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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MEADOWBROOK INSURANCE GROUP,

Petitioner,

v.

DAVID SIMPSON, and the DEPARMENT OF ADMINISTRATION

Respondents.

Case No. A-13-693454-J

Dep't No. XXXI

DECISION AND ORDER

On December 20, 2013, Petitioner Meadowbrook Insurance Group ("Petitioner") filed the instant Petition for Judicial Review. Respondent David Simpson ("Respondent") filed a notice of intent to participate on February 19, 2014. Petitioner filed their Opening Brief on February 24, 2014, and Respondent filed his Answering Brief on March 17, 2014. Petitioner's Reply Brief was filed on April 16, 2014. After a full briefing by the parties, the matter was placed on Department XXXI's Chamber's calendar. After a full review of the Record on Appeal, the briefs of the parties, all relevant law, and the Order of the Hearing Officer and Appeals Officer, the Court finds as follows:

I. PROCEDURAL HISTORY

On May 23, 2012, Respondent, by and through his attorneys, filed a request for hearing which was scheduled for June 18, 2012. The hearing was

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rescheduled and set for August 22, 2012. The issue before the Hearing Officer was claim closure, and the Hearing Officer upheld the March 20, 2012, determination of Meadowbrook Insurance Services. Respondent appealed this decision.

On March 25, 2013, the parties appeared in front of Appeals Officer Paul Lychuk on the issue of claim closure. That hearing was continued upon agreement of the parties before any argument was heard.

Shortly thereafter, in April of 2013, Respondent requested a hearing on the specific issue of scope of claim. The parties agreed to enter into a stipulation to bypass the hearing division and to consolidate the issue of improper claim closure and scope of claim into one hearing before Appeals Officer Lychuk.

A hearing was held in front of Appeals Officer Lychuk on September 19, 2013. During the hearing, Appeals Officer Lychuk heard oral argument by the parties. Appeals Officer Lychuk opined that Dr. Estela diagnosed Respondent with a hematoma, and the hematoma was a result of Respondent's occupational injury. Appeals Officer Lychuk went on to note that the medical records indicate that the hematoma subsequently became infected, causing the osteomyelitis and subsequent infections. Thus, Appeals Officer Lychuk ordered that the scope of the claim be expanded to include Respondent's subsequent infection, treatment, and medical bills.

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II. DISCUSSION

A. Findings as Determined by the Appeals Officer

Appeals Officer Paul Lychuk made the following Findings of Fact and Conclusions of Law in his Decision and Order filed November 26, 2013:

Findings of Fact:

1. Respondent was injured in the course and scope of his employment with Simpson Glass, when he was involved in an industrial accident on October 12, 2011. (R, 33)

2. On October 13, 2011, Respondent sought medical treatment at Spring Valley Hospital. The C-4 form completed by Dr. Kathleen Cornia indicated that from the information given, together with the medical evidence, can directly connect this injury as job incurred and additional medical care would be needed. (R, 33)

3. On October 17, 2011, Respondent reported to his primary care physician, Dr. Steven Fales, with complaints of acute low back pain and weakness in his legs. Dr. Fales recommended Respondent receive pain medication and rest. (R, 33-34)

4. Respondent began medical treatment with Dr. Cesar Estela. On October 20, 2011, Respondent underwent an MRI of his lumbar spine. This MRI revealed a mass in Petitioner's lumbar. Dr. Alan Diamond, the radiologist who conducted the MRI, noted that the mass was possibly related to a history of trauma, and that the mass included a possible infection. (R, 34)

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5. Both Dr. Estela and Dr. Diamond recommended Respondent undergo a CT scan of his abdomen and pelvis to further evaluate the mass. (R, 34)

6. Respondent's symptoms continued into November of 2011. On November 18, 2011, Respondent reported to University Medical Center ("UMC") experiencing balance issues, weakness, multiple falls, and an altered mental state. Respondent was diagnosed with abscess formations in his cervical and lumbar spines. Respondent underwent emergency surgery for this condition, as his treating physicians indicated that if left untreated, the condition could lead to quadriplegia. (R, 34)

7. After being released from UMC, Respondent continued receiving medical treatment for infections by his primary care physician, Dr. Fales, who reported: "Patient's osteomylelitis and treatment thereof, including surgery, was probably, and more likely than not, caused by his injury that created an acute hematoma which became infected and seeded his bone marrow with infection." (R, 34)

8. Respondent also received treatment from infectious disease specialist Dr. Fadi El Salibi. After treating with Dr. Salibi, Dr. Salibi reported: "The causal relationship between his primary injury could be established by the fact that he had a hematoma at the first insult and subsequently he became infected and let to the dissemination of the staph." (R, 35)

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Conclusions of Law as Set Forth in the Appeals Officer's Decision:

1. Judge Lychuk[1] found Dr. Salibi's opinion to be persuasive, particularly this opinion that Respondent's industrial hematoma became infected leading to Respondent's osteomyelitis. As an infectious disease specialist, Judge Lychuk gives considerable weight to his opinion as the cause of the Respondent's infectious disease process and its relationship to his industrial accident. (R, 35)

2. Respondent's personal physician, Dr. Fales, who is most familiar with Respondent's medical history, also opined that the acute muscle injury and hematoma Respondent suffered was a result of his industrial work accident and became infected, resulting in the osteomyelitis. (R, 35)

3. Dr. Estela, Respondent's treating physician, diagnosed and treated the hematoma as being industrially rated, and confirmed the same by CT scan. (R, 35)

4. The evidence presented supports reversal of the Hearing Officer's decision dated August 30, 2012, regarding claim closure, and orders the scope of the claim to be expanded to include the Respondent's diagnosis of osteomyelitis and the treatment related to that condition. (R, 35)

B. Standard of Review

Judicial review of the final decision of an agency is conducted by the Court without a jury and confined to the record. NEV. REV. STAT. § 233B.135 (1). The Court shall not substitute its judgment for that of the agency as to the weight of

[1] The Conclusions of Law section is excerpted directly from Appeals Officer Paul Lychuk's Decision. As that Decision uses the title Judge Lychuk, the Court's references herein refer to him interchangeably as Appeals Officer Lychuk and Judge Lychuk.

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the evidence on questions of fact and may remand, affirm, or set aside the agency decision in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary capricious or characterized by an abuse of discretion." NEV. REV. STAT. § 233B.135(3).

In short, the final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. NEV. REV. STAT. § 233B.135(2). The court may only set aside a final decision of an administrative agency where substantial rights of the Petitioner have been prejudiced because the final decision is in violation of statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NEV. REV. STAT. § 233B.135(3).

Generally, the Appeals Officer's factual findings are entitled to deference. In determining whether an administrative decision is supported by substantial evidence, the methodology of the District Court is well-defined. First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the record on appeal is reviewed to determine whether the agency's decision on each issue is supported by substantial factual evidence. *Tighe v. Las Vegas Metro. Police Dept.*, 110 Nev. 632, 877 P.2d 541 (1994). If the decision of the administrative

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agency on the appealed issue is supported by substantial factual evidence in the record on appeal, the District Court must then affirm the agency's decision as to that issue. *Id.* at 634.

Previously, the Nevada Supreme Court has defined substantial evidence to be that, which "a reasonable mind might accept as adequate to support a conclusion." *Nevada Power Co. v. Pub. Utility Comm. Of Nev.*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006). NEV. REV. STAT. § 233B.135(2)-(3) further provides that the final decision of the agency shall be deemed reasonable and lawful until that decision is reversed or set aside in whole or in part by the court with the burden of proof being on the party attacking the decision to show the final decision is invalid.

Most issues are not purely questions of law, but rather are issues involving findings of facts and the application of those facts to the law. Deference is given by the reviewing court to conclusions of law made by the Appeals Officer. *Jones v. Rosier*, 102 Nev 215, 719 P.2d 805 (1986); *State Indus. Ins. Sys. v. Choice*, 108 Nev. 123, 825 P.2d 218 (1992).

C. Petitioner's Statement of Issues

1. Is the Appeals Officer's Decision and Order expanding the Respondent/Claimant's claim arbitrary and capricious under the existing Nevada law?

2. Is the Appeals Officer's Decision and Order reversing the Respondent/Claimant's closure of the claim clearly erroneous under the existing Nevada law?

III. DECISION

Petitioner argues that the Appeals Officer's decision should be reversed as it was arbitrary and capricious, and clearly erroneous under existing Nevada law. Petitioner argues that Respondent failed to establish an entitlement to additional scope of coverage for his claim in light of the clear and substantial medical evidence. Petitioner also argues that based on the information provided at the hearing, the decision was arbitrary and capricious as he allegedly ignored both Dr. Rimoldi and Dr. Estela's findings that the Respondent's medical records do not establish causation for any newly developed conditions. Further, Petitioner argues that the Appeals Officer should have ordered an independent medical examination, as he was allowed to do under NEV. REV. STAT. § 616C.330, but failed do so. Petitioner also cites Nevada's rejection of the "treating physician rule" in *McClanahan v. Raley's Inc.*, 117 Nev. 921 (2006) and argues that the Appeals Officer gave undue deference to Respondent's primary care physician, and therefore, the order was clearly erroneous. Petitioner's arguments fail for the following reasons:

First, there is no indication that the Appeals Officer ignored the findings of Dr. Rimoldi and Dr. Estrela. Rather, the Conclusions of Law entered by the Appeals Officer merely indicate that he gave greater weight to Dr. Fales, who concluded that Respondent's osteomyelitis was more probably than not causally

related to the underlying condition; and Dr. Salibi, who concluded that it was possible that there was a causal relationship. Dr. Fales' opinion is stated to a degree of medical probability as required by *Exposition Services Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, (1993). Based on the report of Dr. Fales, there is substantial evidence in the record to support the finding of a causal relationship between Respondent's low back injury and the osteomyelitis. The fact that there are two other doctors testifying that there is no causal relationship does not in and of itself indicate that the decision was arbitrary and capricious. As there is substantial evidence in the record to support the decision, the Court will not disturb the findings of the Appeals Officer.

Furthermore, the assertion that the Appeals Officer was somehow required to order an independent medical examination is undermined by the clear language of the statute cited by Petitioner. NEV. REV. STAT. § 616C.330 indicates that the Appeals Officer "may" order an independent medical examination if necessary to resolve a medical question. Nowhere in the statute is any requirement that the Appeals Officer do so. In the present case, there were already several doctors, including: an infectious disease specialist, an emergency room doctor, two treating physicians, and another doctor. The decision to order such an examination is clearly within the discretion of the Appeals Officer, and again, will not be disturbed by the Court. There was substantial evidence to support the decision that another medical opinion was not necessary in the present case.

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With respect to Petitioner's claim that the Appeals Officer violated the Supreme Court's holding in *McClanahan*, the Court, again, finds that Petitioner's arguments fail. *McClanahan* stands merely for the proposition that as a matter of law, a treating physician should not be given any special deference based merely on the fact that he or she is the treating physician. Nowhere does *McClanahan* hold that a treating physician should be ignored or that deference should be given to non-treating physicians. While the Appeals Officer did indicate that he favored the opinions of the treating physicians in this case, he did not indicate that he did so because he felt legally obligated to do so. As the trier of fact, the Appeals Officer was within his discretion to determine that the two doctors upon which he relied were entitled to greater weight than those upon which he did not.

Petitioner's final argument is that the decision was a clear error of law because Dr. Rimoldi and Dr. Estrela each determined that Respondent was capable of returning to work full-duty and had reached maximum medical improvement with no ratable impairment on his industrial injury. Petitioner's claim that Respondent failed to adduce and proper evidence to contradict this conclusion ignores the clear findings of Dr. Fales who stated in his report that the causal relationship between the two issues was more probable than not. Further, as noted by the Appeals Officer, his determination of what weight to give Dr. Rimoldi's opinion was impacted based on his determination that "Dr. Rimoldi's review of the case appears to ignore some of the actual evidence in the record." R, 44. Further, the fact that Dr. Estela changed his opinion was a factor that the Appeals Officer could take into account when determining credibility and the

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weight to give the opinion. Finally, the Appeals Officer could appropriately take into account when evaluating whether the injury was work related or pre-existing the fact that the Claimant was working full-duty without incident or symptoms before his industrial accident as noted in his decision. The determination of the Appeals Officer was, therefore, neither clearly erroneous nor arbitrary and capricious as it was based on substantial evidence in the record.

Petitioner argues generally that the Appeals Officer exceeded the scope of the issues before him and formulated medical determinations. The Court does not find merit to that assertion. Instead, the Record reflects that the Appeals Officer was faced with conflicting medical reports and determined that greater weight should be given to the medical evidence presented by some of the doctors over other doctors. To determine the weight and credibility of each medical opinion is within the purview of the Appeals Officer, and does not constitute providing a medical opinion. Given the above, the Appeals Officer's determinations are not be overturned if they are supported by substantial evidence. Accordingly, the Petition for Judicial Review is DENIED.

ORDER

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that the Petition for Judicial Review is DENIED and the Order of the Appeals Officer is AFFIRMED.

Dated this 20th day of August, 2014

HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below via one, or more, of the following manners: via email, via facsimile, via US mail, via Electronic Service if the Attorney/Party has signed up for Electronic Service, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

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