


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LOVES TRAVEL STOPS & COUNTRY
STORES,
Appellant,
vs.
AMY DEMILIO,
Respondent.

No. 83980-COA

FILED

JUN 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Loves Travel Stops & Country Stores appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

Respondent Amy Demilio suffered an industrial injury while employed by Loves Travel Stops & Country Stores (Loves). On October 12, 2018, while Demilio was stocking a cooler, a stack of cases fell onto her left ankle, injuring it. Demilio did not seek medical treatment until October 27, 2018. On that day, she submitted an industrial insurance claim, noting on the form that her injury occurred at 9:15 p.m. on October 12; there were no witnesses, but the incident was "on camera;" and she reported the incident to her manager on the day of the injury. The physician who filled out part of her form noted that she was "not sure" whether she could directly connect the injury as job incurred "due to time lapsed." Loves' report stated that Demilio did not report her injury until October 31, 2018. Loves' third-party administrator, Broadspire, accepted the claim on November 15, 2018. Demilio had various doctors' appointments over the following months, and it was initially determined that she had a left ankle sprain. After reporting

no improvement in pain, Demilio underwent an MRI in January 2019, which showed various findings relating to her industrial injury, including a “deltoid ligament tear at the insertion to the talus, ATFL injury and peroneal brevis tendon longitudinal split tear,” as well as other injuries that did not relate to her industrial injury. Subsequently, two doctors recommended surgery for Demilio’s ankle, which Broadspire did not approve.

Thereafter, Broadspire obtained surveillance video footage purportedly showing that the incident reported by Demilio did not occur. Consequently, Broadspire closed the claim on April 10, 2019, even though the appeal deadline had expired, believing that it should not have accepted the claim. A hearing officer affirmed that determination, finding the claim closure was proper as the video footage showed Demilio “going uneventfully about her business” at work.

Following that determination, Loves responded to Demilio’s request for production for “the entire day of video footage from the date of the incident, October 12, 2018.” Loves stated that it had already produced relevant portions of the footage and had “copied all video for all times that [Demilio] was in the subject cooler on the subject day,” and no other footage existed as unsaved footage was overwritten after 60 days.

Demilio subsequently appealed the hearing officer’s determination, and Demilio testified at the hearing and again described how she was injured while in the cooler. The appeals officer reversed the claim closure, finding that gaps in the video footage and the viewing angle precluded a finding that Demilio was not injured as reported. Specifically, the appeals officer noted that Demilio reported the injury as occurring at 9:15 p.m., and the video footage ended at 7:49 p.m. The appeals officer

further stated that she believed Demilio's testimony describing the incident and "found it to be consistent with the statements made to her doctors." As a result, the appeals officer found that Demilio did not "knowingly misrepresent or conceal a material fact to obtain workers' compensation benefits." Loves petitioned the district court for judicial review, and the district court denied the petition. This appeal followed.

On appeal, Loves contends that the appeals officer arbitrarily and capriciously disregarded evidence showing that Demilio made misrepresentations regarding her injury. In response, Demilio argues that substantial evidence supports the appeals officer's decision since the video had various time gaps, including the period when the incident occurred. Demilio additionally asserts that Loves did not exercise diligence in reviewing the video.

Like the district court, this court reviews an appeals officer's decision in workers' compensation matters for clear error or abuse of discretion. NRS 233B.135(3); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Our review is confined to the record before the appeals officer, and on issues of fact and fact-based conclusions of law, we will not disturb the appeals officer's decision if it is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88; *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." *Vredenburg*, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4 (internal quotation marks omitted). Further, this court will not substitute its judgment for that of the appeals officer regarding the weight of the evidence on questions of fact. NRS 233B.135(3); *Maxwell v. SIIS*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

Here, we conclude that substantial evidence supports the appeals officer's determination that the claim closure was improper and that there was a lack of evidence showing Demilio knowingly misrepresented her injury. The evidence before the appeals officer consisted, in relevant part, of Demilio's claim report, describing the incident, stating the time of injury was 9:15 p.m., and noting that she reported it to her manager the day of the injury; medical records showing Demilio repeatedly presented for persistent pain in her left ankle and reported that, while at work, cases fell on her ankle causing the injury; Demilio's testimony before the appeals officer stating the same; and video footage from the cooler where the injury purportedly occurred that, according to the record, was missing portions and ended at 7:49 p.m., well before the incident took place.¹ Taken together, this constitutes the "quantity and quality of evidence which a reasonable [person] could accept as adequate to support" the appeals officer's conclusion that Demilio suffered an injury at work and Broadspire wrongfully closed her claim. *See Maxwell*, 109 Nev. at 331, 849 P.2d at 270 (internal quotation marks omitted). Accordingly, we cannot say that the appeals officer abused her discretion in finding that the claim closure was improper.

To the extent that Loves argues that Demilio's delay in seeking medical treatment demonstrates she was not injured at work, we are unpersuaded by this contention. Broadspire accepted the claim knowing this information, as well as the initial physician's note that she was "not sure" that she could directly connect Demilio's injury as job incurred due to the time between injury and treatment. Moreover, Demilio presented

¹The surveillance video is not included in the record on appeal.

evidence showing that, while there was a delay in seeking treatment, there was not a delay in reporting the incident, thereby supporting her contention that she was injured at work. Despite Loves' report stating that Demilio failed to report the incident until 19 days later, Demilio's October 27, 2018, claim report stated that she reported the incident on the day of her injury to her manager. This factual discrepancy went to the weight of the evidence, which was the appeals officer's responsibility to resolve, and we will not substitute our judgment for that of the appeals officer on questions of fact. See NRS 233B.135(3); *Maxwell*, 109 Nev. at 331, 849 P.2d at 271.

Further, in reaching this conclusion, we reject Loves' assertions that (1) the video surveillance shows that Demilio misrepresented the injury under NRS 616C.225 to obtain benefits because the incident was not reflected in the video footage, and (2) the lack of evidence in the video is evidence that she was not injured. NRS 616C.225(1) provides, in pertinent part, that "if an insurer determines that an employee has knowingly misrepresented or concealed a material fact to obtain any benefit or payment" it may deduct from any payments due to the employee the amount obtained due to the misrepresentation or concealment. Insurers may withdraw their acceptance of claims by showing that the injured worker "knowingly misrepresented or concealed a fact in order to obtain benefits." *Browning v. Young Elec. Sign Co.*, 113 Nev. 420, 424, 936 P.2d 322, 325 (1997).

In this case, given that the video ended before the time that Demilio reported that the injury occurred, it is unsurprising that it is not depicted in the produced video. Additionally, Demilio reported on October 27, 2018, that the injury occurred at 9:15 p.m. and was depicted on camera, undermining Loves' assertion that she misrepresented or concealed the

incident. This report was submitted prior to Broadspire's acceptance of the claim and informed both Loves and Broadspire of the specific time of the injury. Despite this notice, Loves did not preserve the relevant portions of the video footage, and Broadspire failed to exercise reasonable diligence in reviewing the footage, as it waited several months before obtaining it. *See, e.g., id.* (concluding that the insurer could not show misrepresentation by the injured worker regarding his intoxication at the time of the incident where the worker's blood alcohol level was tested immediately following the incident and, with the use of due diligence, the insurer could have obtained the report that was available prior to claim acceptance).

Further, Demilio explicitly requested that Loves produce the video footage for the *entire day* of October 12, 2018, but Loves only turned over video footage that ended prior to the specific time of injury, asserting that the remaining footage was unsaved and not recoverable. Although Loves claims that it produced only the footage from when Demilio was actually in the cooler, producing the footage of when the injury reportedly occurred could have resolved this issue. As previously noted, it was the responsibility of the appeals officer, who actually viewed the video, to weigh the evidence presented. *See NRS 233B.135(3); Maxwell*, 109 Nev. at 331, 849 P.2d at 271. And the appeals officer determined that the produced video footage failed to show that either Demilio misrepresented her injury or that the injury did not occur because it did not depict the time of the incident. Further, the appeals officer determined that Demilio's version of events was credible and consistent with her reporting to her doctors. Again, we will not substitute our judgment for the appeals officer's as to the weight of this evidence. *See NRS 233B.135(3); Maxwell*, 109 Nev. at 331, 849 P.2d at 271. Thus, based on the record before us, we cannot say the appeals officer

committed a clear error or abused her discretion in finding that Demilio did not knowingly misrepresent the incident.²

In sum, we conclude that substantial evidence supported the appeals officer's determination that the claim was improperly closed. Therefore, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Westbrook


_____, Sr.J.
Silver

cc: Hon. Christy L. Craig, District Judge
Janet Trost, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas - Sahara Ave.
The State of Nevada Department of Administration,
Hearings Division
Heness & Haight, Injury Attorneys
Eighth District Court Clerk

²Given our conclusion that the evidence does not show that Demilio misrepresented her claim, we need not address Loves' contention that it detrimentally relied on her misrepresentation regarding her injury and, therefore, equitable estoppel bars her from challenging the claim closure.

³The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.