IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH J. OLSON,
Appellant,
vs.
ANDERSON DAIRY; AND TRAVELERS INSURANCE,
Respondents.

No. 72457

FILED

JUN 27 2018

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

ORDER OF REVERSAL AND REMAND

Kenneth J. Olson appeals from a district court order denying a petition for judicial review of an administrative proceeding denying workers' compensation benefits. Eighth Judicial District Court, Clark County; Sally Loehrer, Senior Judge.

Olson worked for Anderson Dairy as a refrigeration engineer.[1] As part of his job, Olson maintained boilers, which involved handling various chemicals. According to Olson, in December 2014, he used an air hose to blow concrete dust off two of the dairy's boilers that had gathered as a result of construction work on the premises. In the process, Olson claims that he scraped dried chemicals off the boilers, which he then blew off along with the concrete dust. As a result, he believes that his face, body, arms, and skin were "covered in chemical dust." The next day,

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[1]We do not recount the facts except as necessary to our disposition. We note that this case was heard by the court at oral argument which was noticed and open to the public and this order is not a secret order as alleged by our dissenting colleague, but an order available to the public online or from the Nevada Supreme Court Clerk's Office, as all orders are.

COURT OF APPEALS
OF
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Olson was outside and noticed that he could no longer see the red light on top of a cell phone tower with his left eye. He first sought medical treatment for his changing vision a couple of days after noticing the impairment. Over the course of the next few months, he experienced progressively worsening symptoms, and he sought further treatment from multiple doctors. Treatment was unsuccessful, as Olson subsequently became permanently blind in both eyes.

During the course of his treatment, Olson sought workers' compensation benefits, and Anderson Dairy's industrial insurance carrier, Travelers Insurance, denied his claim. He challenged the denial, but a Department of Administration appeals officer affirmed the insurer's decision. Olson petitioned the district court for judicial review of the appeals officer's decision, but the district court denied the petition.

On appeal, Olson argues that the district court erred because substantial evidence did not support the appeals officer's decision, the appeals officer committed legal error, and the appeals officer abused his discretion by failing to order an independent medical examination (IME) as allowed by NRS 616C.360(3)(a). Because we agree with Olson that the appeals officer's conclusions of law were erroneous, we need not consider his other arguments.

Under NRS 233B.135, this court may remand the final decision of an appeals officer if a petitioner's substantial rights have been prejudiced because the agency's final decision is "[a]ffected by [an] error of law;" is "[c]learly erroneous in view of the reliable, probative and

substantial evidence on the whole record;" or is "[a]rbitrary or capricious."[2]

Here, the appeals officer's conclusion of law[3] that Dr. Houchin was an IME physician was clearly erroneous. We cannot say that this error was harmless, as the record reflects that the appeals officer gave more weight to Dr. Houchin's opinion. And contrary to what our dissenting colleague states, we have found legal error only, and we are not requiring the appeals officer to engage in a "medical investigation on his own." Accordingly, we reverse the order of the district court denying Olson's petition for judicial review. On remand, we instruct the district

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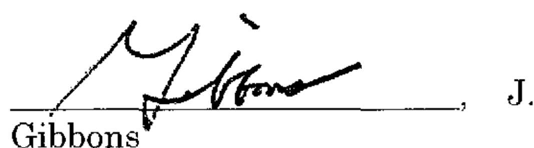
[2]We agree with our dissenting colleague that NRS 616C.360(3)(a) is permissive as opposed to mandatory, however, we note that the statute states that if there is a medical question or dispute concerning an injured employee's condition, an IME may be ordered. There certainly appears to have been a medical question or dispute in this case. Under these circumstances, because of the serious, permanent nature of Olson's condition involving total blindness in both eyes, the appeals officer should consider, on remand, ordering an IME pursuant to NRS 616C.360(3)(a) to give an unbiased opinion regarding whether Olson's permanent and rapid-onset blindness was caused by the alleged industrial injury, or was due to his preexisting medical problems, or whether Olson's preexisting medical conditions contributed to the alleged industrial injury. *See* NRS 616C.175(1) (regarding liability for an employment-related injury arising from the aggravation of a preexisting condition); NRS 617.366(1) (regarding liability for an occupational disease arising from the aggravation of a preexisting condition).

[3]Our dissenting colleague is mistaken that we are reversing "because the appeals officer's '*findings of fact*' contain one simple error." To the contrary, this court is reversing and remanding because the appeals officer's "*conclusions of law*" are clearly erroneous and we cannot conclude the error was harmless.

court to grant the petition and remand the matter to the appeals officer for proceedings consistent with this order.

It is so ORDERED.

_________________________, C.J.
Silver



_________________________, J.
Gibbons

TAO, J., dissenting:

"A judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." *A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). This is especially so when dealing with statutory law enacted by a legislature, as opposed to mere common law developed by judges. When applying judge-made common law to resolve a common law case, we might have more freedom to bend and warp, or even overrule and re-write, settled principles in order to reach a result we like (subject, of course, to the limitations of the judge-made doctrine of stare decisis); after all, the common law originated in equity and it is, by nature, developed largely ad hoc in a case-by-case fashion.

But not so when dealing with statutory law. The principle of separation of powers, inimical to liberty and expressly embodied in our state constitution (*see* Nev. Const. art. 3, § 1), requires the judiciary to tread delicately when dealing with legislative statutes, for the power to

amend statutes belongs exclusively to the legislative, not judicial, branch of government. "It is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). Nor can we ignore statutes or apply them selectively: "[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Beazer Homes Nev. Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004); *see City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 867, 59 P.3d 477, 483 (2002) (invalidating vague statute because, to enforce it, "this court would have to engage in judicial legislation and rewrite the statute substantially"), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). Respect for our co-equal branches of government under our tripartite constitutional system demands nothing more and nothing less. *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983) (going beyond recognized judicial limits "will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance").

This matters here because workers' compensation law is entirely a creation of statute, with no historical roots or tradition anywhere in common law. Quite to the contrary, it represents a clear

legislative departure from ancient and established common law principles of liability. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 787-89 (1982). We must thus apply the relevant statutes faithfully, neutrally, and in accordance with their text, ignoring how we think they could have been better written or whether they happen to produce a result we like in the case at hand.

I.

Nevada's workers' compensation statutes state, unambiguously, that the administrative tribunal is the finder of fact, and its factual determinations are not to be disturbed by courts reviewing the matter on appeal unless arbitrary, capricious, or utterly lacking evidentiary basis. *See Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). A court "shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact." NRS 233B.135(3).

This is sometimes easier said than done, and this case presents a good example why. While working as a refrigeration engineer, Olson used an air hose to blow some dust, possibly mixed with dried chemical residue, off of a boiler. The next day he began experiencing vision problems starting with difficulty seeing the color red and worsening into blurriness and vision loss until he ended up completely blind only a few weeks later despite treatment by eye specialists. He filed for workers' compensation benefits, supporting his claim with written reports from two of his physicians (Drs. Rodger and Levine) who

concluded, to a reasonable degree of medical probability, that his blindness was caused by chemical toxins.

That's a pretty decent prima facie case for benefits. What complicates things is that Olson was a smoker with a variety of pre-existing health problems linked to the kind of visual neuropathy that he developed. In opposing his claim, the employer's workers' compensation insurer supplied a report from another physician, Dr. Houchin, who reviewed Olson's medical records and concluded instead that the blindness was caused by Olson's pre-existing medical conditions, namely diabetes, hypertension, hyperlipidemia, and smoking, which he called "the main four risk factors for ischemic optic neuropathy." He therefore stated "with medical certainty that the cause of [Olson's blindness] is NOT exposure to a toxic agent" (emphasis original).

The parties disputed other important facts as well. At the hearing on Olson's claim, Olson testified that his blindness began hours after he scraped chemical residue from a boiler and used an air hose to blow it away. A coworker testified, however, that he saw no such residue on the boilers.

The appeals officer denied Olson's claim. The decision isn't a stretch of the imagination by any means; it's clearly rooted in Dr. Houchin's medical report and the coworker's testimony. But one could fairly read the record and come away with the opposite conclusion as well. It's undisputed that Olson had a variety of pre-existing conditions linked to various forms of visual neuropathy. But on balance it seems odd that his vision loss occurred so unexpectedly, suddenly, and rapidly, leading one to naturally wonder whether some external toxin, like the chemical

dust he says blew into his face the day before, played at least some role in either triggering or accelerating his condition.

So this is a case where reasonable minds could believe that the appeals officer may have gotten it wrong. But my objection here is that, at this stage of the case, whether the appeals officer was right or wrong is no longer the issue. The fear is that, in trying to turn things around for Olson, we're ignoring what the statute so clearly commands us to do and, along the way, creating precedent, intentional or otherwise, for future cases that we're someday going to regret.

The law cares about achieving a just and fair outcome for any individual litigant like Olson. But it cares equally, and perhaps even more, about ensuring predictability, consistency, stability, and clarity across the full spectrum of cases that could conceivably ever come before a court. "Law . . . unlike science, is concerned not only with getting the result right but also with stability, to which it will frequently sacrifice substantive justice." Richard A. Posner, *The Problems of Jurisprudence* 51 (1990). Appellate courts must therefore consider not only the case at hand, but also how any rule they apply in this case will fit other cases that might come up in the future, possibly involving considerably more complex or less palatable facts. The law of unintended consequences applies as much in jurisprudence as anywhere else; bending a rule to accommodate one litigant doesn't always achieve better justice—sometimes it just sows confusion in anyone trying to figure out what we'll do in other cases in the future. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1 (1959) (explaining that judicial decisions must, when possible, rest upon

reasoning and analysis that transcend the immediate result so that non-parties can know whether the holding extends to them).

Here, the majority remands the entire case for further review because the appeals officer's findings of fact contain one simple error, wrongly characterizing Dr. Houchin's medical analysis as an "IME" (Independent Medical Examination) when it was instead a report submitted by one of the parties. That's clearly a mistake. But it's a minor factual one. The findings accurately describe what the report says, and it ought to be the contents, and not the label, that matters. The rest of the findings make clear that the appeals officer chose, as a question of credibility, to believe the contents of Dr. Houchin's report over competing medical reports. To reverse based on a three-letter label when everything else about the case supports the appeals officer's conclusion goes far beyond what we're normally permitted to do, and what we normally do in practice in other cases, when reviewing proceedings like this one. *See, e.g., Escobar v. Green Valley Ranch/Station Casinos, Inc.*, No. 70166 (Order of Reversal and Remand, February 10, 2017) (reversing administrative decision as not based on substantial evidence because it rested upon questionable medical conclusions that went beyond the conclusions any physician actually reached); *Gottula v. Kevco Construction, LLC*, No. 67552 (Order of Reversal and Remand, October 6, 2016) (reversing appeals officer's decision that relied upon medical reports that were factually incorrect on matters the parties themselves did not dispute).

Yes, this is an unpublished and technically non-precedential order that likely very few will ever read and no one can ever cite, at least overtly. But the principles of law that we apply in our unpublished

decisions ought to be exactly the same as the principles we apply in published decisions, or else we're either not following the law, or following it only faithlessly and creating two different sets of rules, one public and the other secret, for different kinds of cases. I don't think we're constitutionally permitted to do that. I certainly don't think it's a good idea.

II.

When all is said and done, what we're left with in this appeal is a quintessential credibility battle: two witnesses disagree that there was any residue at all around the boilers, and two sets of physicians disagree as to the medical cause of Olson's blindness. The appeals officer chose to believe one side over the other. There's no reason for us to second-guess that decision, no matter how wrong we believe it to be, when the statute prohibits us from doing so and, as a practical matter, we're exceptionally poorly situated to do so.

"An appellate court is not particularly well-suited to make factual determinations in the first instance" because its "ability to make factual determinations is hampered by the rules of appellate procedure, the limited ability to take oral testimony, and its panel or en banc nature." *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299-300, 279 P.3d 166, 172-73 (2012); *see Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact). It's for reason of that handicap that our review is strictly limited under NRS Chapter 233B. We can reverse a denial of benefits only for

legal error; where the decision was arbitrary or capricious; or where important factual findings were unsupported by substantial evidence in the record. But where the parties have presented two contradictory sets of evidence and the final decision ultimately rests upon choosing which competing sets of witnesses to believe, none of these grounds for reversal exists.

Nonetheless, Olson invites us to poke and prod at the physician's reports and dismiss some of them as insufficient to justify the appeals officer's decision. The reports aren't perfect. One could note, for example, that Dr. Houchin never personally met with Olson, unlike Olson's physicians who did. But one could just as easily note that no physician ever testified that such a personal meeting was necessary to reach a medically sound conclusion. Or one could also note that Houchin had access to both of the reports generated by Olson's doctors while reaching his conclusion, while neither of Olson's doctors had access to as complete a file as Houchin did. In the end, however, the evidence need not be perfect. It need only be "substantial," defined as enough to reasonably support the appeals officer's findings. All of Olson's critiques just go to the credibility and weight of the evidence, and assigning relative credibility and weight to each piece of evidence is exactly what we're supposed to leave to the finder of fact to decide and not disturb on appeal.

During oral argument, Olson suggested that, when confronted with such flatly contradictory sets of medical reports, the appeals officer should have ordered up an IME pursuant to NRS 616C.360(3) from a new physician in order to resolve the conflict. But NRS 616C.360(3) is permissive on its face, by its terms permitting such IMEs but never

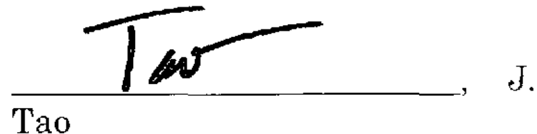
requiring them. The appeals officer could certainly have ordered one; but it was not error for him to refuse to do so—especially when Olson never asked for one when he had the chance to. It appears relatively clear that administrative officers possess the power to order an IME even when neither party requests it. *See Law Offices of Barry Levinson, P.C., v. Milko*, 124 Nev. 355, 361 n.3, 184 P.3d 378, 383 n.3 (2008). It's one thing to grant an administrative officer the power to consult with additional physicians when the existing evidence may be deficient or insufficient in some way for him to make a decision; the statute clearly accomplishes that. But to reverse an appeals officer for failing to do so when neither party asked him to is something entirely different. No statute or other law contemplates anything even remotely like that.

Olson presented his evidence to the appeals officer and then rested his case. When he did so, he represented that the evidence he submitted was sufficient for a final decision one way or the other, and thereby requested that the appeals officer render a decision based only upon the evidence presented and nothing more. *See* Sidney Beckman, *Hiding the Elephant: How the Psychological Techniques of Magicians Can Be Used to Manipulate Witnesses at Trial*, 15 Nev. L.J. 632, 633 (2015) ("[A] trial is not a scientific inquiry into truth. A trial is the resolution of a dispute."). To now require that the appeals officer should have done more medical investigation on his own, beyond what Olson himself deemed necessary to his claim, would be unprecedented in Nevada law. Furthermore, it would change the fundamental nature of the adjudication process from an adversarial system under which the parties present their evidence to a neutral decision-maker (what the American judiciary is supposed to be) into something more akin to an "inquisitorial" proceeding

in which the judge investigates the merits of the case entirely on his own (something commonly found in the socialist countries of Europe). I don't read NRS 616C.360(3) as designed to accomplish anything like that.

III.

For these reasons, I respectfully dissent. Perhaps reasonable minds could believe that the appeals officer got it wrong in adjudicating Olson's claim. But this court isn't the finder of fact, and it's not supposed to engage in second-guessing fact-finders. It's also not permitted to rewrite or ignore laws that clearly compel it to render decisions one way no matter how much we'd prefer them to come out the other way. I would affirm.



__________________________, J.
Tao

cc: Chief Judge, Eighth Judicial District Court
Hon. Sally Loehrer, Senior Judge
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Law Offices of David Benavidez
Legal Aid Center of Southern Nevada, Barbara E. Buckley, Executive Director
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