

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GALLAGHER BASSETT SERVICES,
INC.,
Appellant,
vs.
MICHELLE ZEITLOW,
Respondent.

No. 83708-COA

FILED

NOV 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Gallagher Bassett Services, Inc., appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Third-party administrator Gallagher Bassett Services, Inc. (GBS) denied respondent Michelle Zeitlow total temporary disability (TTD) benefits for an injury Zeitlow sustained in October 2018, while employed at Merryhill Schools. At the time of her October injury, Zeitlow was already working in a light duty position having been released to light duty from an earlier work injury. Zeitlow eventually stopped working and filed a claim of discrimination with the Equal Employment and Opportunity Commission (EEOC) against Merryhill Schools. In September 2019, as part of an amended agreement to settle the EEOC claim, Zeitlow accepted compensation for lost wages and pain and suffering and agreed to resign from her employment with Merryhill Schools. The agreement, however, specifically did not release Zeitlow's employer from being required to compensate Zeitlow for her pending workers' compensation claims.

In February 2020, GBS accepted Zeitlow's claim under the Nevada Industrial Insurance Act for the October 2018 injury. In March

2020, Zeitlow requested TTD benefits because she had been released to light duty but had not been offered a light duty position. GBS denied TTD benefits based on its understanding that Zeitlow had received termination benefits under the EEOC settlement agreement, and she was no longer employed with Merryhill Schools. Zeitlow sought review from a hearing officer, who affirmed the GBS decision, which Zeitlow challenged at an administrative hearing before an appeals officer. The appeals officer determined that the EEOC settlement agreement could not be used by GBS to deny TTD benefits to Zeitlow, as that would be in violation of NRS 616B.609¹ which prohibits contracting away industrial insurance liability. The appeals officer found that Zeitlow was entitled to TTD benefits from March 2020 to September 2020, after which Zeitlow was released to full duty. GBS petitioned the district court for judicial review, which was denied on the same basis as the appeals officer's reasoning.

During the time of the district court proceedings, Zeitlow requested a lump sum payment from GBS for permanent partial disability (PPD) benefits. GBS argued to the district court below that Zeitlow's PPD request resolved all of Zeitlow's workers' compensation issues pursuant to

¹The statute states in relevant part:

(a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by chapters 616A to 616D, inclusive, of NRS.

(b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by chapters 616A to 616D, inclusive, of NRS is void.

NRS 616B.609 (a) & (b) (2021).

NRS 616C.495.² The district court disagreed but stayed any payment to allow GBS to appeal the denial of its petition for review.

On appeal, GBS argues that Zeitlow is not entitled to TTD benefits for several reasons. First, GBS argues that Zeitlow was offered a light duty position and therefore TTD benefits were not required. Second, NRS 616B.609 does not apply to the settlement agreement between Zeitlow and the EEOC and therefore the agreement is not void. Thus, GBS argues that Zeitlow is not entitled to recover additional wages because she received compensation for her lost wages as part of the settlement with the EEOC. And GBS argues since this compensation is for the same time period, allowing additional wages would result in a double recovery. Third, GBS adds that even if the compensation is not double recovery, it should be considered termination pay according to NAC 616C.423³ and therefore deducted from any amount allegedly owed by GBS. Finally, GBS claims that Zeitlow's request for a lump sum payment of PPD benefits resolved all

²NRS 616C.495 states, in relevant part, "If the claimant elects to receive his or her payment for a permanent partial disability in a lump sum pursuant to subsection 1, all of the claimant's benefits for compensation terminate. Except as otherwise provided in paragraph (d), the claimant's acceptance of that payment constitutes a final settlement of all factual and legal issues in the case." NRS 616C.495(2). An amendment effective May 31, 2021, included paragraph (d), which provides the claimant a right to "conclude or resolve any contested matter which is pending at the time that the claimant executes his or her election to receive his or her payment for a permanent partial disability in a lump sum" with certain caveats not at issue here.

³NAC 616C.423 reads, in relevant part, "[m]oney, goods and services which are paid within the period used to calculate the average monthly wage include, but are not limited to . . . (f) Termination pay."

factual and legal issues in her workers' compensation claim pursuant to NRS 616C.495, and therefore she is not entitled to TTD.

In turn, Zeitlow argues that she was not offered a light duty position following the October 2018 injury, and she was only offered a light duty position in relation to a prior injury. Zeitlow further argues that NRS 616B.609 does apply and the EEOC settlement agreement cannot be used to deny TTD benefits here. Zeitlow also notes that the compensation provided for in the EEOC settlement agreement is for lost wages in 2018 and 2019, and not for future compensation related to her pending workers' compensation claim, which included the time frame of March 2020 through September 2020 when she could have returned to light duty following the October 2018 injury. Additionally, Zeitlow argues that GBS is misinterpreting NAC 616C.423 and there is no basis for the settlement compensation to be used to reduce the TTD benefits awarded as these benefits were separate and apart from the wages she received in settlement. Therefore, the award of TTD benefits did not constitute double recovery. Finally, Zeitlow points out that NRS 616C.495 was revised prior to her election of a lump sum payment and that the statute now allows for continuation of the instant dispute to resolve the TTD benefits. We agree with Zeitlow.

Nevada appellate courts review administrative agency decisions in the same capacity as the district court and as such do not defer to the district court's decision when reviewing an order deciding a petition for judicial review. *See Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We examine the administrative agency's decision for clear error or an abuse of discretion, independently reviewing purely legal issues and upholding fact-based conclusions when such conclusions

are supported by substantial evidence. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005); *see also* NRS 233B.135(3)(e), (f); *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. “Substantial evidence” is defined as “evidence which a reasonable mind might accept as adequate to support a conclusion,” regardless of whether we ourselves would reach the same conclusion had we been in the appeals officer’s place. *Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997) (internal quotation marks omitted). We will not reweigh the evidence or substitute our judgment for that of the appeals officer on a question of fact. *Id.* Substantial evidence may be inferentially shown by a lack of certain evidence. *Wright v. State, Dep’t of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

Based on the record, we conclude that Zeitlow is entitled to TTD benefits for the time period from March to September of 2020. GBS’s representations that Zeitlow was offered a light duty position in relation to the October 2018 injury and that Zeitlow’s compensation from the EEOC settlement agreement covers the same time period as the TTD benefits are not supported by the record. A plain reading of NAC 616C.423 does not support GBS’s contention that Zeitlow’s TTD benefits should be limited by the EEOC settlement compensation, and GBS offers no legal support for this position. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). And we agree NRS 616C.495, as amended, applies such that Zeitlow’s election of a lump sum PPD payment does not preclude her from receiving TTD benefits and thus does not resolve the instant dispute.


As to the remaining issue on the appeal—the applicability of NRS 616B.609—we need not address this issue as Zeitlow preserved her

rights to pursue her pending workers' compensation claims. The supplemental settlement agreement to the EEOC settlement agreement specifically exempted from release any of Zeitlow's pending workers' compensation claims as of September 4, 2019, which necessarily would have included her pending injury claim arising from the October 2018 incident. As an agent of Zeitlow's employer, GBS was bound to address Zeitlow's pending claims. *See Falline v. GNLV Corp.*, 107 Nev. 1004, 1007-08, 823 P.2d 888, 890-91 (1991) (recognizing the agency relationship between employers and third-party administrators in workers' compensation matters). We are not persuaded by GBS's argument that because Zeitlow was no longer employed at Merryhill Schools and could not be offered light duty by her employer, she should be denied TTD benefits. Here, because the settlement agreement between Zeitlow and Merryhill Schools also included Zeitlow's separation from employment, well in advance of Zeitlow qualifying for TTD benefits, GBS knew or should have known that under the circumstances a light duty assignment would be unavailable to Zeitlow, and therefore, an award of TTD benefits would be likely. *See Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 456-57, 916 P.2d 786, 792-93 (1996) (holding that "in an industrial injury case, any reasons for an injured employee's discharge which are unrelated to the injury . . . are relevant only if the evidence shows that [those reasons], rather than the injury, caused the employee's inability to secure subsequent work"). Because the agreement between Zeitlow and her employer preserved Zeitlow's entitlement to pursue workers' compensation benefits even after leaving employment, we do not need to determine whether the settlement agreement invoked the application of NRS 616B.609. Because Zeitlow's workers' compensation claim arising out of the October 2018 injury was

preserved, it was unnecessary to rely on NRS 616B.609 to reach this determination. Thus, we affirm Zeitlow's entitlement to TTD benefits. *See, e.g., Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (stating this court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason).

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 11
Hon. Kathy A. Hardcastle, Senior Judge
Gilson Daub, LLP
Greenman Goldberg Raby & Martinez
Eighth District Court Clerk

⁴Insofar as the parties have raised 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 or need not be reached given the disposition of this appeal.