


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CITY OF BOULDER CITY; PUBLIC  
AGENCY COMPENSATION TRUST;  
AND ALTERNATIVE SERVICE  
CONCEPTS, LLC,  
Appellants,  
vs.  
THOMAS ENGEL,  
Respondent.

No. 86368-COA

**FILED**

**FEB 22 2024**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

City of Boulder City (Boulder City), Public Agency Compensation Trust, and Alternative Services Concepts, LLC (ASC) (collectively 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.

In August 2010, Thomas Engel, a landscaper for Boulder City, injured his left hip while picking up trash bags filled with rocks and landscaping debris.<sup>1</sup> Engel filed a workers' compensation claim that ASC, the claims administrator for Boulder City and the Public Agency Compensation Trust, accepted. Engel was diagnosed with left hip strain and underwent physical therapy but his pain did not improve. Four months later, Engel received an MRI without contrast that showed mild osteoarthritis in both his hips and femoral acetabular impingement syndrome (FAI).<sup>2</sup> In response, Engel received two intraarticular left hip

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

<sup>2</sup>FAI "occurs when the bones of the hip joint are not shaped properly, causing them to rub against one another." *Femoroacetabular Impingement*

24-00477

injections that only provided temporary relief.<sup>3</sup> With no clear answer as to the cause or cure of the continuing hip pain, Engel's treating physician recommended that the claim be closed. Frustrated with the recommendation, Engel made an appointment on his own with Ronald Koe, M.D., who believed that Engel actually suffered from a hernia. Engel had surgery to repair the hernia and ASC modified the scope of his claim from "left hip pain" to "left inguinal hernia." Following hernia surgery, Engel continued to feel pain in his left hip and requested to see a hip specialist; ASC approved the request.<sup>4</sup>

Engel sought an evaluation from Mark Rosen, M.D., who determined that Engel had preexisting left hip osteoarthritis. Dr. Rosen opined that Engel "may require a total hip replacement, but that should not be related to any injury that he may have suffered on the job." Based on Dr. Rosen's assessment, ASC ordered a permanent partial disability (PPD) rating for Engel's hernia only and closed his claim in its entirety. Two months later, Engel filed a request for a hearing to reopen his claim, based in part on his continued left hip pain, which was granted. In his decision and order, the hearing officer ordered another evaluation of Engel's left hip.

Robert Tait, M.D., subsequently evaluated Engel and opined that he likely experienced a labral tear at work that, when combined with

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*Syndrome*, YaleMedicine, <https://www.yalemedicine.org/conditions/femoroacetabular-impingement-syndrome> (last visited Feb. 12, 2024).

<sup>3</sup>An intraarticular injection is an injection of "a numbing agent, an anesthetic," and often a cortisone into the hip joint.

<sup>4</sup>According to the record, the hernia repair caused additional pain that is separate and distinct from Engel's left hip pain. The hernia repair and any related damages are not presently before this court on appeal.

his preexisting condition, necessitated a hip replacement. Although ASC was provided with Dr. Tait's report, the insurer denied Engel's claim for a left total hip replacement, citing Dr. Rosen's earlier examination. Engel appealed, and the hearing officer remanded the claim to ASC to "solicit clarification from Dr. Tait as to the work relatedness of [Engel's] left hip condition and the need for replacement." On remand, the parties deposed Dr. Tait, who disagreed with Dr. Rosen's characterization of Engel's condition and opined that Engel's work activity was sufficient to cause a traumatic labral tear that, combined with his underlying condition, became symptomatic necessitating a total hip replacement.

Following Dr. Tait's deposition, ASC once again denied coverage for the left total hip replacement, which Engel again timely appealed. In December 2013, the hearing officer found that Engel's "left hip condition and need for replacement is a consequence of the industrial accident," and therefore ordered ASC to accept the claim. Appellants timely appealed the hearing officer's decision. As Dr. Rosen and Dr. Tait had provided conflicting opinions, the appeals officer ordered an independent medical evaluation (IME) for clarification as to whether Engel's work activity was a substantial contributing cause to the need for a left total hip replacement.

The parties selected Todd Swanson, M.D., to complete the IME. During the evaluation, Dr. Swanson gave Engel an intraarticular left hip injection that provided him with minimal relief. Because the injection did not provide Engel total relief as would be anticipated if the pain was related to the hip joint, Dr. Swanson opined that Engel did not need a total hip replacement. Nevertheless, Dr. Swanson requested another MRI without contrast that once again showed FAI and osteoarthritis. Thereafter, Dr.

Swanson recommended Engel receive another intraarticular left hip injection, this time under fluoroscopic guidance to ensure the numbing agent entered Engel's hip joints.<sup>5</sup> Following the guided injection, Engel felt temporary near-total pain relief. Accordingly, Dr. Swanson opined that Engel would benefit from a total left hip replacement and that the symptoms necessitating the hip replacement were directly caused by his work injury. The appeals officer then affirmed the hearing officer's decision without permitting appellants to depose Dr. Swanson.

Appellants timely petitioned for judicial review, which the district court granted, finding that appellants should have been permitted to depose Dr. Swanson regarding his evaluation and remanding the matter. At his deposition, Dr. Swanson disagreed with Dr. Rosen's assessment, and instead stated that he believed that the symptoms in Engel's left hip were caused by his initial work-related injury. As Dr. Swanson explained: patients with joint problems, such as arthritis, can experience symptoms with a fairly minor injury and, once symptomatic, the pain does not improve and surgery is required. Following Dr. Swanson's deposition, additional briefing by both parties, and a hearing, the appeals officer once again determined that Engel's left hip replacement surgery should be covered, stating that Engel met his burden of establishing a compensable injury, and therefore directed ASC to include the hip surgery as part of Engel's claim. Appellants once again filed a petition for judicial review, which the district court denied. This appeal followed.

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<sup>5</sup>A fluoroscopy is a type of medical imaging that shows a continuous x-ray image on a monitor so that the movement of an instrument can be seen in detail. *Fluoroscopy*, U.S. Food & Drug Administration, <https://www.fda.gov/radiation-emitting-products/medical-x-ray-imaging/fluoroscopy> (last visited Feb. 12, 2024).

On appeal, appellants argue that (1) the medical conditions that existed in Engel's left hip after the work incident were the result of a personal risk injury, and therefore are not compensable because the condition did not arise out of his employment, and (2) that the work incident was not the substantial contributing cause of Engel's osteoarthritis, FAI, and the symptoms from these conditions; namely, the ongoing hip pain and need for a left total hip replacement. In response, Engel argues that substantial evidence supports the appeals officer's finding that his left hip replacement is compensable as a work-related injury and that this court should affirm the appeals officer's decision.

This court reviews administrative agency decisions in the same capacity as the district court and thus gives the district court's decision no deference. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). "Th[is] court may remand or affirm the final decision or set it aside . . . if substantial rights of the petitioner have been prejudiced because the final decision of the agency is . . . clearly erroneous . . . or [a]rbitrary and capricious . . . ." NRS 233B.135(3)(e)-(f). This court reviews questions of law de novo, *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010), but we "shall not substitute [our] judgment for that of the agency as to the weight of evidence on a question of fact," *Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 537, 936 P.2d 839, 842 (1997) (internal quotation marks omitted). "[W]e examine the administrative agency's fact-based conclusions of law for clear error or an abuse of discretion, and will not disturb them if supported by substantial evidence." *City of Henderson v. Spangler*, 136 Nev. 210, 212, 464 P.3d 1039, 1042 (2020) (internal quotation marks omitted). "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*, 113 Nev. at 537, 936 P.2d at 842 (quoting *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993)). The party attacking or resisting the decision has the burden of proof to show that the final decision is invalid. NRS 233B.135(2). Although appellants argue that "the decision of the Appeals Officer is affected by error of law—specifically an error in the determination of factual causation," we note that the issues raised on appeal involve whether substantial evidence supports that Engel's surgery is compensable under Nevada's workers' compensation statutes.

We agree that Engel sustained a compensable mixed-risk injury. "An injured employee . . . [is] not entitled to receive [workers'] compensation . . . unless [they] establish by a preponderance of the evidence that the . . . injury arose in and out of the course of [their] employment." NRS 616C.150(1). "[T]he employee must show that the origin of the injury is related to some risk involved with the scope of employment." *Phillips*, 126 Nev. at 350, 240 P.3d at 5 (quoting *Mitchell v. Clark Cnty. Sch. Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). Employees may encounter employment risks, such as machinery breaking; personal risks, such as falling at work due to a bad knee; or mixed risks—when a personal and employment risk combine to produce the harm—such as a person with a weak heart dying from an employment-related strain. *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600-02, 426 P.3d 586, 590-92 (2018).

Further, NRS 616C.175(1) expressly provides that when an employee with a preexisting condition (e.g., a personal risk) subsequently sustains an "injury by accident arising out of and in the course of" employment (e.g., an employment risk) that "aggravates, precipitates or



accelerates the preexisting condition,” the resulting condition is deemed compensable, “unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.”

Here, substantial evidence supports the appeals officer’s finding that Engel is entitled to compensation because his injury arose out of and in the course of his employment. It is undisputed that Engel was injured on the job, sustaining a left hip sprain, as a result of the scope of work he performed for Boulder City. *See* NRS 616C.150(1). It is also undisputed by all the opining physicians that Engel had osteoarthritis and FAI prior to the work incident. However, prior to the work injury, Engel’s underlying conditions were asymptomatic; after the injury to his left hip, his pain did not resolve. As Dr. Swanson explained, a hip replacement typically is needed when osteoarthritis becomes symptomatic and does not improve. Although Engel’s underlying conditions could be classified as a personal risk, it combined with the employment risk of picking up heavy trash bags and caused his underlying arthritis to become symptomatic, making him a candidate for a left hip replacement, and therefore constituted a mix-risk injury. As such, the appeals officer did not abuse his discretion in finding that Engel’s left hip injury arose out of and in the course of his employment and was compensable as a mixed-risk injury. *See Baiguen*, 134 Nev. at 602-04, 426 P.3d at 591-93 (holding an employee’s stroke injuries were exacerbated by the absence of “policy, procedure, or the necessary training to allow other employees to properly respond” and thus compensable under a mixed-risk theory).

Because we agree that substantial evidence supports the appeals officer’s finding that Engel’s work injury aggravated, precipitated,

or accelerated his left hip condition resulting in the need for a left total hip replacement, we also agree that the appeals officer properly shifted the burden to appellants to demonstrate otherwise. See NRS 616C.175(1).<sup>6</sup> And we agree that appellants failed to prove Engel's injury was not a substantial contributing cause of Engel's need for surgery. See NRS 616C.175(1) ("[T]he resulting condition of an employee who: (a) has a preexisting condition . . . ; and (b) subsequently sustains an injury . . . arising in and out of the course of . . . employment which aggravates, precipitates, or accelerates the preexisting condition, shall be deemed . . . compensable . . . ."); see also, *Substantial-Cause Test*, Black's Law Dictionary (11th ed. 2019) (defining "substantial cause" as "[t]he principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries"). In doing so, we reject appellants' argument that the statute requires the work-related injury to be "the" substantial cause for the left hip replacement surgery.

Appellants cite to NRS 616C.175(1) to argue that the claimant's work injury must be *the* substantial contributing cause of the claimant's condition to be compensable. However, in shifting the burden, the statute states that the injury shall be deemed compensable "unless the insurer can prove by a preponderance of the evidence that the injury . . . is not *a* substantial contributing cause of the resulting condition." NRS 616C.175(1) (emphasis added). The use of "a" rather than "the" in the statute signifies that the Legislature did not intend for as strict of a causation standard as

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<sup>6</sup>Appellants did not file a reply brief, and therefore do not challenge the shifting burden of proof. See *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (electing to treat a party's failure to respond to an argument as a confession of error).



appellants seek. Therefore, we find that the appeals officer applied the appropriate legal standard.

Here, both Dr. Swanson and Dr. Tait opined that the work incident aggravated Engel's left hip injury because, prior to the incident, Engel's left hip was asymptomatic and therefore the work-related injury was a substantial factor in requiring surgery to address Engel's ongoing pain.<sup>7</sup> Although appellants point to Dr. Rosen's opinion to argue that the injury was not a substantial contributing cause of Engel's need for a left total hip replacement, the appeals officer did not find Dr. Rosen's opinion persuasive in light of both Dr. Swanson's and Dr. Tait's subsequent opinions to the contrary as set forth in their reports and depositions. *See Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 562, 188 P.3d 1084, 1091 (2008) ("[U]nder NRS 616C.150, so long as the preponderance of the evidence would lead a reasonable mind to conclude that a causal nexus exists, the evidence supporting an appeals officer's decision need not be conclusive, and may even be conflicting."). We will not reweigh evidence or substitute our judgment for that of the appeals officer's factual determinations where the correct legal standard was applied. *Horne*, 113 Nev. at 537, 936 P.2d at 842. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

	 _____, C.J.
	Gibbons
 _____, J.	 _____, J.
Bulla	Westbrook

<sup>7</sup>See NRAP 31(d)(2).

cc: Hon. Jessica K. Peterson, District Judge  
Laurie A. Yott, Settlement Judge  
Thorndal Armstrong/Reno  
Nevada Attorney for Injured Workers/Carson City  
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Eighth District Court Clerk