

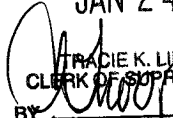
IN THE SUPREME COURT OF THE STATE OF NEVADA

EMPLOYERS INSURANCE COMPANY
OF NEVADA, A MUTUAL COMPANY,
Appellant,
vs.
GWENDOLYN REDDIC AND
MEADOWBROOK INSURANCE
SERVICES,
Respondents.

No. 46871

FILED

JAN 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review of an appeals officer's decision to grant the reopening of a workers' compensation claim. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant Employer Insurance Company of Nevada (EICON), a former insurer of respondent Gwendolyn Reddic, sought judicial review of an appeals officer's determination regarding Reddic's workers' compensation claim. The appeals officer determined that EICON was responsible for Reddic's knee replacement surgery because Reddic's initial injury, which occurred while she was insured by EICON, necessitated the surgery. EICON argued that it was Reddic's last injury that occurred while she was insured by respondent Meadowbrook Insurance Services (Meadowbrook) that necessitated the surgery. Therefore, EICON argued that it was not responsible for paying for the surgery. The district court disagreed and affirmed the appeals officer's decision. We affirm the district court's decision.

On appeal, EICON argues that the district court erred on two grounds. First, EICON argues that the appeals officer lacked subject

matter jurisdiction to review the matter. EICON also argues that Reddic's appeal of the hearings officer's ruling was untimely, and therefore, the appeals officer could not hear Reddic's appeal.¹ EICON further argues that the hearing officer's determination that they were not responsible for Reddic's surgery should have been the final decision. EICON argues that the district court did not have subject matter jurisdiction to review the appeals officer's decision, and therefore, the decision was invalid.

Next, EICON argues that the district court erred in not applying the last injurious exposure rule to determine the responsible party for Reddic's surgery. EICON argues that Reddic's 2001 injury was an intervening, aggravating factor, and therefore, Meadowbrook should be responsible for coverage under the last injurious exposure rule.

We disagree with EICON's arguments. We conclude that Reddic's appeal of the hearing officer's decision was timely, and therefore, the district court had subject matter jurisdiction to hear Reddic's appeal. We also conclude that the district court did not err in not applying the last injurious exposure rule.

DISCUSSION

"The function of this court in reviewing an administrative decision is identical to the district court's."² Typically, the district court is

¹Under the current workers' compensation plan, a claimant is entitled to two levels of administrative review for a denial of a claim. The claimant can request review by a hearings officer of the denial; if the hearings officer affirms the denial, the claimant can request review by an appeals officer. See NRS 616C.315; NRS 616C.345.

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

free to decide purely legal questions without deference to the agency.³ In reviewing questions of fact, however, this court is prohibited from substituting its judgment for that of the agency's.⁴ In making this determination, the reviewing court is confined to the record before the agency.⁵ Therefore, this court's review is limited to determining whether there was "substantial evidence in the record to support the [appeals officer's determination]."⁶

Timeliness of Reddic's filing

EICON argues that the appeals officer lacked subject matter jurisdiction to review Reddic's appeal because her appeal was untimely. NRS 616C.345(1) allows a workers' compensation claimant thirty days to appeal a determination of a hearings officer. EICON contends that since the hearings officer rendered his decision on November 4, 2002, Reddic had until December 7, 2002, exactly 33 days after the decision date, to file her appeal.⁷ We disagree. Because EICON failed to establish when it deposited the notice with the United States Postal Service, we are left with no choice but to conclude that Reddic's appeal was timely.

³Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

⁴NRS 233B.135(3).

⁵SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990).

⁶Id. at 88, 787 P.2d at 409.

⁷An additional three days are allowed for the mailing of the hearing officer's determination to the parties. See Nyberg v. Nev. Indus. Comm'n, 100 Nev. 322, 324, 683 P.2d 3, 5 (1984); NRCP 6(e).

In Mikohn Gaming v. Espinosa, this court rejected the same argument and held that the time period began to run “on the last day when the State Mail Service might possibly have deposited the appeals officer’s decision with the United States Postal Service.”⁸ A party raising the statute of limitations as a defense has the burden of proving the action is untimely.⁹ We conclude that EICON failed to prove conclusively that Reddic’s appeal was untimely.

Here, there is no evidence on the record to establish exactly when the notice of the hearing officer’s decision was placed with the United States Postal Service. EICON offers only a certificate of mailing that does not conclusively prove when the notice was mailed.¹⁰ The

⁸122 Nev. 593, 599, 137 P.3d 1150, 1155 (2006).

⁹See, e.g., Permanente Medical Group/Kaiser v. W.C.A.B., 217 Cal. Rptr. 873, 876 (Ct. App. 1985) (“The burden of producing evidence sufficient to show [plaintiff’s] claim is barred was upon [defendant] who had asserted the statute as a defense.”).

¹⁰EICON’s certificate of mailing for the hearing officers determination reads:

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate addressee runner file at the Department of Administration, Hearings Division

. . . .

continued on next page . . .

certificate does not affirmatively state that the notice of the hearing officer's decision was mailed on November 4, 2002; it states that it could have been mailed that day "OR" placed in the state mail system to be mailed later.

EICON does not conclusively prove when it mailed the notice to Reddic. From the plain language of the mailing certificate, we can only conclude that EICON may have mailed the notice on November 4, 2002, or that the notice may have languished in the state mailroom until it was eventually mailed a few days before Reddic claims to have received it on December 23, 2002. Therefore, without EICON providing affirmative proof of when it mailed the notice, we can reach no other conclusion but that the last possible date the notice could have been deposited with the Postal Service was December 20, 2002, in order to be received by Reddic on December 23. Accordingly, we conclude that Reddic had 33 days from December 20, 2002, or until January 22, 2003, to deliver her appeal in the mail. Here, Reddic hand-delivered her appeal on January 10, 2003, well within 30-day time limit. Therefore, we conclude that Reddic's appeal was timely.

However, we are mindful that the gap of 48 days between the date on EICON's certificate of mailing, November 4, 2002, and the date Reddic claims to have received the notice, December 23, 2002, is

... continued

DATED this 4th day of November,
2002

significantly larger than the possible discrepancy of a single day we considered in Mikohn. It may seem unreasonable to assume that EICON delayed mailing the notice until December 20, 2002. Nevertheless, such a scenario is exactly what this court contemplated in Mikohn. The interpretation of workers' compensation laws requires a neutral reading.¹¹ We emphasize again, EICON bears the burden of establishing concrete proof of when the notice was placed with the U.S. Postal Service; it did not.

Substantial evidence

EICON argues that the appeals officer erred when he did not apply the last injurious exposure rule to Reddic's right knee replacement surgery because her 2001 injury was an aggravating and contributing factor.¹² EICON argues that Reddic's surgery was caused by the bilateral knee injury she sustained while working at her last employment. Therefore, EICON argues, Meadowbrook, as that employer's insurance carrier, should be responsible for covering the knee replacement surgery. We disagree.

This court reviews an "appeals officer's decision for clear error or arbitrary abuse of discretion."¹³ An appeals officer's designation of

¹¹See NRS 616A.010(4).

¹²The last injurious exposure 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." Riverboat Hotel Casino v. Harolds Club, 113 Nev. 1025, 1030, 944 P.2d 819, 823 (quoting SIIS v. Swinney, 103 Nev. 17, 19, 731 P.2d 359, 360 (1987)).

¹³Manwill v. Clark County, 123 Nev. ___, ___, 162 P.3d 876, 879 (2007).

causation under the last injurious exposure rule is a question of fact and will be upheld if the record contains substantial evidence to support the agency's determination.¹⁴ Substantial evidence is defined as evidence that "a reasonable mind might accept as adequate to support a conclusion."¹⁵

We conclude that the appeals officer's finding that Reddic's 1989 injury and two subsequent surgeries were a direct cause of her need for the knee replacement surgery was supported by substantial evidence. We also conclude that the 2001 injury was not an aggravating factor. During the appeals hearing, Reddic submitted medical reports from several doctors indicating that her right knee had deteriorated and that further treatment such as surgery was appropriate. Only one of those doctors opined that Reddic's last injury necessitated her knee replacement surgery. Based on the doctors' testimony, the appeals officer concluded Reddic's 2001 injury did not contribute to her knee replacement surgery.

This court shall not substitute its judgment for that of the agency in regard to a question of fact unless the appeals officer's decision was clearly erroneous.¹⁶ Because the appeals officer's decision is supported by substantial evidence, we conclude that the district court did not err in not applying the last injurious exposure rule.

¹⁴SIIS v. Christensen, 106 Nev. 85, 88, 787 P.2d 408, 409-10 (1990).


¹⁵State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

¹⁶Riverboat Hotel Casino, 113 Nev. at 1029, 944 P.2d at 822.

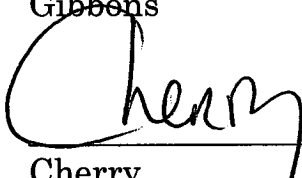
CONCLUSION

We conclude that Reddic's appeal was timely. We also conclude that substantial evidence supports the appeal officer's finding that Reddic's knee replacement surgery was due to her previous injuries for which EICON was responsible. Accordingly, we conclude that the district court properly denied EICON's petition for judicial review of the appeals officer's decision to reopen Reddic's claim. Therefore we


ORDER the judgment of the district court AFFIRMED.


_____, C.J.

Gibbons


_____, J.

Cherry


_____, J.

Saitta

cc: First Judicial District Court Dept. 1, District Judge
Lester H. Berkson, Settlement Judge
Beckett, Yott & McCarty/Reno
McDonald Carano Wilson LLP/Reno
Nevada Attorney for Injured Workers/Las Vegas
Carson City Clerk