IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC M. JOHNSON,
Appellant,
vs.
TRAVELERS INSURANCE; AND QUEBECOR-FERNLEY,
Respondents.

No. 69937

FILED

APR 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Eric Johnson appeals from an order denying a petition for judicial review in a workers' compensation action. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Johnson injured his lower back in the course of replacing a cylinder in a printing press at one of respondent Quebecor-Fernley's printing facilities. He filed a workers' compensation claim for the injury, which respondent Travelers Insurance Co. accepted on behalf of Quebecor-Fernley. Approximately five months later, Travelers closed the claim. On two occasions, Johnson unsuccessfully attempted to reopen his claim more than one year after it was closed.

The instant case arises out of an administrative appeal concerning Johnson's second application to reopen the claim, which an appeals officer dismissed for three reasons: (1) Johnson's application was time-barred under NRS 616C.390(5)(a) because he was not off work as a result of the industrial injury; (2) claim and/or issue preclusion prevented Johnson from reopening his claim; and (3) Johnson failed to meet his burden under NRS 616C.390(1) because no doctor recommended reopening the claim or primarily related the current condition to the industrial injury. The district court affirmed the appeals officer's dismissal on the

first basis only, and added that Johnson's claim would be time-barred if an amendment to NRS 616C.390(5)(a) was retroactively applied to his application to reopen the claim.[1]

On appeal, Johnson challenges only the reasons advanced by the district court in its order of affirmance, and asserts that rationales (2) and (3) are beyond the scope of this appeal because they were not addressed by the district court. However, this appeal is not restricted to the issues addressed by the district court because "[t]his court's role in reviewing an administrative decision is *identical* to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of discretion."[2] *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993) (emphasis added).

We agree with Johnson that his application was not time-barred by NRS 616C.390(5) because the rule does not require that the time "off-work" be ordered by a physician. *See Williams v. United Parcel Services*, 129 Nev. 386, 382, 302 P.3d 1144, 1147 (2013) (holding NRS 616C.390(5) requiring "a causal relationship between the injury and that time off work" but not requiring a physician's order.). However, Johnson failed to argue the additional reasons for dismissal were erroneous, thus

---

[1]We do not recount the facts except as necessary to our disposition.

[2]Under this standard, the supreme court has reviewed questions that were not addressed by the district court. *See, e.g., Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 782-88, 312 P.3d 479, 480-84 (2013) (concluding that the appeals officer's order was procedurally deficient even though the district court had addressed only whether the claimant's application was barred by claim and/or issue preclusion).

waiving any challenge thereto.[3] *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an issue not raised on appeal is deemed waived). Because Johnson has waived any argument that the other grounds for dismissal were erroneous, we necessarily affirm. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J., concurring in the judgment:

Since Johnson failed to satisfy his obligation to address all three rationales that support the appeals officer's dismissal order, this court may in its discretion affirm on that basis. *See* NRS 233B.135(2) (providing that "[t]he burden of proof is on the party attacking or resisting the [agency's] decision to show that the final decision is invalid"); *United*

[3]The appeals officer indicated that the claim and/or issue preclusion rationale was an independent basis to dismiss. Further, the conclusion that Johnson failed to meet his burden under NRS 616C.390(1) was also independent of the time-bar issue. *Compare* NRS 616C.390(1) (emphasis added) (providing that "the insurer *shall* reopen [a] claim" in response to an application submitted more than one year after claim closure if certain requirements are met), *with* NRS 616C.390(2) (emphasis added) (providing that if certain conditions are satisfied, an insurer "*may* authorize the reopening of the claim for medical investigation only").

Exposition Serv. Co. v. State Indus. Ins. Sys., 109 Nev. 421, 423, 851 P.2d 423, 424 (1993) (emphasis added) (noting that "[t]his court's role in reviewing an administrative decision is *identical* to that of the district court"); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported with relevant authority). For that reason, I concur in the judgment.

Nevertheless, had this court decided to reach the merits of Johnson's appeal, reversal may have been warranted. This is because: (1) the appeals officer misinterpreted pre-S.B. 232 NRS 616C.390(5)(a)[4] by requiring Johnson to prove that a physician had ordered him not to report to work, (2) neither claim nor issue preclusion barred Johnson from reopening his claim, and (3) the appeals officer misinterpreted NRS 616C.390(1) by requiring Johnson to show that a doctor had either "recommend[ed] reopening" the claim or "primarily relate[d]" the change of circumstances to the original industrial injury.

---

[4]When the appeals officer issued the dismissal order, NRS 616C.390(5) provided that an application to reopen a claim had to be made within one year after the date on which the claim was closed if the claimant "was not off work as a result of the injury" and "did not receive benefits for a permanent partial disability." *See* NRS 616C.390(5) (2014). The Legislature subsequently replaced the "off work" prong of NRS 616C.390(5) with the following text: "The claimant did not meet the minimum duration of incapacity as set forth in NRS 616C.400 [(*i.e.*, 5 consecutive days, or 5 cumulative days within a 20-day period)] as a result of the injury[.]" *See* 2015 Nev. Stat., ch. 240, § 2, at 1137, 1140-41 (introduced as S.B. 232); NRS 616C.400(1). This opinion differentiates between these two versions of that provision by referring to it as either "pre-S.B. 232 NRS 616C.390(5)(a)" or "post-S.B. 232 NRS 616C.390(5)(a)."

Pre-S.B. 232 NRS 616C.390(5)(a) did not provide that a claimant was time-barred unless a physician ordered him or her not to report to work

The appeals officer and the district court concluded that in order to avoid pre-S.B. 232 NRS 616C.390(5)'s one-year limitation on reopening a workers' compensation claim, Johnson had to show that a physician had ordered him not to report to work because of his original industrial injury. I disagree.

"A de novo standard of review is applied when this court addresses a question of law, 'including the administrative construction of statutes.'" *See Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (quoting *Holiday Ret. Corp. v. State of Nev. Div. of Indus. Relations*, 128 Nev. 150, 153, 274 P.3d 759, 761 (2012)).

Relying upon *Williams v. United Parcel Services*, 129 Nev. 386, 302 P.3d 1144 (2013), the appeals officer concluded that in order to satisfy pre-S.B. 232 NRS 616C.390(5)(a)'s "off work as a result of the injury" requirement, the claimant must show that a physician ordered him or her not to report to work. Although *Williams* concluded that a physician's "instruction not to work" was *sufficient* to establish that a claimant was "off work as a result of the injury[,]" the supreme court did not hold that it is a *statutory requirement*. *See Williams*, 129 Nev. at 392, 302 P.3d at 1148. Instead, the court held only that "NRS 616C.390(5) conditions an employee's ability to reopen a claim on . . . losing time from work and a *causal relationship* between the injury and that time off work." *See id.* at 392, 302 P.3d at 1147 (emphasis added).

Furthermore, the fact that the provision did not explicitly condition the reopening of a claim on a physician's order is strong evidence that it did not impose any such requirement. *See Dep't of Taxation v.*

DaimlerChrysler Servs. N. Am., LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (footnote omitted) ("Nevada law . . . provides that omissions of subject matters from statutory provisions are presumed to have been intentional."). Therefore, the appeals officer's conclusion that Johnson's application was time-barred relied upon an erroneous interpretation of the "off work" requirement.[5]

Neither claim nor issue preclusion bar Johnson from reopening his claim

The appeals officer concluded that Johnson could not reopen his claim because a hearing officer affirmed the denial of Johnson's first application on the ground that it was time-barred under pre-S.B. 232 NRS

---

[5]Additionally, I am not persuaded by respondents' other arguments offered to support the appeals officer's interpretation of pre-S.B. 232 NRS 616C.390(5)(a).

Further, although the majority briefly addresses this issue, I note that the order does not clarify that it is interpreting only pre-S.B. 232 NRS 616C.390(5)(a), or that *Williams* did not squarely address this question.

Lastly, I reject respondents' contention that post-S.B. 232 NRS 616C.390(5)(a) retroactively governs Johnson's application to reopen. This is because: (1) there is a presumption that the statutory amendment has only prospective application, *see Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 853 (2013); *cf. McKellar v. McKellar*, 110 Nev. 200, 203-04, 871 P.2d 296, 298 (1994) (applying this presumption to an amendment that eliminated a statute of limitations); and (2) NRS 616C.390(10) does not rebut that presumption because it provides only that the date of the *original injury* is immaterial under NRS 616C.390, and not that the *date of the application to reopen* is irrelevant. *See* NRS 616C.390(10) (emphasis added) (providing that "[t]he provisions of this section apply to any *claim* for which an application to reopen . . . is made pursuant to this section, regardless of the date of the *injury* or *accident* to the claimant").

616C.390(5). I submit that neither claim nor issue preclusion bars Johnson's second application to reopen.[6]

First, the appeals officer's dismissal order and respondents' briefing fail to explain why either doctrine is applicable to this case. Second, in the absence of any such explanation, it is not clear that Johnson's second application raises the same "claim" for the purpose of claim preclusion, especially considering that Johnson apparently underwent back surgery *after* the hearing officer had affirmed the denial of his first application. *See Weddell v. Sharp*, 131 Nev. ___, ___, 350 P.3d 80, 81 (2015) (holding that an element of claim preclusion is that "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action"). Lastly, issue preclusion is inappropriate because: (1) Travelers raised the time-bar issue for the first time orally at the hearing on the initial application, and (2) the hearing officer's decision was issued only two days thereafter. *See Thompson v. City of N. Las Vegas*, 108 Nev. 435, 439-40, 833 P.2d 1132, 1134-35 (1992) (holding that issue preclusion is inapplicable if a party "did

---

[6]Although the appeals officer's dismissal identifies both claim and issue preclusion, the written decision does not clarify which doctrine(s) supposedly prevents Johnson from reopening his claim. The appeals officer should have been mindful that agency decisions must be sufficiently clear to allow appellate review. *See Elizondo*, 129 Nev. 785-86, 312 P.3d at 482-83 (concluding that an appeals officer's decision that did not include factual or legal conclusions "preclud[ed] adequate review on appeal").

Furthermore, for the purpose of this opinion, I assume arguendo that claim preclusion and issue preclusion are both available as defenses in this context (*i.e.*, when a claimant is attempting to relitigate NRS 616C.390(5)'s one-year limitation).

not have a full and fair opportunity to litigate an issue"). Therefore, the appeals officer erred in concluding that claim and/or issue preclusion bar Johnson from reopening his claim.

The appeals officer erroneously concluded that NRS 616C.390(1) requires a doctor to recommend reopening or primarily relate the change of circumstances to the industrial injury

The appeals officer concluded that Johnson did not meet his burden to reopen his claim because NRS 616C.390(1) requires a doctor to either: "recommend reopening" the claim, or "primarily relate" the change of circumstances to the original industrial injury. I submit that the appeals officer misconstrued NRS 616C.390(1).

First, the only explicit obligation that NRS 616C.390(1) imposes in relation to doctors is a claimant's burden to include a physician's or chiropractor's certificate "showing a change of circumstances which would warrant an increase or rearrangement of compensation." *See* NRS 616C.390(1)(c). Second, although NRS 616C.390(1)(b) provides that claimants must satisfy a "primary cause" standard, it does not expressly limit the types of evidence that may be used to meet that standard. *See* NRS 616C.390(1)(b). Lastly, the fact that NRS 616C.390 expressly restricts the forms of evidence used to support other applications to reopen—but NRS 616C.390(1)(b) does not—indicates that a claimant may satisfy the "primary" cause standard without a doctor's opinion. *See DaimlerChrysler*, 121 Nev. at 548, 119 P.3d at 139 (footnote omitted) ("Nevada law . . . provides that omissions of subject matters from statutory provisions are presumed to have been intentional."); *see, e.g.*, NRS 616C.390(4)(a) (emphasis added) (providing that an application filed within one year of a claim's closure shall be

reopened if (among other things) "[t]he application is supported by *medical evidence* demonstrating an objective change in the medical condition of the claimant"); *cf. United Exposition*, 109 Nev. at 424-25, 851 P.2d at 425 (holding that a claimant may establish that a condition is industrially-related by advancing "sufficient facts" from which "the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury"). Therefore, NRS 616C.390(1) does not require that "a doctor recommend reopening [or] . . . primarily relate a change of circumstances to the industrial injury."

Accordingly, had this court chosen to overlook Johnson's failure to satisfy his appellate burden, then it would have likely been appropriate to reverse the district court's order and remand to that court with instructions to remand this matter to the appeals officer. Upon remand, the appeals officer would have needed to reconsider whether: (1) Johnson was "off work as a result of the injury" for the purpose of pre-S.B. 232 NRS 616C.390(5)(a), and (2) Johnson has met his burden under NRS 616C.390(1). Nonetheless, I concur in the judgment because this court is not required to excuse Johnson's failure to completely argue the merits of his appeal.

_____, J.
Gibbons

cc: Department 8, Second Judicial District Court
Chief Judge, Second Judicial District Court
Carol Webster Millie, Settlement Judge
Law Offices of Steven F. Bus, Ltd.
Law Offices of David Benavidez
Dept. of Business and Industry/Div. of Industrial Relations/Carson City
Washoe District Court Clerk