

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RR DONNELLEY; AND GALLAGHER
BASSETT SERVICES, INC.,
Appellants,
vs.
JOHN CHURCH,
Respondent.

No. 85230-COA

FILED

NOV 28 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

RR Donnelley and Gallagher Bassett Services, Inc. (Gallagher Bassett) (together, appellants) appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

John Church, a career printing press operator, began working for RR Donnelley in 2008.¹ Church's main duties involved loading a press with liquid Nicoat, a gloss coating made of latex polymers, and controlling the press, which required him to sit just several feet away from the press's exhaust conduit. The exhaust conduit occasionally leaked gas during Church's shift, which caused temporary symptoms such as burning, eye redness, sore throat, skin itchiness, throat swelling, headaches, weakness, fatigue, and shortness of breath. Following four years of exposure, Church sought medical treatment for these symptoms and a persistent cough. At this time, Church completed C-3 and C-4 forms to initiate a workers' compensation claim. The treating nurse practitioner recommended Church follow up with a pulmonologist and released him to full-duty work with the use of a mask. However, Church's symptoms persisted, so he sought further

¹We do not recount the facts except as necessary for our disposition.

treatment, and the attending physician placed him on modified duty work away from the press machine. Church noted some relief, but still felt discomfort when taking deep breaths. Pulmonologist Naresh Singh, M.D., completed an independent medical evaluation (IME) of Church and determined that he could return to work so long as he avoided exposure to Nicoat. Gallagher Bassett thereafter denied Church's claim, stating his injury did not arise out of the course of his employment. Church timely appealed. While awaiting a hearing, Dr. Singh diagnosed Church with reactive airway disease and occupational asthma, opined that his injury was a direct result of exposure to Nicoat, and recommended RR Donnelley permanently reassign him to an office job. Based on this updated evaluation, the hearing officer remanded the matter, and Gallagher Bassett accepted the claim.

However, RR Donnelley could not accommodate Church's work restrictions, and therefore, referred him to a vocational rehabilitation counselor. The counselor determined Church did not have transferrable skills, but that he qualified for retraining. Subsequently, Church enrolled in the health information technology associate degree program at Kaplan College. Church completed the program within 18 months but did not obtain any related certifications. Additionally, shortly after Church completed the program, Kaplan lost its accreditation and closed. Church did not return to the workforce in any capacity.

While Church was undergoing vocational rehabilitation in 2014, Dr. Singh deemed him stable and ratable. Mark Reed, M.D., completed a permanent partial disability (PPD) exam and found Church had a 17 percent whole person impairment due to the diagnosis of asthma from his occupational injury. Thus, Gallagher Bassett awarded Church a lump sum

PPD payment of \$79,894.33, which Church accepted as settlement of his claim. Following the settlement, Church underwent an IME by Jeff Willoughby, M.D., who noted Church required three medications to control his coughing, wheezing, shortness of breath, and exercise intolerance.

Over the next three years, Church had routine checkups with Dr. Singh. However, in 2017, Church's health rapidly declined. Church experienced oxygen desaturation for which Dr. Singh prescribed constant supplemental oxygen. In response, Gallagher Bassett requested Church undergo another IME. In 2018, Church presented to Dr. Willoughby again, who opined "[s]ince I last saw him in 2014, [Church] has deteriorated." Dr. Willoughby noted Church now required 15 medications to treat an alpha-1-antitrypsin deficiency, occupational asthma, reactive airway disease, occupational lung disease, fatigue, dyspnea, chronic cough, chest pain, daily headaches, and a shortness of breath with minimal exertion. Dr. Willoughby further noted that Dr. Singh kept up with the seriousness of Church's medical issues and opined that he completely agreed with the present treatment plan.

Following the IME, Church pursued the reopening of his industrial claim to receive permanent total disability (PTD) benefits under the odd-lot doctrine. Dr. Singh signed a letter indicating that, in his medical opinion, Church qualified for PTD benefits under the odd-lot doctrine. Church also underwent a PTD evaluation by Larry Haney, a vocational counselor, who reviewed Church's injury, age, education, training, and experience. Haney noted that, at the time of evaluation, Church was 55 years old, had only worked as a printing press operator, had a high school education, and although he subsequently attended Kaplan College and completed the training program in 2015, the institution had since closed due

to losing its accreditation, and Church was unable to obtain employment in the field for which he had retrained. Haney further noted Church's work restrictions as described by Dr. Singh, including requiring constant supplemental oxygen, likely being off task 25 percent of the time, missing four or more days a month of work, and requiring 30-minute breaks every hour. Considering all these factors together, Haney opined that "super human efforts, sympathetic friends or employers, a business boom, or temporary good luck will be required to return Mr. Church to any well-known branch of the competitive labor market," and recommended that Church be awarded PTD benefits under the odd-lot doctrine.

Church sent the updated IME report, Dr. Singh's opinion, and the PTD evaluation to Gallagher Basset with a request to reopen his industrial claim. Gallagher Bassett denied the request, stating that Dr. Willoughby's opinion supported the current treatment plan, Church had not established that his condition worsened, and there was no medical evidence to support an award of PTD benefits under the odd-lot doctrine. Church timely appealed. The hearing officer affirmed Gallagher Bassett's decision, and Church once again timely appealed. The appeals officer found that Church's condition had worsened since the settlement and sufficient evidence supported an award of PTD benefits under the odd-lot doctrine. In response, appellants filed a petition for judicial review, which the district court denied. This appeal followed.

On appeal, appellants argue that (1) Church failed to meet his burden of proof because the medical evidence fails to demonstrate there has been a change of circumstances to Church's industrial injury warranting the reopening of his claim and an increase in compensation under NRS 616C.390; and (2) Church did not meet his burden of establishing that he

qualified for PTD benefits under the odd-lot doctrine set forth in NRS 616C.435(2) because he did not provide substantial medical evidence that his injury, age, education, training, and experience impacts his earning capacity or ability to work. Specifically, appellants claim that the appeals officer incorrectly applied the odd-lot doctrine, and that the odd-lot doctrine is a legal question, not a factual one, and therefore Dr. Singh's opinion cannot be relied upon because he is not in a position to make legal conclusions. In response, Church contends that he has met his burden because there is substantial evidence in the record, namely Dr. Singh's opinion and Dr. Willoughby's and Haney's reports, to support the reopening of his claim and an award of PTD benefits under the odd-lot doctrine. Church further asserts that the appeals officer properly considered substantial evidence on the record including Church's injury, age, education, experience, and training in applying the odd-lot doctrine and gave proper weight to Dr. Singh's opinion.

This court reviews an 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 v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion," regardless of whether we ourselves would have reached the same conclusion in the appeals officer's place. *Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 537, 396 P.2d 839, 842 (1997) (quoting *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). Thus, this court will not reweigh the evidence or substitute our

judgment for that of the appeals officer on a question of fact. *Id.* Further, the party attacking or resisting the decision has the burden of proof to show that the final decision is invalid. NRS 233B.135(2).

Church provided substantial evidence to support the appeals officer's finding that his industrial claim should be reopened under NRS 616C.390

Under Nevada law, if a workers' compensation claim has been closed for over one year, the claimant must meet the three-part statutory test for reopening. NRS 616C.390(1). First, there must be a change of circumstances that warrants an increase in compensation; second, the primary cause of the change of circumstances must be the industrial injury; and third, the application must be accompanied by a certificate of a physician showing there is a change of circumstances that warrants an increase in compensation. NRS 616C.390(1).

An employee has the burden of proof to demonstrate by a preponderance of the evidence that the claim should be reopened. *State Indus. Ins. Sys. v. Hicks*, 100 Nev. 567, 569, 688 P.2d 324, 325 (1984). While the statute requires medical evidence, the Nevada Supreme Court has held that new evidence that the claimant is not amenable to vocational rehabilitation, when combined with an established injury, is substantial evidence to support reopening an industrial claim to consider PTD benefits under the odd-lot doctrine. *State Indus. Ins. Sys. v. Perez*, 116 Nev. 296, 299, 994 P.2d 723, 725 (2000).

Here, the evidence before the appeals officer, which included reports from two physicians and a vocational counselor, supported reopening Church's claim. Dr. Willoughby, who evaluated Church in both 2014 and 2018, stated plainly that in the time between the evaluations Church deteriorated. Similarly, Dr. Singh, who has served as Church's primary physician related to the industrial injury since 2013, opined in 2018 that

Church's injury rose to the level of necessitating PTD benefits under the odd-lot doctrine. The record reflects that Dr. Singh had not previously held that opinion, indicating that Church's injury had indeed worsened since the PPD settlement. Additionally, in 2018, vocational counselor Haney opined that Church was unemployable due to his industrial injury, age, education, experience, and training, which was a significant change from the vocational counselor's opinion in 2014 that Church could reenter the workforce after his vocational rehabilitation through Kaplan College. Additionally, there is no dispute that Church's worsened symptoms were related to his industrial injury. Thus, substantial evidence supported the appeals officer's finding that there was a change of circumstances to Church's injury, thereby warranting the reopening of his industrial claim. As such, all three prongs of NRS 616C.390 were satisfied, and therefore the appeals officer's determination to reopen Church's claim was supported by substantial evidence.

There is substantial evidence in the record to support an award of PTD benefits under the odd-lot doctrine

NRS 616A.340 defines total disability as "incapacity resulting from an accident arising out of and in the course of employment which prevents the covered worker from engaging, for remuneration or profit, in any occupation for which the worker is or becomes reasonably fitted by education, training or experience." In Nevada, a claimant may be eligible for PTD benefits if (1) they have suffered a scheduled injury; or (2) they qualify under the odd-lot doctrine. NRS 616C.435; *Nev. Indus. Comm'n v. Hildebrand*, 100 Nev. 47, 50, 675 P.2d 404, 403 (1984). "Scheduled" injuries are those explicitly enumerated in statute.² *Hildebrand*, 100 Nev. at 50, 675

²It is undisputed that Church does not suffer from a scheduled injury.

P.2d at 403. The odd-lot doctrine serves as “a residuary catch-all clause” for all permanent injuries not enumerated in NRS 616C.435(1). *Id.* Under the odd-lot doctrine, “all other cases of permanent total disability [outside those enumerated in subsection (1)] must be determined by the insurer in accordance with the facts presented.” NRS 616C.435(2).

In determining whether a claimant’s disability is covered by the odd-lot doctrine, factors to be considered in addition to the “physical impairment of the worker,” include “the worker’s age, experience, training and education,” *Hildebrand*, 100 Nev. at 51, 675 P.2d at 404, because “[a] considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education,” 7 Larson, et al., *Larson’s Workers’ Compensation Law* § 83.04 (2023). Claimants “need not be in a state of ‘utter and abject helplessness’ to be considered permanently and totally disabled under the odd-lot doctrine.” *Hildebrand*, 100 Nev. at 51, 675 P.2d at 404 (quoting 2 A. Larson, *The Law of Workmen’s Compensation*, § 57.51 (1981)). Instead, “[t]he focus of the analysis, in considering the various factors, is on the degree to which the worker’s physical disability impairs the worker’s earning capacity or ability to work.” *Id.* When considering these factors, the fact finder may rely on reports from both medical professionals and vocational counselors. *Ranieri v. Catholic Cmty. Servs.*, 111 Nev 1057, 1060-61, 1064, 901 P.2d 158, 160-61, 163 (1995) (reinstating an appeals officer’s decision to award PTD benefits under the odd-lot doctrine based on medical and vocational evidence); *see also State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1118-19, 1124, 946 P.2d 179, 181, 185 (1997) (claimant awarded PTD under the odd-lot doctrine based on medical and vocational reports); *Perez*, 116 Nev. at 299-300, 994 P.2d at 725 (holding that new

vocational evidence, when combined with prior medical evidence, qualified the claimant for PTD benefits under the odd-lot doctrine). “Determination of the extent or permanency of the employee’s medical disability is a question of fact and the finding of the Commission will not be set aside unless it is against the manifest weight of the evidence.” *Hildebrand*, 100 Nev. at 51, 675 P.2d at 404.

Here, Church provided substantial evidence from his personal physician, Dr. Singh; an independent medical evaluator, Dr. Willoughby; and a vocational counselor, Haney, to support an award of PTD benefits. Both Dr. Singh and Haney explicitly recommended that Church be awarded PTD benefits. Dr. Singh made this recommendation after reviewing the odd-lot statute and based on his years-long tenure treating Church.³ Haney made this recommendation after reviewing Church’s medical records, age, education, training, and experience. Dr. Willoughby did not make an explicit recommendation that Church be awarded PTD benefits, but he noted Church’s deterioration and stated his complete agreement with Dr. Singh’s ongoing treatment and assessment.

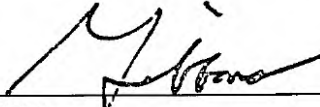
³We note that appellants provided no authority to support their position that a medical examiner, such as Dr. Singh, who concludes that odd-lot benefits are appropriate based on medical evidence, has somehow reached an improper legal conclusion that should be disregarded. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of relevant authority). Nevertheless, although Dr. Singh may have concluded that odd-lot benefits were appropriate in his medical opinion, the appeals officer ultimately made his determination after undertaking the appropriate factual analysis by considering Church’s injury, age, education, training, and experience. *Hildebrand*, 100 Nev. at 51, 675 P.2d at 404.

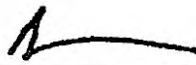
While appellants concede that Church has a serious injury, they challenge the appeals officer's decision that Church qualified for PTD benefits under the odd-lot doctrine, arguing that he has not shown that he is so handicapped that he would not be able to obtain regular employment in any well-known branch of the labor market. However, this argument is without merit. The record reflects that Church, who is presently 59 years old, requires 15 medications to treat several serious pulmonary conditions. Additionally, he experiences shortness of breath with minimal exertion and requires constant supplemental oxygen. As Haney opined in his report, it is highly unlikely that Church will be reemployed. To support his opinion, Haney noted that when Church attended the now-closed Kaplan College, he did not receive any certificates or enter the workforce in a new capacity. Additionally, Haney noted that all of Church's relevant work experience has been as a printing press operator—a job he cannot return to due to the industrial injury. Further, Haney reviewed Church's work restrictions as opined by Dr. Singh and concluded that no employer would be able to provide the necessary accommodations.


Thus, the record shows that the appeals officer examined the provided reports; considered Church's injury, education, training, and experience as described by Haney; and ultimately found that Church was entitled to PTD benefits under the odd-lot doctrine. *See Ranieri*, 111 Nev at 1060-61, 1064, 901 P.2d at 160-61, 163. Based on our review of the record, we conclude that the appeals officer's determination that Church was entitled to PTD benefits under the odd-lot doctrine was supported by

substantial evidence, and therefore, we affirm the district court's denial of appellants' petition for judicial review.⁴ Accordingly, we

ORDER this matter AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Veronica Barisich, District Judge
Ara H. Shirinian, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
The Law Office of Karen Greene-Lewis, Esq.
Eighth District Court Clerk

⁴Insofar as the parties have raised any other arguments that are not specifically addressed in this opinion, 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.