IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SOC LLC; AND AIG CLAIMS SERVICES,
Appellants,
vs.
JESSENIA RODRIGUEZ,
Respondent.

No. 78460-COA

ORDER OF AFFIRMANCE

SOC LLC and AIG Claims Services appeal from an order granting a petition for judicial review and setting aside the decision of an administrative appeals officer in a workers' compensation matter. Eleventh Judicial District Court, Mineral County; Jim C. Shirley, Judge.

Appellant employer, SOC LLC (SOC) employed respondent, Jessenia Rodriguez, as a munitions handler.[1] As part of her job duties, Rodriguez packed grenades into boxes, and lifted the filled 56-pound boxes onto a pallet for shipment. On February 27, 2013, Rodriguez went to the hospital, alleging an injury to her right shoulder and neck due to repetitive motions at her work. Rodriguez timely filed a claim for an industrial injury, which appellant insurer, AIG Claims Services (AIG), accepted on March 6, 2013, for "Right Shoulder Strain & Right Neck Strain." Rodriguez treated this condition with physicians and specialists, and received temporary total disability (TTD) payments from AIG. During this time, Rodriguez's treating

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

doctors recommended that Rodriguez be placed on light duty work, but SOC was unable to accommodate these work restrictions.[2]

Despite physical therapy sessions, several trigger point injections, epidurals, and diagnostic tests, Rodriguez's treating physicians were unable to precisely diagnose and treat the cause of Rodriguez's pain. Following a disagreement with one of Rodriguez's treating physicians over the appropriate course of treatment, AIG set up an independent medical examination (IME) with Dr. Aubrey Swartz on November 26, 2014.

Following his examination of Rodriguez, Dr. Swartz opined that Rodriguez suffered mild soft tissue muscle strains of the cervical spine and right shoulder girdle for which Rodriguez was over-treated. He recommended no additional testing or treatment and opined that Rodriguez was capable of full duty work and was *not* ratable for permanent partial disability (PPD). Following this report, AIG issued a determination advising Rodriguez that her TTD benefits were terminated as she was capable of full duty work, and issued a separate notice of intention to close claim without a disability evaluation.

Rodriguez first appealed to a hearing officer, who affirmed the closure of Rodriguez's claim. She appealed that decision to the appeals officer, who, relying heavily on Dr. Swartz's report, affirmed AIG's determinations.

Rodriguez next petitioned for judicial review in the Eleventh Judicial District Court. The district court, after reviewing the record,

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[2]Rodriguez was on "medical leave" at SOC from June 2013 forward, until SOC terminated Rodriguez on June 19, 2014, pursuant to the bargaining unit agreement that placed a 365-day limit on any medical leave of absence.

granted the petition for judicial review and set aside the decision of the appeals officer, finding that: (1) the appeals officer should not have relied upon Dr. Swartz's report, and (2) AIG failed to comply with the requirements of Nevada's workers' compensation statutes in closing Rodriguez's claim. SOC and AIG now appeal the district court's order granting Rodriguez's petition for judicial review and setting the appeals officer's decision aside, which the district court stayed pending the outcome of this appeal.

On appeal, SOC and AIG argue that the district court erred by substituting its own judgment in place of the appeals officer's determination that Dr. Swartz's report was reliable and credible. In response, Rodriguez argues that Dr. Swartz's report was unreliable, and that reliance on the same goes against the weight of the evidence. Rodriguez further argues that in their opening brief SOC and AIG failed to address, and therefore waived, the district court's separate determination that AIG failed to comply with Nevada's workers' compensation statutes in closing Rodriguez's claim.[3]

Standard of review

When reviewing an agency's decision, we, like the district court, consider whether an error of law affected the appeals officer's decision or

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[3]Rodriguez also urged this court to strike or disregard SOC and AIG's opening brief for failure to comply with NRAP 28(e)(1). While we acknowledge that the argument section of SOC and AIG's brief does not comply with the requirements of NRAP 28(e)(1), we decline to accept Rodriguez's invitation to strike the opening brief. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (holding appellate courts "need not consider the contentions of an appellant where the appellants opening brief fails to cite to the record on appeal"); NRAP 28(e)(1) (requiring every factual assertion be supported by a reference to the appeal appendix). Instead, we admonish counsel for SOC and AIG to fully comply with the requirements of NRAP 28(e)(1) in all further briefing before the appellate courts as required.

whether that decision was "an arbitrary and capricious abuse of discretion." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008); *see also* NRS 233B.135(3)(d), (f); *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385–86, 254 P.3d 601, 603 (2011). If the agency's decision rests on an error of law and the petitioner's substantial rights have been prejudiced, this court may set aside the decision. *State, Private Investigator's Licensing Bd. v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013). Our review is limited to the record before the agency, *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 282, 607 P.2d 581, 582–83 (1980), and we will overturn the agency's factual findings only if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4); *Nev. Pub. Emps.' Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

Whether SOC and AIG complied with NRS 616C.235

We first address Rodriguez's argument that AIG and SOC failed to contest the district court's finding in their opening brief that AIG failed to comply with the statutory requirements of NRS 616C.235 in closing Rodriguez's claim, therefore, they have waived this issue on appeal. Generally, "[i]ssues not raised in an appellant's opening brief are deemed waived." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). However, it is the court's "prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice." *Id.* (internal citations omitted).

A review of SOC and AIG's opening brief supports that SOC and AIG failed to address the district court's finding that they failed to comply with NRS 616C.235.[4] Specifically, SOC and AIG's opening brief is bereft of any argument related to their failure to comply with statutory mandates when closing Rodriguez's claim. Indeed, SOC and AIG's reply brief also contains no citations to authority and no argument in response to Rodriguez's assertion that they waived this argument on appeal. Accordingly, we determine that this issue is waived on appeal. *Id.*

Nevertheless, we take this opportunity to address the merits of this argument. NRS 616C.235(1)(a) states:

> When the insurer determines that a claim should be closed before all benefits to which the claimant may be entitled have been paid, the insurer shall send a written notice of its intention to close the claim to the claimant by first-class mail addressed to the last known address of the claimant and, if the insurer has been notified that the claimant is represented by an attorney, to the attorney for the claimant by first-class mail addressed to the last known address of the attorney. The notice *must* include, on a separate page, [1] a statement describing the effects of closing a claim pursuant to this section and [2] a statement that if the claimant does not agree with the determination, the claimant has a right to request a resolution of the dispute pursuant to NRS 616C.305 and 616C.315 to 616C.385, inclusive, including, without limitation, a statement which prominently displays the limit on the time that the claimant has to request a resolution of the dispute as set forth in NRS 616C.315. A suitable form for requesting a resolution of the dispute must be

[4]We note that the Legislature amended NRS 616C.235 effective July 1, 2017. However, these amendments were minimal and do not affect our analysis here.

> enclosed with the notice. *The closure of a claim pursuant to this subsection is not effective unless notice is given as required by this subsection.*

(Emphases added.)

Further, as applicable here, NRS 616C.235(5)(b) states that "if an evaluation for a permanent partial disability will not be scheduled pursuant to NRS 616C.490," the written notice shall include "a statement explaining that the reason is because the insurer has determined there is no possibility of a permanent impairment of any kind."

"'When interpreting a statute, we first look to its language,' and when the language used has a certain and clear meaning, we will not look beyond it." *Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) (quoting *Webb v. Shull*, 128 Nev. 85, 88-89, 270 P.3d 1266, 1268 (2012)). Here, NRS 616C.235(1)(a) states that the "notice *must* include, on a separate page, [1] a statement describing the effects of closing a claim pursuant to this section and [2] a statement that if the claimant does not agree with the determination, the claimant has a right to request a resolution of the dispute pursuant to NRS 616C.305 and 616C.315 to 616C.385, inclusive, including, without limitation, a statement which prominently displays the limit on the time that the claimant has to request a resolution of the dispute as set forth in NRS 616C.315." Generally, the word "must" imposes a mandatory requirement. *Otto*, 128 Nev. at 432, 282 P.3d at 725. And, since NRS 616C.235 states that "[t]he closure of a claim pursuant to this subsection is not effective unless notice is given as required by this subsection," we conclude that all elements of the statute must be met in order to constitute proper notice, and effectively close a claim.

Before the appeals officer, Rodriguez argued "there was not a separate page describing the effects of closing a claim," and that closure was

ineffective as AIG "didn't follow the statute properly." Indeed, a review of the December 23 notice of claim closure produced by AIG to the appeals officer reveals that the claim closure letter that was sent to Rodriguez by AIG did not comply with all of the requirements of NRS 616C.235.

We acknowledge that the notice of claim closure did comply with some portions of NRS 616C.235.[5] Nonetheless, partial compliance with a statute's mandatory requirement is not compliance. *See generally Otto*, 128 Nev. at 432, 282 P.3d at 725. Thus, AIG's notice to Rodriguez is facially deficient, and therefore, ineffective under the plain language of the statute. As stated above, the notice does not provide any explanation of the effects of closing a claim, on a separate page or otherwise. Further, although the notice informs the reader of the right to appeal, and states the time limit to file an appeal, the notice lacked any mention of "a right to request a resolution of the dispute pursuant to NRS 616C.305 and 616C.315 to 616C.385, inclusive," as required by the statute.

As the notice sent to Rodriguez did not comply with all of the mandatory requirements of NRS 616C.235, we conclude that closure of the claim is ineffective. NRS 616C.235(a). For this reason, we also conclude the appeals officer erred as a matter of law when she affirmed the hearing officer's decision affirming the closure of Rodriguez's claim without a PPD evaluation. Accordingly, the appeals officer's decision was "affected by error of law" and we conclude the district court properly set that decision aside. *See* NRS 233B.140(5)(d).

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[5]For example, the notice did include the statement under NRS 616C.235(5) that the claim will be closed without a PPD determination as "there is no possibility of a permanent impairment of any kind," informs the reader of the right to appeal, and bolds the provision setting for the time limit to appeal the claim closure pursuant to NRS 616C.315.

Whether the district court erred when it determined that the appeals officer should not have relied upon Dr. Swartz's IME report at the hearing

SOC and AIG argue that the district court erred by substituting its own judgment for that of the appeals officer when it determined that the appeals officer should not have relied upon Dr. Swartz's IME report at the hearing. Rodriguez responds that the IME report was unreliable, and that SOC and AIG's failure to provide Rodriguez with the correspondence sent to Dr. Swartz substantially affected her ability to prosecute her claim.

On factual determinations, the appeals officer's decision will not be disturbed if it is supported by substantial evidence, which is "evidence that a reasonable person could accept as adequately supporting a conclusion." *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557 n.4, 188 P.3d 1084, 1087-88 n.4 (2008). This court "will not reweigh the evidence or substitute our judgment for that of the appeals officer on a question of fact." *City of Henderson v. Spangler*, 136 Nev., Adv. Op. 25, 464 P.3d 1039, 1042 (Ct. App. 2020) (internal citations omitted). However, NRS 233B.135 permits the reviewing court to remand or affirm the final decision of the appeals officer or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is clearly erroneous, arbitrary or capricious, or an abuse of discretion. NRS 233B.135(e), (f).

Further, under NRS 233B.135, "a reviewing court, whether the district court or this court, must inquire whether the agency's factual determinations are reasonably supported by evidence of sufficient quality and quantity." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (internal citation omitted). And, even though administrative proceedings "typically need not strictly follow the rules of evidence . . . the fact-finder is charged with making a decision based only on

evidence of a type and amount that will *ensure a fair and impartial hearing.*" *Id.* (emphasis added).

Below, Rodriguez raised the issue that AIG may have failed to follow NRS 616D.330(1)(b) before the appeals officer. NRS 616D.330(1)(b) provides that when an insurer initiates written communication with a physician about the employee's medical condition, it must provide a copy of the communication to the employee or the employee's representative. This language is mandatory, and the statute provides an express remedy for violating the provisions of the statute. NRS 616D.330(2).[6]

Here, it appears that Dr. Swartz relied upon medical records provided by AIG, and responded to questions asked by AIG in writing his report. Therefore, it appears that AIG sent a letter to Dr. Swartz without providing a copy to Rodriguez. AIG responds that Rodriguez never asked it to produce the letter. Nevertheless, as noted above, NRS 616D.330(1)(b) states that an insurer *shall not* initiate "any written communication relating to the medical disposition of the claim with the injured employee's examining or treating physician or chiropractor unless a copy of the communication is submitted to the injured employee or the injured employee's representative in a timely manner." Accordingly, AIG had a duty to produce any written communications with Dr. Swartz to Rodriguez.

However, this failure to produce the alleged written communication between AIG and Dr. Swartz does not necessarily mean that

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[6]*See* NRS 616D.330(2)(a)-(c) (providing that "[i]f the Administrator determines that a person has violated the provisions of this section, the Administrator shall" issue a notice of correction for an initial violation, impose an administrative fine of not more than $250 for a second violation, and impose an administrative fine of not more than $1,000 for a third violation).

the appeals officer should have excluded the IME report. As noted above, NRS 616D.330 already contains an express penalty provision. Consequently, as nothing in the Nevada Revised Statutes or Nevada Administrative Code provide for further penalties, remedies, or exclusions based on such violations, and because "the issue [of determining remedies for statutory violations] is best left to legislative debate and rulemaking," we decline to establish an exclusionary rule for violations of NRS 616D.330(1)(b). *Nev. Highway Patrol Ass'n v. State, Dep't of Motor Vehicles & Pub. Safety,* 107 Nev. 547, 550, 815 P.2d 608, 610 (1991).[7]

Although exclusion of the report was not required for failure to comply with NRS 616D.330, we recognize the broader impact that this noncompliance had on Rodriguez. Rodriguez argues that Dr. Swartz's report was missing "over 54%" of the medical records, and was thus unreliable. We first note that without having the records and written communications provided to Dr. Swartz, Rodriguez did not have the opportunity to properly challenge and rebut his findings in front of the appeals officer. We further recognize that without knowledge of what was provided to Dr. Swartz, it was impossible for Rodriguez to determine whether any of the information and medical history was incorrect or prejudicial to her case. *See Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy,* 124 Nev. 701, 711, 712, 191 P.3d 1159, 1166, 1167 (2008) (stating that "although proceedings before administrative agencies may be subject to more relaxed procedural and

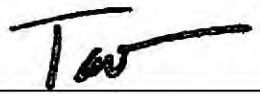
[7]Indeed, the Supreme Court of Nevada recognized the same in *Maggio v. Bunkers Eden Vale Mem'l Park,* Docket No. 61638 (Order of Affirmance, December 18, 2013). Although this disposition is unpublished, we approve of its logic here.

evidentiary rules, due process guarantees of fundamental fairness still apply," and defining due process as the "opportunity to prepare a defense").

Accordingly, we conclude that even though the appeals officer's consideration of the IME report without disclosure of the written communications between Dr. Swartz and AIG was not an abuse of discretion in and of itself, Rodriguez was not afforded a fair opportunity to challenge the reliability of the report in front of the appeals officer. And because the appeals officer relied heavily on this report and discounted the other medical information, we also conclude that Rodriguez was not provided with a fair and impartial hearing. Based on this unfairness, we conclude the appeals officer abused her discretion in relying on Dr. Swartz's IME report, and thus conclude that the district court did not err in granting the petition for judicial review. Accordingly we,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Jim C. Shirley, District Judge
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