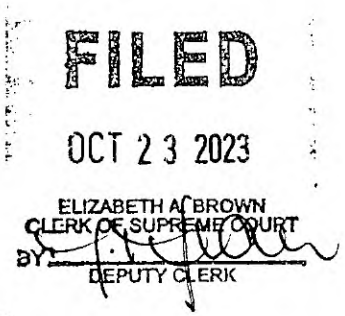
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BIMBO BAKERIES USA; AND ESIS INC.,
Appellants,
vs.
JAMES W. POWELL,
Respondent.

No. 84801-COA



ORDER OF AFFIRMANCE

Bimbo Bakeries USA and ESIS Inc., (appellants) appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

James W. Powell suffered an injury to his left shoulder and left wrist in the scope of his employment for Bimbo Bakeries USA. That injury initially resulted in a finding that Powell was 27 percent permanently partially disabled. In addition, doctors concluded that Powell needed to have multiple work-related restrictions to accommodate his injury. During the ensuing years, Powell continued to suffer issues stemming from the injury and he underwent numerous medical procedures and evaluations in an effort to improve his condition and to help ascertain his ability to be employed.

Powell eventually underwent an evaluation to ascertain if he was permanently totally disabled (PTD). Dr. Cestowski conducted that

evaluation and found to a reasonable degree of medical probability that Powell was PTD due to the complications resulting from the injury to his left shoulder and left wrist. Powell also underwent assessments to evaluate his ability to perform work and those assessments found that Powell was able to perform light physical work, including management-level positions.

Based on Dr. Cestowski's finding that Powell was PTD, Powell requested ESIS Inc., the insurer for Bimbo Bakeries, (insurer) to adjust his claim to PTD status. However, the insurer denied Powell's request, and Powell later sought a hearing concerning that decision. The hearing officer subsequently affirmed the insurer's decision and Powell appealed that decision to an appeals officer.

The appeals officer directed Powell to undergo an independent medical examination to determine his status. Dr. Quaglieri conducted this examination and concluded, to a reasonable degree of medical probability, that Powell was PTD. Dr. Quaglieri noted that Powell's condition interfered with his normal daily activities to a significant degree. Dr. Quaglieri explained that he concluded Powell was PTD under the odd-lot doctrine because Powell suffered from a significant loss of use of his upper left extremities, Powell used opioids for pain management, and he was over 70 years of age. Dr. Quaglieri also explained that the previously identified issues, combined with Powell's previous work experience and his education level, caused Powell to be unable to be employed in the regular job market. In addition, Dr. Quaglieri testified at a deposition concerning his findings and reiterated his conclusion that Powell was PTD.

Powell's medical records and Dr. Quaglieri's deposition testimony were presented to the appeals officer, who subsequently entered a written order reversing the hearing officer's decision to reject Powell's request to adjust his claim to PTD status. In making this decision, the appeals officer noted Powell's initial injury and the medical interventions that followed that injury, as well as the fact that two physicians found Powell to be PTD based on his occupational injury and that Powell's condition impacted his daily life. The appeals officer found that Powell was a 72-year-old man with only a high school education, and that Powell did not have the sort of training that would permit him to find gainful employment in a field unrelated to his prior work experience. Based on the information and examinations conducted by Dr. Cestowski and Dr. Quaglieri, and considering complications stemming from Powell's injury and his age, the appeals officer concluded that Powell was PTD based on the odd-lot doctrine.

Appellants subsequently filed a petition for judicial review, which the district court denied following a hearing. This appealed followed.

On appeal, appellants challenge the denial of their petition for judicial review, arguing that the appeals officer's decision that Powell was PTD based on the odd-lot doctrine was not supported by substantial evidence and that Powell is actually capable of working.

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. State Indus. Ins. Sys.*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993). Evidence from a physician can establish that a condition was caused by an industrial injury, but the physician must state his or her conclusion in this regard to a degree of reasonable medical probability. *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993).

NRS 616C.435(1) sets forth a schedule of severe injuries deemed to be "total and permanent." NRS 616C.435(2), known as the odd-lot doctrine, provides that "[t]he enumeration in subsection 1 is not exclusive, and in all other cases permanent total disability must be determined by the insurer in accordance with the facts presented."

The odd-lot doctrine "permits a finding of PTD when a worker, while not altogether incapacitated for work, is so handicapped that they will not be employed regularly in any well-known branch of the labor market." *Associated Risk Mgmt., Inc. v. Ibanez*, 136 Nev. 762, 763, 478 P.3d 372, 373 (2020) (internal quotation marks and brackets omitted). Factors to be

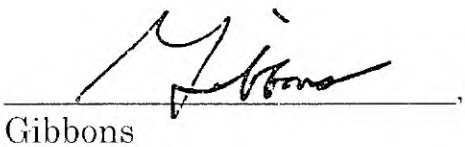
considered in applying the odd-lot doctrine "include, among others, the worker's age, experience, training and education." *Ranieri v. Cath. Cmty. Servs.*, 111 Nev. 1057, 1062, 901 P.2d 158, 161 (1995) (internal quotation marks omitted). "Additionally, a worker does not need to be in a state of utter and abject helplessness to appropriately receive a PTD determination under the odd-lot doctrine." *Id.*

Here, the evidence before the appeals officer showed Powell suffered from an occupational injury to his left arm and left wrist. The appeals officer reviewed Powell's medical records, Powell's work assessments, and Dr. Quaglieri's deposition testimony. The appeals officer found that Powell suffered from severe physical impairment and that the evidence demonstrated that Powell's condition was caused by his occupational injury and the complications stemming from that injury. The appeals officer noted that there was no evidence Powell had the sort of training that would permit him to find reliable and steady employment given his condition, and the nature of Powell's work history and his advanced age would hinder his efforts to be hired in a position that could accommodate his restrictions. And in consideration of the nature of Powell's injury, his age, his education level, his work history, and the findings of Dr. Cestowski and Dr. Quaglieri, the appeals officer concluded that Powell was PTD under the odd-lot doctrine.

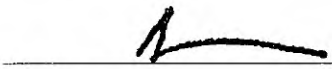
Based on our review of the record and the parties' briefs, we conclude that the appeals officer's decision that Powell was PTD pursuant to the odd-lot doctrine was supported by substantial evidence. *See Vredenburg*, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4; *see also Ranieri*, 111

Nev. at 1062, 901 P.2d at 161-62 (noting evidence concerning the claimant's advanced age, limited education, limited potential of transferability of job skills, and the conclusions of nearly every examining physician that the claimant was not employable constituted substantial evidence supporting the appeals officer's decision that the claimant qualified for PTD under the odd-lot doctrine). Therefore, we conclude that appellants are not entitled to relief based on this claim. Accordingly, we affirm the district court's denial of appellants' petition for judicial review.

It is so ORDERED.



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Jessica K. Peterson, District Judge
Janet Trost, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
The State of Nevada Department of Administration, Hearings Division
GGRM Law Firm
Eighth District Court Clerk