

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT;
AND SIERRA NEVADA
ADMINISTRATORS, INC.,
Appellants,
vs.
JAVONNE WILSON,
Respondent.

No. 84426-COA

FILED

DEC 06 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Clark County School District (CCSD) and its workers' compensation carrier Sierra Nevada Administrators, Inc. (Sierra) appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Respondent Javonne Wilson, who worked for CCSD as a bus driver, sustained a compensable injury to her calf in the course and scope of her employment in April 2019. Following Sierra's acceptance of her claim, Wilson requested that Sierra provide her an average monthly wage using both the 12-week¹ and one-year periods set forth in NAC 616C.435, which provides the time periods used to calculate an injured employee's average monthly wage.

¹Although the parties in their briefs and the appeals officer use the term "84-day" calculation, we use the "12-week" term used in NAC 616C.435.

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Initially, Sierra issued Wilson a determination letter, notifying her that her average monthly wage was \$3,680.94. The accompanying documentation, however, revealed that, based on the 12-week period from January 20, 2019, through April 13, 2019, Wilson's average monthly wage was \$4,291.94. Shortly thereafter, Sierra issued an amended monthly wage determination, based on the one-year period from April 15, 2018, through April 13, 2019, resulting in an average monthly wage of \$3,680.94.

Wilson administratively appealed Sierra's determination of her benefits. The hearing officer remanded the matter and instructed Sierra to recalculate Wilson's benefits using the 12-week period to determine her average monthly wage, finding that this period was "fairly representative" of Wilson's average monthly wage. The hearing officer further found that using the 12-week period was proper because Wilson's earnings "were not sporadic or significantly disparate so as to skew the calculation into overcompensation if this method were used."

CCSD and Sierra (hereinafter collectively referred to as CCSD) appealed, and the appeals officer affirmed the hearing officer's determination, concluding that the 12-week period, resulting in an average monthly wage of \$4,291.94, fairly represented Wilson's average monthly wage. The appeals officer found that there was a significant drop in wages between May 27, 2018, and August 4, 2018, and concluded that including the months where Wilson did not work did not accurately reflect her average monthly wage. CCSD subsequently petitioned the district court for judicial review. The district court denied the petition, affirming the appeals officer's determination, and remanded the matter for Sierra to recalculate Wilson's benefits based on the 12-week period and pay any underpayment based on its prior calculation. This appeal followed.

On appeal, CCSD asserts that the appeals officer erred in determining that the 12-week period fairly represented Wilson's average monthly wage, arguing that using this period unjustly inflated her wage by not accounting for the summer months during which she did not work. Therefore, according to CCSD, the one-year period, which does account for those months, should be utilized. In response, Wilson argues that including the summer months where she did not earn her normal wages artificially lowers her average monthly wage, and that the one-year calculation is not an accurate representation of her wages since she is only contracted to work nine months per year.² She additionally contends that NAC 616C.435 mandates that an insurer use the higher of the two calculations.

Like the district court, this court reviews an administrative decision to determine, based on the evidence that was before the agency, whether the agency's decision was clearly erroneous or arbitrary or capricious and, therefore, an abuse of discretion. NRS 233B.135(3)(e), (f); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). While we independently review the appeals officer's legal determinations, *State Indus. Ins. Sys. v. Montoya*, 109 Nev. 1029, 1031-32, 862 P.2d 1197, 1199 (1993), the appeals officer's "fact-based conclusions of law are entitled to deference and will not be disturbed if supported by substantial evidence," *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087. Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* at 557 n.4, 188 P.3d at 1087 n.4.

²While the parties do not argue this point, the record actually demonstrates that Wilson worked 11 of the preceding 12 months, although the wages she earned during the summer months were less than those earned during the 9-month school year.

Generally, workers' compensation benefits are calculated by averaging a 12-week history of the injured employee's past wages preceding the employee's injury. *City of North Las Vegas v. Warburton*, 127 Nev. 682, 687, 262 P.3d 715, 718 (2011) (citing NAC 616C.435(1) and NRS 616C.420). However, if the 12-week period is not representative of the employee's average monthly wage, earnings over a period of 1 year may be used. NAC 616C.435(2).

CCSD's sole argument that the one-year calculation should apply is based on our supreme court's decision in *Montoya*, 109 Nev. 1029, 862 P.2d 1197. In *Montoya*, the injured worker was employed on a sporadic, on-call basis, and the insurer used the 12-week period preceding her injury to calculate her average monthly wage. 109 Nev. at 1031, 862 P.2d at 1199. The appeals officer ordered that the injured worker's average monthly wage be based on the two weeks prior to the accident in which the worker was fully employed based on NAC 616.678(7),³ which provides alternate rules to be applied when the methods described by the other subsections "cannot be applied reasonably and fairly," and the district court denied judicial review of that decision. *Id.*

On appeal, the supreme court reversed the district court's denial of judicial review and held that neither the 12-week calculation, nor a calculation based on the two weeks of full employment immediately preceding the injury, fairly represented the average monthly wage because those calculations did not fairly and accurately represent the worker's wage history in light of her sporadic employment. *Id.* at 1033-34, 862 P.2d at 1200-01. Thus, the supreme court ordered the district court to remand the

³NAC 616.678 has since been renumbered as NAC 616C.435.

matter to the appeals officer with instructions to calculate the worker's average monthly wage based upon a one-year period of earnings, which provided a fair and reasonable method for calculating the average monthly wage since it accounted for the periods where the worker was unemployed, worked full-time, and worked part-time. *Id.* at 1034, 862 P.2d at 1201.

CCSD's reliance on *Montoya* is unavailing. Unlike the injured worker in *Montoya*, the record in this case reflects that Wilson does not work on a sporadic basis. Indeed, the parties agree that she is contracted to work nine months out of the year. And it is undisputed that Wilson was working during the 12 weeks preceding her injury. Under these circumstances, we cannot conclude that using the one-year calculation—which would factor in three months where Wilson was not contracted to work—provides a proper computation of Wilson's average monthly wage. As Wilson points out, using the one-year approach CCSD advocates for artificially lowers her wages by including months that she is not contracted to work.⁴ Thus, a calculation produced utilizing this approach would “not fairly represent [Wilson's] wage history.” *Id.* at 1034, 862 P.2d at 1201 (examining the application of various NAC provisions to the respondent's work history to determine which method fairly represented respondent's wage history and allowed for a fair and accurate calculation of respondent's average monthly wage).

⁴To the extent Wilson argues that NAC 616C.435 requires an insurer to always use the calculation that results in the higher average monthly wage, that argument misreads this provision. Rather, NAC 616C.435(2) provides that, where the 12-week period of earnings is not representative of the average monthly wage, earnings over a 1-year period may be used, and earnings over the 1-year period must be used if the average monthly wage would be increased using this approach.

Based on the foregoing analysis, we conclude that the appeals officer's determination that using the 12-week period preceding Wilson's injury to perform the necessary calculations produced a wage amount that fairly represented Wilson's average monthly wage was not clearly erroneous or arbitrary or capricious and therefore an abuse of discretion. See NRS 233B.135(3)(e), (f); *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087. Further, this determination, which yielded an average monthly wage of \$4,291.94, is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087. Accordingly, we affirm the district court's denial of CCSD's petition for judicial review.

It is so ORDERED.⁵


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Nancy L. Alf, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
The State of Nevada Department of Administration, Hearings
Division
GGRM Law Firm
Eighth District Court Clerk

⁵The Honorable Deborah L. Westbrook did not participate in the decision in this matter.