IN THE SUPREME COURT OF THE STATE OF NEVADA

MGM GRAND/MGM RESORTS INTERNATIONAL,
Appellant,
vs.
RON MORGAN,
Respondent.

No. 60031

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; Nancy L. Allf, Judge.

In 2010, while working for appellant MGM Grand/MGM Resorts International (MGM), Morgan hurt his left shoulder. He filed a workers' compensation claim, under which he received treatment. After a physician concluded that Morgan's shoulder injury had healed and that his preexisting arthritis was the cause of his pain, MGM issued a notice of intent to close Morgan's claim. Morgan timely appealed MGM's notice by requesting a hearing before a hearing officer, who ruled in favor of MGM.

Morgan appealed the hearing officer's decision to an appeals officer. The appeals officer determined that the 2010 accident and resulting injury accelerated Morgan's arthritis to the extent of requiring surgery. Concluding that MGM was liable for the surgery costs under the last injurious exposure rule, the appeals officer ordered MGM to keep Morgan's claim open and to authorize and finance his surgery.

MGM filed a petition for judicial review of the appeals officer's order with the district court, which denied the petition. MGM appeals and asks this court to determine whether substantial evidence supports the

appeals officer's determination that MGM must authorize and finance Morgan's shoulder surgery under the last injurious exposure rule. As explained below, we conclude that substantial evidence supports the appeals officer's determination. Because the parties are familiar with the facts in this case, we will not recount them except as pertinent to our disposition.

Substantial evidence supports the appeals officer's determination that MGM must authorize and finance Morgan's shoulder surgery

MGM argues that it is not required to authorize and finance Morgan's shoulder surgery under the last injurious exposure rule. It asserts that the appeals officer misunderstood the rule and that substantial evidence does not support her conclusion that the 2010 injury affected the arthritis in Morgan's left shoulder to the extent that MGM was liable for his surgery. We disagree.

MGM's arguments concern the appeals officer's characterization of the shoulder injury as one for which MGM was liable under the last injurious exposure rule. The characterization of an injury under the last injurious exposure rule "is a fact-based conclusion of law." *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 284, 112 P.3d 1093, 1098 (2005). Such conclusions are not disturbed if they are supported by substantial evidence. *Id.* at 283, 112 P.3d at 1097. Substantial evidence is that which "'a reasonable person could accept as adequately supporting a conclusion.'" *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557 n.4, 188 P.3d 1084, 1087 n.4 (2008) (quoting *Manwill v. Clark Cnty.*, 123 Nev. 238, 241 n.4, 162 P.3d 876, 879 n.4 (2007)). In reviewing the determinations below, we defer to the appeals officer's judgment as to the credibility and weight of the evidence. *Grover*, 121 Nev. at 283-84, 112 P.3d at 1097.

The last injurious exposure rule

Generally, in order to receive workers' compensation benefits, an injured employee has the burden of proving that his or her injury "arose out of and in the course of his or her employment." NRS 616C.150(1). When a previously injured employee incurs an industrial injury with his or her most recent employer, and there is a question about whether the final injurious condition was caused by the most recent industrial injury or by a prior injury that was not incurred while working for the most recent employer, the last injurious exposure rule is used to resolve whether the most recent employer is liable for workers' compensation benefits. *See Las Vegas Hous. Auth. v. Root*, 116 Nev. 864, 869, 8 P.3d 143, 146 (2000) (providing that "[t]he last injurious exposure rule applies to successive injury cases"). Under the rule, the injured employee must establish that his or her recent injury or aggravation of a prior injury has "a slight causal relation" to his or her final injurious condition. *Grover*, 121 Nev. at 284, 112 P.3d at 1097-98.

The characterization of an injury under the last injurious exposure rule determines which employer is liable for the injured employee's workers' compensation benefits. *Id.* at 284, 112 P.3d at 1098. Possible characterizations include: (1) "an aggravation of a prior industrial injury," (2) "a new injury," or (3) "a recurrence of a prior industrial injury." *Id.* The employer at the time of the most recent industrial injury is liable for workers' compensation benefits that arise from either the aggravation of a prior injury *or* a new injury, but not for the recurrence of a prior industrial injury. *Id.*

An aggravation of a prior injury "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." *Id.* at 286-87, 112 P.3d at 1099 (footnote omitted). Under NRS 616C.175(1), a new and distinct compensable injury exists where a work-related injury aggravates, precipitates, or accelerates a non-work-related preexisting condition:

> 1. The resulting condition of an employee who:
>
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
>
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
>
> shall be deemed to be *an injury by accident that is compensable* . . . unless the insurer can prove by a preponderance of the evidence that the . . . injury is not a substantial contributing cause of the resulting condition.

Id. (emphasis added). A recurrence occurs "when symptoms of an original injury persist and when no specific incident can independently explain the worsened condition." *Grover*, 121 Nev. at 287, 112 P.3d at 1099.

The appeals officer understood the last injurious exposure rule

In arguing that the appeals officer misunderstood the last injurious exposure rule, MGM points to the following statement within the appeals officer's order: "[U]nder the last injurious exposure rule, the burden is on the last employer to establish that their employment did not contributed [sic] at all to the [c]laimant's current condition." MGM asserts that "[t]he standard is "not whether the new accident 'contributed at all' to the present condition, but whether the new injury bears a causal relation to the disability."

When read in isolation, the statement above suggests that the initial burden of proof is on the employer, in contravention with NRS

616C.150(1) and NRS 616C.175(1), which place the burden of proof on the employee. Also, the statement does not clearly provide that a causal relationship between the injury and the injured employee's ultimate injurious condition must be proven. *See Grover,* 121 Nev. at 284, 112 P.3d at 1097-98.

However, an order's meaning is ascertained by reading it as a whole. *Herup v. First Boston Fin., LLC,* 123 Nev. 228, 232-33, 162 P.3d 870, 873 (2007). In addition to the statement above, the order also states that Morgan "met his *burden of proving* . . . that the January 4, 2010, industrial injury is the *cause* of his current need for treatment and further surgery." (Emphases added.) Further, the order has findings of fact that address the causal relationship between the 2010 accident, the condition of Morgan's left shoulder, and Morgan's need for shoulder surgery. Hence, the order as a whole indicates that the appeals officer understood the last injurious exposure rule.

Substantial evidence supports the appeals officer's determination

Here, the appeals officer's order does not explicitly identify whether Morgan's arthritis in his left shoulder was a pre-existing industrial or non-industrial condition. But the order's use of the terms "accelerated" and "precipitated" in its description of the 2010 injury's effect on Morgan's arthritic shoulder indicates that the appeals officer categorized Morgan's injury as an injury under NRS 616C.175(1), which provides that a work-related injury that "accelerates" or "precipitates" a non-industrial preexisting condition is a compensable injury. The record supports this categorization in that the report of one doctor identified Morgan's arthritis as being a non-industrial preexisting condition. Thus, the order indicates the appeals officer characterized Morgan's shoulder condition to be a new and distinct compensable injury under NRS

616C.175(1) for which, pursuant to the last injurious exposure rule, MGM was financially liable. *See* NRS 616C.175(1); *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 286-87, 112 P.3d 1093, 1099 (2005). This characterization of the injury is supported by substantial evidence.

Dr. Steven Thomas's report addressed the nexus between the arthritis and the 2010 injury. His report stated that Morgan's 2010 injury "was the major reason why he is having problems with his shoulder." The report further stated that "[i]t is unlikely that [Morgan] would be seeking any medical attention for his shoulder if not for the January [2010] injury." Moreover, it provided that although Morgan had pre-existing arthritis, "his new injury in January [2010] significantly contributed to his problem" and hastened the need for surgery. The totality of Dr. Thomas's report communicated that the injury and accident in 2010, at the least, accelerated Morgan's arthritis to the extent of requiring surgery. *See Random House Webster's College Dictionary* 7 (2d ed. 1997) (defining "accelerate" as "to cause faster development, progress, or advancement in").

MGM argues that the appeals officer's reliance on Dr. Thomas's report was misplaced because other doctors concluded that the 2010 accident and resulting injury did not affect Morgan's shoulder and because Dr. Thomas's report contained inaccurate information. In reviewing the determinations below, we will not second-guess the appeals officer's credibility decisions or the weight that she gave to Dr. Thomas's report. *See Grover*, 121 Nev. at 283-84, 112 P.3d at 1097. The appeals officer had the discretion to weigh Dr. Thomas's report, including any inaccuracies, against all the other evidence and give it the amount of weight that she did. *See id.* Accordingly, we conclude that substantial evidence supports the appeals officer's conclusion that Morgan's final

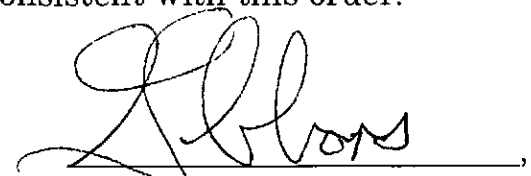
injurious condition was one for which MGM was liable under the last injurious exposure rule.

The order contains an error that must be corrected

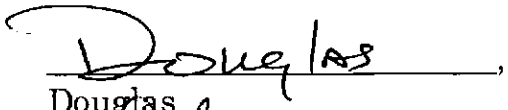
The appeals officer's order contains a factual error that must be remedied. The order states that the "industrial events of . . . 2010[ ] accelerated the degenerative condition of [c]laimant's left shoulder and precipitated his need for surgical intervention to address the *right* shoulder condition." (Emphasis added.) But, Morgan needed surgery on his *left* shoulder. This is the only statement in the order that identifies which shoulder will be surgically treated. Thus, upon remand, the district court shall instruct the appeals officer to correct her order to accurately reflect that the *left* shoulder is the shoulder for which MGM must authorize and finance surgery.

In light of the above, we

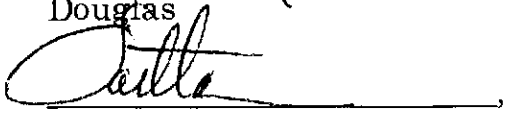
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[1]



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Saitta

---

[1]We have considered the remaining contentions on appeal and conclude that they lack merit.

cc: Hon. Nancy L. Allf, District Judge
William F. Buchanan, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Greenman Goldberg Raby & Martinez
Eighth District Court Clerk