IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NELLIS CAB; PTSIG; AND YORK RISK SERVICES GROUP, INC.,
Appellants,
vs.
ION FERENTZ,
Respondent.

No. 80036-COA

ORDER OF AFFIRMANCE

Nellis Cab, PTSIG, and York Risk Services Group, Inc. (collectively, appellants) appeal from the district court's order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

On March 2, 2017, Ion Ferentz, a 57-year-old taxicab driver for Nellis Cab, sustained injuries to his right thigh, right hip, and low back (collectively, the industrial injury) while helping a customer lift a 70-plus-pound luggage bag from his taxicab, which caused him a sudden onset of severe low back pain with difficulty ambulating.[1] Ferentz immediately sought medical care at Concentra Medical Center for his injuries and was subsequently evaluated by multiple physicians. Ultimately, Ferentz filed a claim for compensation for his injuries with his employer by submitting a form C-4 as required.

David Henry, a physician assistant-certified (PA-C), who initially examined Ferentz at Concentra, diagnosed Ferentz's injuries as lumbar strain and strains in the right hip and right thigh, and on the employment-claim-for-compensation report (form C-4) signed by Dr. Tony Chin, Ferentz's injuries were directly connected to working on the job. In

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

the employer's report of Ferentz's industrial injury to its insurer (form C-3), Nellis Cab confirmed his injuries were work related and did not dispute the validity of his claim. PA-C Henry recommended that Ferentz be placed on a modified work schedule, which included allowing him to be seated 75 percent of the time and referred him to an orthopedic specialist.

Several physicians at Concentra saw Ferentz for follow ups and ordered x-rays and other tests. The x-rays revealed no acute fracture but "probably old trauma" to the left pelvis based on the diagnosis of a pelvic ramos fracture on the left side. Other radiographs demonstrated "multilevel spondylotic changes to the lower lumbar spine" and an MRI revealed "multilevel degenerative changes" or degenerative disc disease. In a follow up, Dr. Allan Schwartz diagnosed Ferentz with a lumbar strain and noted that Ferentz's lumbar pain was "acute on chronic." During his follow-up visits at Concentra, Ferentz was prescribed a walker and then crutches with weight bearing as tolerated and was eventually instructed to remain seated 95 percent of the time, and a modified work schedule continued to be recommended.

During his consultation with orthopedic specialist Dr. Michael Elkanich, Ferentz told Dr. Elkanich that he had suffered an industrial back injury in 1995 (for which he received a 4-percent permanent partial disability (PPD) rating). Dr. Elkanich also documented in his medical records that prior to his recent industrial injury, Ferentz was not experiencing any back pain, nor received treatments related to back pain for several years, and had been working full time without restriction until the March 2 industrial injury. Dr. Elkanich diagnosed Ferentz with "severe right lower extremity radiculopathy" as well as related weakness in the extremities, ultimately recommending both surgical and non-surgical

options. Dr. Elkanich also certified Ferentz for temporary disability. After further follow up, Dr. Elkanich recommended an L2-S1 laminectomy/decompression and that Ferentz remain off work. Ferentz later requested "Temporary Total Disability [TTD], Temporary Partial Disability, and/or vocational rehabilitation maintenance benefits from" the date of his injury until his return to work.

Ferentz eventually acknowledged to York Risk, Nellis Cab's claims administrator, that he had visited Dr. Rafael Mirchou, his primary care physician, for low back pain in September of 2016, having failed to relate this relatively recent medical history of back pain to Dr. Elkanich and other treating physicians.[2] Of note, he also checked a box next to a statement on a form from York Risk stating he had "no prior conditions, injuries or disabilities of which [he was] aware, that might affect the disposition of the claim."[3]

York Risk denied liability for Ferentz's workers' compensation claim, stating his disability did not satisfy the definitions of "accident" or "injury" pursuant to NRS 616A.030 and NRS 616A.265, respectively, and failed to show by a preponderance of the evidence that he sustained his injury during the course of his employment, as required by NRS 616C.150. Ferentz appealed York Risk's decision to a hearing officer. The hearing

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[2]We also note that there is a significant discussion before the appeals officer regarding a medical evaluation for low back pain that Ferentz apparently underwent in Romania prior to his industrial injury of March 2, but Ferentz explained the reason for his evaluation to the satisfaction of the appeals officer and we decline to reweigh this credibility issue on appeal.

[3]Ferentz, however, testified before the appeals officer that he understood this statement to mean whether any previous back pain prevented him from working his job.

officer affirmed York Risk's decision, agreeing that Ferentz failed to prove his claim by a preponderance of the evidence pursuant to NRS 616C.150.

Ferentz then appealed the hearing officer's decision to an appeals officer. In an interim order, the appeals officer found that a medical question existed as to whether Ferentz sustained an injury from lifting the luggage while working. As such, the appeals officer ordered the insurer to schedule Ferentz for an independent medical evaluation (IME).

According to the IME performed by Dr. Stuart Kaplan, Dr. Kaplan asked Ferentz about his 1995 industrial injury related to his back, and Ferentz apparently said that "he [did] not recall" that injury. However, Ferentz also stated that he had no low back problems for 10 years prior to the visit, although he acknowledged that as a taxicab driver for 24 years, working 12 hours a day, he experienced "occasional pains here and there from sitting a lot," but nothing significant. He also indicated to Dr. Kaplan that he was able to work without restriction until the industrial injury of March 2. Dr. Kaplan concluded that Ferentz suffered a work-related injury on March 2 and recommended further evaluation and treatment for his injury. In his report, Dr. Kaplan wondered if Ferentz had two problems, one to the hip and one to the back, both of which would require an orthopedic evaluation. Although Dr. Kaplan also concluded that Ferentz did not have a "true" herniated disc, he indicated that Ferentz could be describing lumbar radiculitis, or "irritation or inflammation" of the disc. Further, although Dr. Kaplan indicated that the mechanism of injury (lifting approximately 70 pounds of luggage) appeared "relatively benign," he would defer to the orthopedic physician regarding the mechanism of the hip injury and also postured that it was possible lifting the luggage irritated or inflamed Ferentz's "L5 nerve root at the L5-S1 level." Dr. Kaplan also

indicated that Ferentz could be suffering from "a facet mediated type pain," but that this usually resolves quickly after this type of injury, and his pain had not. Ultimately, Dr. Kaplan recommended that an orthopedic physician evaluate Ferentz's injuries, and that he undergo an "EMG/nerve conduction study." He would also consider an injection to Ferentz's right side at the L5-S1 level, or if surgery was entertained for Ferentz, a right-sided L5-S1 foraminotomy would be used to "see if that makes a difference for him."

After the completion of the IME, the appeals officer conducted a hearing. Ferentz testified that although he had visited Dr. Mirchou for back pain a few months prior to his industrial injury, the pain never became so severe that Dr. Mirchou had to recommend his employer take him off work. He also testified that other than his 1995 injury, his previous back pain did not extend to his low back. However, during the hearing, Ferentz testified that he did have some low back pain before the industrial injury of March 2.

The appeals officer reversed the hearing officer's affirmance of York Risk's decision to deny Ferentz's claim and remanded the matter for claim acceptance, finding Ferentz's "sudden onset of pain upon lifting the [luggage bag] satisfies the definitions of injury and accident as defined by NRS 616A.030 and NRS 616A.265." The appeals officer also found the "causal connection of the injury to [Ferentz's] employment satisfies [his] burden to establish the injury arose out of and in the course of his employment."[4]

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[4]To the extent that Ferentz asserts that the appeals officer's determination was also substantially supported as to its determination of NRS 616C.175 and his preexisting condition, we decline to address this issue because appellants did not raise this issue in their opening brief.

Appellants then filed a petition for judicial review with the district court, which the court denied without explanation. This appeal followed.

In their appeal, appellants first seek clarification as to the proper standard of review. The standard of review in workers' compensation appeals is well-established and is set forth below. Next, appellants argue the appeals officer erred when she found that Ferentz established the existence of a compensable industrial insurance claim under NRS 616C.150, because substantial evidence does not support the appeals officer's decision. We disagree and affirm the district court.

Standard of review

"Because judicial review is limited to the appeals officer's final written decision, NRS 616C.370(2), this court's role is identical to that of the district court." *Buma v. Providence Corp. Dev.*, 135 Nev. 448, 450, 453 P.3d 904, 907 (2019) (internal quotation omitted). Thus, while legal conclusions are reviewed de novo, *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011), this court reviews an appeals officer's factual findings in a workers' compensation case for clear error or abuse of discretion, *see* NRS 233B.135(3); NRS 616C.370 (granting the courts judicial review over an appeals officer's final decision on workers' compensation claims); *Vredenburg v. Sedgwick CMS*, 124 Nev.

Edelstein v. Bank of New York Mellon, 128 Nev. 505, 523 n.13, 286 P.3d 249, 261 n.13 (2012). Nevertheless, even if the appeals officer erred in this determination, such error was harmless because, as stated below, substantial evidence supports the appeals officer's decision regarding NRS 616C.150. *See e.g., State Indus. Ins. Sys. v. Romero*, 110 Nev. 739, 741-42, 877 P.2d 541, 542 (1994) (conducting harmless-error review in the context of a workers' compensation appeal).

553, 557, 188 P.3d 1084, 1087 (2008). This court cannot disturb "[a]n appeals officer's fact-based conclusions of law" if substantial evidence supports them. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087. Substantial evidence is evidence a reasonable person could find adequate to support the decision. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). Further, this court cannot "reweigh the evidence or revisit an appeals officer's credibility determination." *Id.*

Substantial evidence supports the appeals officer's finding that Ferentz suffered a compensable industrial injury

Under the facts and circumstances of this case, to establish a compensable industrial injury under NRS 616C.150, the employee must establish "by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment" (a work-related injury). *Buma*, 135 Nev. at 450, 453 P.3d at 907 (emphases omitted) (quoting NRS 616C.150(1)). "If the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties, then the injury arises in the course of employment under NRS 616C.150(1)." *Id.* (internal quotations omitted).

We now address whether substantial evidence supports the appeals officer's finding that Ferentz's injury to his low back arose out of his employment. In this case, while working as a taxicab driver, Ferentz felt immediate pain after lifting a 70-plus-pound luggage bag and could not walk afterwards. *See Milko*, 124 Nev. at 364, 184 P.3d at 385 ("[I]mmediate pain [is] an objective symptom of injury."). After he timely reported his injury as a work-related injury on the C-4 form as required, he was diagnosed with a lumbar strain and strains in his right hip and right thigh of an acute nature. In addition, Dr. Kaplan concluded in his report that Ferentz suffered a work-related injury. Although there is a question

regarding the extent of Ferentz's preexisting back pain, Ferentz testified that his previous back pain was never as severe as it was after his March 2 industrial injury, including that he was not debilitated or unable to work as a taxicab driver. In addition, Nellis Cab confirmed Ferentz injured himself while on the job and did not doubt the validity of his claim arising out of his employment in its report of his industrial injury to its insurer. Thus, substantial evidence supports the appeals officer's finding that Ferentz sustained a work-related injury.[5] As a result, the appeals officer did not abuse her discretion when she concluded that Ferentz had sustained a work-related injury that was compensable under NRS 616C.150.[6]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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[5]The appeals officer concluded Ferentz's testimony was credible, which we cannot reassess; nor can we reweigh evidence on appeal. *Milko*, 124 Nev. at 362, 184 P.3d at 384. While the medical records do not support that Ferentz mentioned to PA-C Henry or Dr. Elkanich that he previously suffered back pain before March 2, Dr. Kaplan was aware of it. The appeals officer weighed Ferentz's testimony as well as the medical evidence demonstrating that the March 2 industrial injury was on an acute onset and concluded that Ferentz sustained a work-related injury on March 2.

[6]Insofar as the parties raise additional arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief, need not be reached, or are otherwise harmless.

cc: Chief Judge, The Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Bertoldo Baker Carter & Smith
Eighth District Court Clerk