IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TREASURE ISLAND HOTEL/CASINO; AND YORK RISK SERVICES GROUP, INC.,
Appellants,
vs.
HEIDI VOORHEES; AND STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS,
Respondents.

No. 78009-COA

FILED

MAY 20 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Treasure Island Hotel and Casino and York Risk Services Group, Inc., appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Heidi Voorhees started working at Treasure Island Hotel and Casino (TI) as a cocktail waitress in 1993. On November 6, 2014, Voorhees slipped and fell on a wet floor during her shift, injuring her ankles, knees, and elbows. Voorhees submitted a workers' compensation claim. York Risk Services Group, Inc. (York), TI's third-party administrator, handled Voorhees's claim. Voorhees was ultimately released to work with light-duty restrictions. TI could not accommodate Voorhees's work restrictions, so York awarded Voorhees temporary total disability benefits (TTD).

One year later, Voorhees filed an administrative complaint alleging that York was issuing her TTD payments late. The Division of Industrial Relations (DIR) found that York had made four late TTD payments and, therefore, found that York engaged in a pattern of untimely payments under NRS 616D.120(1)(h). DIR imposed a benefit penalty and

an administrative fine. TI and York appealed the imposition of the penalty and the fine. Voorhees also appealed the amount of the penalties, which is not before us on appeal.

In addition to TTD benefits, York also awarded Voorhees vocational rehabilitation benefits. Voorhees's initial vocational counselor required Voorhees to prove her eligibility to work in the United States, and Voorhees presented her expired United States passport, Nevada driver's license, and social security card. The vocational counselor would not accept Voorhees's documents because her passport stated she was born in Libya. York suspended Voorhees's benefits on the basis that she could not prove she was a United States citizen eligible to work in the United States.

Voorhees filed a second administrative complaint and DIR found that by suspending Voorhees's vocational rehabilitation benefits, York engaged in a pattern of untimely payments under NRS 616D.120(1)(h). DIR imposed another benefit penalty and an additional administrative fine. TI and York appealed the imposition of the penalty and the fine. Voorhees also appealed the amount of the penalties awarded, which again is not before us on appeal.

The appeals officer consolidated the four appeals and affirmed both DIR decisions. TI and York petitioned for judicial review. The district court affirmed the appeals officer's decision and denied TI and York's petition for judicial review. This appeal followed.

On appeal, TI and York first argue that the appeals officer's affirmance of DIR's finding of a pattern of untimely TTD payments is not supported by substantial evidence. TI and York also argue that the appeals officer's affirmance of DIR's finding that Voorhees was eligible for vocational rehabilitation benefits and there was a pattern of untimely

payments in awarding these benefits is not supported by substantial evidence because Voorhees failed to prove that she was eligible to work in the United States. In turn, Voorhees argues that substantial evidence supports the finding that TI and York engaged in a pattern of late payments, and that she is an American citizen or eligible to work in the United States.

"This court's role in reviewing an administrative agency's decision is identical to that of the district court, and we do not give any deference to the district court's order denying a petition for judicial review." *N. Lake Tahoe Fire Prot. Dist. v. Bd. of Admin. of Subsequent Injury Account for Ass'ns of Self-Insured Pub. or Private Emp'rs*, 134 Nev. 763, 766, 431 P.3d 39, 42 (2018). We review purely legal questions de novo. *See Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). However, we review an administrative agency's factual findings for clear error or an abuse of discretion, and the factual findings must be supported by substantial evidence. NRS 233B.135(3)(e), (f); *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). "Substantial evidence is present where a reasonable person could find the evidence adequate to support the agency's conclusion." *DeMaranville v. Emp'rs Ins. Co. of Nev.*, 135 Nev. 259, 262, 448 P.3d 526, 530 (2019) (internal quotation marks omitted). On appeal, we "may not reweigh the evidence or revisit an appeals officer's credibility determination." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008).

Substantial evidence supports the finding that TI and York engaged in a pattern of late TTD payments

We first address TI and York's argument that the appeals officer improperly affirmed the DIR's finding that there was a pattern of

untimely TTD payments under NRS 616D.120(1)(h). Voorhees[1] responds that the appeals officer's findings of fact are supported by substantial evidence, and the factual findings support the appeals officer's conclusions of law.

"If a claim for the period of temporary total disability is allowed, the first payment pursuant to this section must be issued by the insurer within 14 working days after receipt of the initial certification of disability and regularly thereafter." NRS 616C.475(3). A certification of disability must include the period of disability and a description of any physical limitations or restrictions. NRS 616C.475(7)(a). The certification of disability must also specify whether the limitations or restrictions are temporary or permanent, and must be signed by the treating physician. NRS 616C.475(7)(b), (c). Temporary total disability payments must cease when the employee's doctor determines the employee is capable of gainful employment, the employer offers the employee light-duty or modified employment, or the employee is incarcerated. NRS 616C.475(5). To determine whether a third-party administrator has engaged in a pattern of untimely payments, the appeals officer will consider several factors within NAC 616D.413(1).

The appeals officer in this case ultimately found four untimely TTD payments. TI and York contest each purported late payment. We address each late payment separately.

The first late payment

As to the first late payment, TI and York argue that the start date used to calculate the payment date was incorrect by one day. The

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[1]The DIR is also a named respondent in this case, but we refer only to Voorhees for simplicity.

appeals officer began calculating TTD payments from November 12, 2014. TI and York argue that November 12 should not be the start date because Voorhees worked in a modified duty capacity that day. However, the record demonstrates that York was notified of Voorhees's work restrictions on November 10, 2014, satisfying the certificate of disability requirement under NRS 616C.475(7). The record further demonstrates that TI informed York it could not accommodate Voorhees's restrictions on November 12, 2014. The appeals officer, applying NRS 616C.475(3), calculated Voorhees's TTD benefits starting from November 12, 2014. Although not addressed by the parties on appeal, we note that NRS 616C.475(3) indicates that the first payment must be issued within 14 working days after *receipt* of the initial certification of disability, which in this case was on November 10.

Nevertheless, the appeals officer, utilizing the date of November 12, found that the first payment should have been made by December 4, 2014, which was 14 working days after November 12.[2] Voorhees was not issued payment until December 8, so the first payment was late. The appeals officer's finding is supported by substantial evidence. And, the first payment would still have been late using the start date proposed by TI and York.

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[2]We note that there is no specific statutory definition of "working days" in NRS Chapter 616C. However, "working days" is defined by NRS 241.015(7) to mean "every day of the week except Saturday, Sunday and any day to be declared a legal holiday pursuant to NRS 236.015." Based on this, it appears that the appeals officer properly excluded weekends and holidays in his count. Further, while the parties dispute the "start" date for calculating benefits, they do not dispute the method by which the appeals officer counted the days, and therefore, we decline to further address this issue on appeal.

The second late payment

As to the second late payment, TI and York agree that the payment was late but argue it was due to technical issues beyond their control. TI and York argue that a late payment as a result of a technical issue is not an "unreasonable delay" or a "refusal" of payment, so it should not be counted as a late payment. However, NRS 616C.475(3) does not include an exception for late payments due to technical issues. Additionally, TI and York's violation stems from NRS 616D.120(1)(h), which requires the violating party to engage in a pattern of late payments. Thus, whether a late payment is reasonable, or whether a late payment is considered a refusal to pay is not contemplated by NRS 616D.120(1)(h), all that matters when applying this statute is that the payment is late. Further, based on TI and York's argument, they appear to be referencing NRS 616D.120(1)(c), which provides a remedy to an injured employee when a third-party administrator either refuses to pay or unreasonably delays payment of owed compensation. However, the appeals officer did not find that York violated NRS 616D.120(1)(c), and therefore, TI and York's argument that their delay in making this payment was reasonable under the circumstances is not applicable to determining whether to uphold the violation as charged. Specifically, York's payment records show that a payment issued on March 26, 2015, for the period of March 11 through March 24, was voided and later reissued on April 8, 2015. Therefore, the appeals officer's finding that the second payment was late by appellants' own admission is supported by substantial evidence.

The third and fourth late payments

As to the third and fourth allegedly late payments, TI and York argue that the payments were delayed because Voorhees requested a

transfer of care, and thus York had to wait for a certificate of disability from the new physician pursuant to NRS 616C.475(7) before it could issue payment. However, the statute merely requires a certificate of disability; it does not require that when an employee transfers her care to a different physician, a new certificate of disability from that physician must be submitted before payment will be issued.

In contrast to TI and York's argument, NRS 616C.475(3) states that payment will issue "within 14 working days after receipt of the *initial* certificate of disability *and regularly thereafter*." (Emphasis added.) The statute says nothing about requiring a new certificate of disability after transferring care. In fact, the statute's plain language indicates that payment will continue regularly (more than once) after submission of an *initial* certificate of disability. And here, the record demonstrates that York possessed Voorhees's certificate of disability at the time of the third and fourth late payments.

As to the third late payment, Voorhees was seen by a doctor on April 7, 2015, who continued her light-duty work restrictions. However, TI could not accommodate these restrictions and did not make Voorhees an offer to return to work on light or modified duty. Voorhees requested a transfer of care, and York set up an appointment for her with a different doctor on May 27, 2015. This doctor also maintained Voorhees on light duty work restrictions, which again TI could not accommodate. York issued Voorhees TTD payments on April 8, April 17, and May 5, and then not again until June 16.

TI and York argue the June 16 payment was not late because Voorhees transferred care to another doctor on May 27, and York was not notified of that doctor's restrictions until May 29, 2015. However, TI and

York do not demonstrate why Voorhees's previous restrictions from April 7 were no longer sufficient to support TTD. As indicated above, although Voorhees changed her doctor, the statute does not mandate a new certificate of disability whenever an injured employee transfers care. Voorhees was not issued TTD payments between May 5, 2015, and June 16, 2015, despite continuing to be on light duty work restrictions and despite York's self-professed biweekly payment schedule. *See* NRS 616C.475(3). Because York failed to follow its own payment procedures and because Voorhees's work restrictions remained in place, we conclude the appeals officer's finding that the third payment was late is supported by substantial evidence.

The fourth late payment was issued on July 14, 2015. TI and York argue this payment was not late because Voorhees had once again transferred her care to another doctor, whom she saw on July 9, and who continued her light duty work restrictions. York states that it did not receive notice of these ongoing restrictions until July 9, 2015. However, again, TI and York do not demonstrate why the light duty restrictions Voorhees's previous doctor set in place on May 27, of which York had notice of on May 29, and were simply continued on July 9, were no longer sufficient to support her TTD payments. This is particularly important since several TTD payments were due to Voorhees prior to her transfer of care on July 9, 2015, and the same restrictions were maintained by the doctor on July 9, following the transfer. As stated above, the statute does not mandate a new certificate of disability whenever an injured employee transfers care, and restrictions are ongoing. Voorhees was not issued payment between June 16, 2015, and July 14, 2015, despite continuing to be placed on work restrictions and despite York's self-professed biweekly payment schedule.

See NRS 616C.475(3). Thus, we conclude that the appeals officer's finding that the fourth payment was late is supported by substantial evidence.

A pattern of late payments

TI and York next argue that even if payments were late, the record does not support a finding of a *pattern* of untimely TTD payments. But DIR's determination considered every factor in NAC 616D.413(1) to find a pattern of untimely payments. And while DIR made findings on each subsection, we note the following as most persuasive: DIR found four separate late TTD payments in a one year period to a single employee. NAC 616D.413(1)(c)-(f), (i), (j). DIR also found that it had recently fined York for untimely TTD benefit payments after a five-year audit. NAC 616D.413(1)(k). Based on DIR's findings and on its own findings, the appeals officer found a pattern of untimely TTD payments.

TI and York finally argue that Voorhees failed to present facts that went "beyond speculation and conjecture" to support a pattern of late payments. To the extent that TI and York are referencing the weight and credibility of the evidence and witnesses in this case, we "may not reweigh the evidence or revisit an appeals officer's credibility determination" on appeal. *Milko*, 124 Nev. at 362, 184 P.3d at 384. And to the extent that we have already concluded that the appeals officer's findings as they relate to the four payments are supported by substantial evidence, this argument is without merit. Therefore, we affirm the appeals officer's decision that TI and York engaged in a pattern of late TTD payments.[3]

[3]We have considered TI and York's other arguments on this point, and find them to be without merit.

Substantial evidence supports that TI and York engaged in a pattern of conduct that wrongly denied Voorhees vocational rehabilitation benefits

We next address TI and York's argument that the appeals officer improperly affirmed the DIR's finding that there was a pattern of untimely vocational rehabilitation benefit payments under NRS 616D.120(1)(h). TI and York argue that Voorhees's expired passport is insufficient to demonstrate proof of eligibility to work in the United States and, therefore, they properly suspended her rehabilitation benefits. Voorhees argues that TI had notice that Voorhees was eligible to work in the United States because she presented her U.S. passport, driver's license, and social security card, and a search within ISO ClaimSearch[4] showed her social security number matched her name in the database.

"Vocational rehabilitation services shall be provided directly or through public or private resources to any individual with a disability . . . ." NRS 615.170. "The compensation for a temporary total disability terminates and vocational rehabilitation maintenance commences on the date on which an injured employee becomes eligible for vocational rehabilitation benefits." NAC 616C.577(2). Thereafter, the "insurer shall pay the injured employee vocational rehabilitation maintenance at least every 14 days." *Id.* Vocational rehabilitation compensation ends when the injured employee fails to cooperate with the insurer or participate in the program, completes the program, or moves out of the state. NAC 616C.577(2)(a)-(c).

TI and York's argument that Voorhees was not eligible for vocational rehabilitation benefits appears to hinge on their belief that

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[4]ISO ClaimSearch is a software program used by workers' compensation claim professionals.

Voorhees is not a citizen of the United States. TI and York cite to 8 C.F.R. § 274a.2(b)(1)(v) (2018) for the proposition that only an unexpired U.S. passport may be used to show identity and employment authorization. But 8 C.F.R. § 274a governs the employment eligibility of non-U.S. citizens within the federal immigration law scheme. And because Voorhees's employment eligibility was not at issue, this regulation does not apply. Therefore, the appeals officer correctly did not rely on the regulation when determining whether Voorhees failed to timely receive her vocational rehabilitation benefits.

Additionally, the only case that TI and York cite to in support of their position is *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 25 P.3d 175 (2001). In *Tarango*, the Nevada Supreme Court affirmed the denial of vocational rehabilitation benefits to an undocumented worker because, due to his undocumented status, providing him with vocational rehabilitation benefits would require the state agency either violate federal immigration law or NRS 616C.530. *Tarango*, 117 Nev. at 448-53, 25 P.3d at 178-81. NRS 616C.530 sets the priority list for returning injured employees to work. For example, the insurer should first try to "[r]eturn the injured employee to the job the injured employee had before his or her injury," NRS 616C.530(1), and if that isn't possible, then the insurer should try the next option set forth in the statute, and so on. In *Tarango*, because the employer could not provide the undocumented worker with further employment without violating federal law, the insurer would have been required to jump to the last, and most expensive, option of "[p]rovid[ing] formal training or education" in another vocation. 117 Nev. at 452-53, 25 P.3d at 181. The supreme court concluded that ignoring the priority scheme in this way would be contrary to the Legislature's intent. *Id.* at 452-53, 25 P.3d at 180-

81. There is no evidence—not to mention substantial evidence—in the record that Voorhees is an undocumented worker, and therefore the appeals officer properly did not rely on this case in making his determination.

Moreover, 42 C.F.R. § 435.407(a)(1) (2017) states that an expired U.S. passport is sufficient documentary evidence of *citizenship* for medical assistance programs. And Voorhees worked for TI for over 20 years. Presumably, TI had a valid I-9 (employment eligibility) form for Voorhees as her employer. Additionally, the record demonstrates that Voorhees offered more than her expired passport. Voorhees also presented her Nevada driver's license and her social security card. The record also demonstrates that a search within ISO ClaimSearch showed that Voorhees's social security number matched her name in the database. These documents are sufficient to prove citizenship and eligibility to work in the United States.

The record indicates that Voorhees's initial vocational rehabilitation counselor, upon seeing that Voorhees was born in Libya, refused to accept her other documentation that also supported her citizenship. In addition, Voorhees has consistently represented that she is a U.S. citizen at all of the hearings, as well as to all of her healthcare providers. The appeals officer found the evidence of Voorhees's citizenship to be credible, and the record supports the appeals officer's findings on this point. To the extent TI and York dispute Voorhees's credibility, we do not reweigh that on appeal. *Milko*, 124 Nev. at 362, 184 P.3d at 384. Therefore, as substantial evidence supports the appeals officer's findings that Voorhees is a U.S. citizen entitled to vocational rehabilitation benefits and that TI and York wrongly delayed those benefits, we conclude there is no

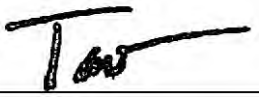
clear error or abuse of discretion in the appeals officer's decisions and the district court did not err in denying judicial review.

Accordingly, we

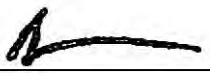
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Joanna Kishner, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
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