

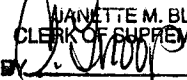
IN THE SUPREME COURT OF THE STATE OF NEVADA

EMPLOYERS INSURANCE COMPANY  
OF NEVADA,  
Appellant,  
vs.  
JOANNE SWANSON-THOMPSON,  
Respondent.

No. 47840

**FILED**

DEC 10 2007

WANNETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

This appeal is taken from a district court order denying judicial review in a workers' compensation matter. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Respondent Joanne Swanson-Thompson was industrially injured in October 2000. Her resulting workers' compensation claim ultimately was accepted by appellant Employers Insurance Company of Nevada (EICN) for multiple conditions, including a left hip strain.

Thereafter, in 2005, Swanson-Thompson administratively challenged two EICN determinations: one determination held in abeyance her temporary total disability (TTD) benefits pending receipt of a disability certificate, and the other determination scheduled her for an independent medical examination in Las Vegas. After EICN's determinations were upheld (as modified) by a hearing officer, one decision of whom noted that Swanson-Thompson's left hip strain was the only industrial condition still at issue, Swanson-Thompson administratively appealed those decisions to an appeals officer. The

appeals officer consolidated the matters and held a hearing on November 30, 2005, at which time the parties addressed whether Swanson-Thompson's left hip strain was the only industrial condition left unresolved.

While these matters were pending before the appeals officer, Swanson-Thompson's physician, Dr. Roger Rogalski, indicated that Swanson-Thompson suffered from trochanteric bursitis and requested approval for a left greater trochanteric bursectomy and exploration. This procedure was denied in a December 2005 letter, which stated that Swanson-Thompson could administratively appeal the decision within fourteen days.<sup>1</sup> According to EICN, Swanson-Thompson did not formally appeal this December 2005 determination, and Swanson-Thompson does not contend otherwise.

Shortly thereafter, with respect to the two determinations that were administratively appealed, the appeals officer issued an order that affirmed the hearing officer's decisions (as modified), concluding that Swanson-Thompson was not entitled to TTD benefits and that the only industrial conditions still unresolved were Swanson-Thompson's left hip strain and chronic greater trochanteric bursitis. The appeals officer's order stated that, if surgery was still recommended, EICN should approve that procedure.

Consequently, EICN petitioned the district court for judicial review, challenging the portion of the order regarding bursitis and

---

<sup>1</sup>The December determination letter also refused to accept arthralgia pain as industrial.

surgery. The district court denied judicial review, and EICN has appealed.

This court, like the district court, reviews an appeals officer's decision for clear error or an arbitrary abuse of discretion.<sup>2</sup> Although the appeals officer's purely legal determinations are independently reviewed, we give deference to the appeals officer's fact-based conclusions of law, which we will not disturb if supported by substantial evidence.<sup>3</sup> We may not substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact,<sup>4</sup> and our review is limited to the record before the appeals officer.<sup>5</sup>

On appeal, EICN argues that (1) the appeals officer exceeded her jurisdiction in considering an issue that was not part of the determination letters administratively appealed by Swanson-Thompson, (2) the appeals officer's conclusion that Swanson-Thompson suffered from bursitis is not supported by substantial evidence, and (3) the appeals officer was barred from determining whether surgery was warranted by the doctrine of collateral estoppel.

---

<sup>2</sup>Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003).

<sup>3</sup>Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003). Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion. Id.

<sup>4</sup>Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997).

<sup>5</sup>Id. at 536, 936 P.2d at 842.

With respect to the first issue, EICN asserts that because neither of the challenged determination letters involved the scope of Swanson-Thompson's industrial condition, the hearing officer had no authority, on administrative appeal from those letters, to determine whether the left hip strain was the only remaining condition at issue. Therefore, EICN contends, the appeals officer likewise had no authority to determine whether the scope of Swanson-Thompson's claim should be expanded to include bursitis.

Under NRS 616C.360(2), an appeals officer is required to hear "any matter raised before [her] on its merits." Here, whether Swanson's Thompson's left hip strain was the only remaining industrial condition at issue was argued by both parties during the November 2005 hearing. As part of her argument, Swanson-Thompson asserted that the hearing officer's statement was incorrect because she also had bursitis, which required surgery. Accordingly, the left hip strain/bursitis issue was raised before the appeals officer, who properly ruled on its merits.

Regarding the second issue, whether the appeals officer's conclusion that Swanson-Thompson has bursitis is supported by substantial evidence, we conclude that it is. In particular, Drs. Rogalski, James S. Sobiek, and Michael R. Edmunds diagnosed Swanson-Thompson with greater trochanteric bursitis, on which diagnoses the appeals officer was entitled to rely, despite any lack of objective evidence in testing

results rendered after two, but before one, of those doctors issued their diagnoses.<sup>6</sup>

Thirdly, EICN asserts that the appeals officer was estopped from rendering a decision on the surgery issue because Swanson-Thompson failed to administratively appeal the December 2005 determination letter. Because Swanson-Thompson failed to administratively challenge that determination letter, the determination became final, divesting the appeals officer of jurisdiction over the issue of whether EICN must approve surgery.<sup>7</sup> As a result, while the appeals officer properly addressed the issue of whether bursitis was part of Swanson-Thompson's claim, she improperly directed EICN to approve, without further consideration, any past-recommended surgical procedural that was still recommended by Dr. Rogalski. In light of this resolution of the bursitis issue, however, EICN is not precluded from considering, on the merits, any future request for surgical procedures.

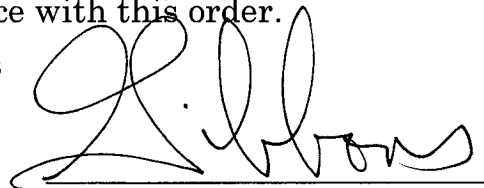
---

<sup>6</sup>See Bally's Grand Hotel & Casino v. Reeves, 113 Nev. 926, 936, 948 P.2d 1200, 1207 (1997) (providing that soft tissue injuries need not be established by objective evidence, but instead by "any reasonable and probable medical testimony").

<sup>7</sup>See NRS 616C.305(1); Reno Sparks Visitors Auth. v. Jackson, 112 Nev. 62, 66-67, 910 P.2d 267, 269-70 (1996) (recognizing that failure to administratively appeal an insurer's determination of an issue renders that determination final and divests the appeals officer of jurisdiction over that issue); Jerry's Nugget v. Keith, 111 Nev. 49, 54-55, 888 P.2d 921, 925 (1995) (providing that preclusive effect is afforded a final decision in a workers' compensation matter, unless circumstances change).

For the reasons discussed above, we affirm the district court's order denying judicial review with respect to the appeals officer's conclusion that bursitis is part of Swanson-Thompson's industrial claim, and we reverse the district court's order as regards the appeals officer's surgery instruction. We remand this matter to the district court with instructions that it remand this matter to the appeals officer to correct the surgery instruction in accordance with this order.

It is so ORDERED.<sup>8</sup>

  
\_\_\_\_\_ J.

Gibbons

  
\_\_\_\_\_ J.

Cherry

  
\_\_\_\_\_ J.

Saitta

cc: First Judicial District Court Dept. 1, District Judge  
Beckett, Yott & McCarty/Reno  
Joanne Swanson-Thompson  
Carson City Clerk

---

<sup>8</sup>As Swanson-Thompson did not petition the district court for judicial review of the appeals officer's determination regarding TTD benefits, we may not now consider that issue; we deny her request to deny any further appeal rights. Her October 15, 2007 request for submission is denied as moot. In light of this order, our November 13, 2006 stay is vacated.