degenerative disease. Hinton was found to have a 5 percent whole person impairment and was offered permanent partial disability (PPD) benefits. Hinton sought vocational rehabilitation and permanent total disability (PTD) benefits, but was denied. The hearing officer affirmed the denial, finding that there was no evidence that Hinton's current injury caused the degenerative disease.

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Subsequently, Dr. Thalgott declared that the degenerative disease was caused by Hinton's years of hard labor and by several prior industrial injuries. Dr. Thalgott stated that Hinton was not employable in anything but the most sedentary of positions. A vocational rehabilitation counselor reported that it was unclear whether Hinton would benefit from vocational rehabilitation due to his age, education, and impairments. Utilizing this information, the appeals officer awarded Hinton PTD benefits under the odd-lot doctrine.

Freeman filed a motion for rehearing, attaching a status report from a different vocational rehabilitation counselor and results from a functional capacity evaluation. The results indicated that Hinton would be able to handle light to medium employment. Freeman argued that the grant of PTD benefits was premature. For the first time, Freeman argued that vocational rehabilitation efforts must be exhausted before an employee may be awarded PTD benefits under the odd-lot doctrine. The appeals officer denied the motion and the district court affirmed the PTD award. Freeman now appeals.

Standard of review

The standard of review of an administrative agency's decision is the same for this court as for 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

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

[2]Id.

on questions of fact must be affirmed unless the decision is not based on substantial evidence in the record.[3] However, questions of law are reviewed de novo.[4]

New legal issues and evidence

On appeal, Freeman argues that the appeals officer erred by prematurely awarding PTD benefits. Freeman argues that vocational rehabilitation efforts must be exhausted before PTD benefits can be awarded under the odd-lot doctrine, an argument that was first made in the motion for rehearing.

"[A] litigant may not raise new legal points for the first time on rehearing. Nor may a petition for rehearing be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion."[5] Freeman was free to make the argument regarding the exhaustion of vocational rehabilitation efforts at the hearing before the appeals officer, but it failed to do so. Therefore, we conclude that Freeman improperly raised this issue for the first time in the motion for rehearing, which issue the appeals officer appropriately denied.

Furthermore, we conclude that the appeals officer did not err by denying the motion for rehearing even though Freeman presented new, allegedly relevant, evidence for the appeals officer's consideration.

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

[4]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[5]In re Ross, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983) (citations omitted).

A motion for rehearing may be granted when the proponent presents newly discovered evidence.[6]

> A motion for rehearing based on newly discovered evidence should be granted when the following are satisfied:
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> "(1) it appears that the [new] evidence is such that it will probably change the result if a new trial is granted, (2) the evidence has been discovered since the trial, (3) the evidence could not have been discovered before the trial by the exercise of due diligence, (4) the evidence is material to the issue, and (5) the evidence is not merely cumulative or impeaching."[7]

It is the proponent's duty to prove diligence in securing the evidence.[8] The "evidence must be of the kind that could not have been discovered with 'reasonable diligence prior to the court's initial judgment'"[9] and the proponent must explain why it was not available.[10]

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[6]Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976); NAC 616C.327(1).

[7]RIS v. Indian Spring Country Club, Inc., 747 So. 2d 974, 978 (Fla. Dist. Ct. App. 1999) (quoting Bray v. Electronic Door-Lift, Inc., 558 So. 2d 43, 47 (Fla. Dist. Ct. App. 1989)).

[8]Id.

[9]A & L Laboratories, Inc. v. Bou-Matic, LLC, 2004 WL 2730099, 2 (D. Minn. 2004) (quoting Dale & Selby Superette & Deli v. Dept. of Agr., 838 F. Supp. 1346, 1348 (D. Minn. 1993)); accord Weidner v. Midcon Corp., 767 N.E.2d 815, 820 (Ill. App. Ct. 2002); Com. v. Delong, 799 N.E.2d 1267, 1280 (Mass. App. Ct. 2003); Eugster v. City of Spokane, 91 P.3d 117, 123 (Wash. Ct. App. 2004).

[10]Berman v. Health Net, 96 Cal. Rptr. 2d 295, 303 (Ct. App. 2000); Stringer v. Packaging Corp. of America, 815 N.E.2d 476, 481 (Ill. App. Ct. 2004); Heritage v. Mance, 695 N.Y.S. 2d 770, 772 (N.Y. App. Div. 1999).

> "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency require that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be."[11]

Freeman's motion for rehearing failed to justify why the evaluation was not completed earlier or why Freeman did not inform the appeals officer of its continuing discovery efforts before the PTD award was made. The new evidence could have been discovered through reasonably diligent efforts prior to the hearing. Accordingly, the appeals officer's denial of the motion for rehearing was not clearly erroneous or an arbitrary abuse of discretion.

The odd-lot doctrine

Next, Freeman argues that the appeals officer's award of PTD benefits under the odd-lot doctrine was clearly erroneous or an abuse of discretion. In making this argument, Freeman primarily relies on evidence that was presented for the first time in the motion for rehearing, namely, the vocational rehabilitation report and results from the functional capacity evaluation. Hinton contends that substantial evidence supports the appeals officer's decision that Hinton qualified for PTD benefits under the odd-lot doctrine since he was entitled to benefits under the last injurious exposure rule.

In reviewing the appropriateness of a decision, this court cannot consider evidence that was not before the deciding body at the time

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[11]Stringer, 815 N.E.2d at 481 (quoting Gardner v. Navistar Intern. Transp. Corp., 571 N.E.2d 1107, 1111 (Ill. App. Ct. 1991)).

it made its decision.[12] Therefore, this court cannot consider the vocational rehabilitation report or the functional capacity evaluation in reviewing the appropriateness of the appeals officer's award of PTD benefits to Hinton under the odd-lot doctrine.

The odd-lot doctrine arises under NRS 616C.435, which specifies the injuries that constitute permanent total disabilities. NRS 616C.435(1) sets forth a schedule of severe injuries deemed to be "total and permanent." NRS 616C.435(2), known as the "odd-lot doctrine," provides that "[t]he enumeration in subsection 1 is not exclusive, and in all other cases permanent total disability must be determined by the insurer in accordance with the facts presented."

> The odd-lot doctrine is "[a] doctrine which permits finding of total disability where claimant is not altogether incapacitated for any kind of work but is nevertheless so handicapped that he will not be able to obtain regular employment in any well-known branch of the competitive labor market absent superhuman efforts, sympathetic friends or employers, a business boom, or temporary good luck."[13]

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[12]See Achrem v. Expressway Plaza Ltd., 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) (concluding that the district court properly refused to consider affidavits that were presented for the first time as an attachment to a motion for rehearing because they were not properly submitted as evidence before the court reached its decision in the case).

[13]SIIS v. Perez, 116 Nev. 296, 297 n.1, 994 P.2d 723, 724 n.1 (2000) (quoting Black's Law Dictionary 1080 (6th ed. 1990)).

"'The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market.'"[14] However, "the worker need not be in a state of 'utter and abject helplessness' to be considered permanently and totally disabled under the odd-lot doctrine."[15] Consideration should be given to the worker's age, experience, training and education.[16]

The "last injurious exposure rule" is a judicial creation which provides a means of assigning liability when multiple, successive employers are both potentially liable for a claimant's injury or occupational disease.[17] 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."[18] In SIIS v. Swinney, this court explained that 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."[19] 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

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[14]Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401, 404 (1984) (quoting 2 A. Larson, The Law of Workmen's Compensation, § 57.51 (1981)).

[15]Id.

[16]Id.

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

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

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

severe in the absence of the prior condition, and even if the prior injury contributed to the final condition."[20] 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."[21]

Although the last injurious exposure doctrine may sometimes produce harsh results for an employer, "it serves the best interests of employees, avoids the difficulties of attempting to apportion responsibility between successive employers in particular cases, and spreads the risks between employers overall."[22] An appeals officer's determination that an injury is a recurrence or continuation of an existing injury is a question of fact which may not be set aside unless it is against the manifest weight of the evidence.[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,

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

[21]Id. at 20, 731 P.2d at 361.

[22]Collett Electric v. Dubovik, 112 Nev. 193, 197, 911 P.2d 1192, 1195 (1996).

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

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

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 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]

We conclude that the appeals officer's award of PTD benefits under the odd-lot doctrine was not clearly erroneous or an arbitrary abuse of discretion. Hinton was 68 years old at the time of the hearing. He had been employed in hard physical labor for all his working years. He had approximately two years of college. Dr. Thalgott diagnosed him as having significant degenerative disease, which was work related. The 1999 injury was moderately severe and contributed to Hinton's overall condition. Dr. Thalgott repeatedly opined that Hinton would be unable to return to any kind of work, except in the most sedentary of occupations. The original vocational rehabilitation counselor concluded that due to Hinton's age and physical limitations, it was unclear whether he would benefit from vocational rehabilitation. Therefore, while Hinton was not completely incapacitated, based on this evidence, it was reasonably certain that he

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

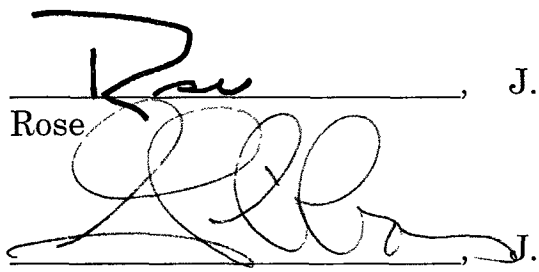
[26]Id. at ___, ___ P.3d at ___ (quoting SIIS v Kelly, 99 Nev. 774, 776, 671 P.2d 29, 30 (1983)), superseded by statute, NRS 616C.175.

[27]Id.

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

would be unable to obtain regular employment in any well-known branch of the competitive labor market. The appeals officer's award of PTD benefits under the odd-lot doctrine was based on substantial evidence and, therefore, not clearly erroneous or an arbitrary abuse of discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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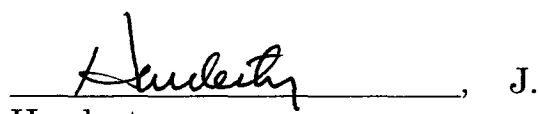

_____, J.
Hardesty

cc: Hon. David Wall, District Judge
J. Michael McGroarty, Chtd.
Nevada Attorney for Injured Workers/Las Vegas
Clark County Clerk