139 Nev., Advance Opinion 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Appellants,
vs.
ROBERT HOLLAND,
Respondent.

No. 82843

Appeal from a district court order granting a petition for judicial review in an occupational disease case. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Affirmed.

Lewis Brisbois Bisgaard & Smith LLP and Daniel L. Schwartz and L. Michael Friend, Las Vegas,
for Appellants.

GGRM Law Firm and Lisa M. Anderson, Las Vegas,
for Respondent.

BEFORE THE SUPREME COURT, EN BANC.[1]

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[1]The Honorable Linda Marie Bell, Justice, voluntarily recused herself from participation in the decision of this matter.

OPINION

By the Court, HERNDON, J.:

In this opinion, we address the burden of proof for an NRS 617.457 occupational heart disease claim, when an NRS 617.457(11) defense is raised alleging that the employee failed to correct predisposing conditions. Respondent was denied occupational heart disease benefits after suffering from two heart attacks. On a petition for judicial review, the district court reversed the claim denial. At issue in this appeal is (1) whether the district court erred by improperly reweighing the evidence and retrying the case, and (2) whether the district court improperly added new requirements to the exclusion set forth in NRS 617.457(11).

We clarify that the employee bears the initial burden to establish entitlement to the statutory presumption pursuant to NRS 617.457(1) that their heart disease arose out of and in the course of employment. Thereafter, if the employer asserts an NRS 617.457(11) defense, the employer bears the burden to demonstrate that the employee had predisposing conditions that lead to heart disease, had the ability to correct those conditions, and failed to do so when ordered in writing by an examining physician. Finally, the employee has an opportunity to rebut the employer's evidence to establish their entitlement to the presumption. Upon analyzing respondent's claim under this framework, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

In December 2012, respondent Robert Holland retired after 25 years as a police officer with appellant Las Vegas Metropolitan Police Department (LVMPD). In May 2019, Holland was admitted to the hospital with complaints of chest pain. Holland denied any cardiac history aside

from hypertension. While at the hospital, Holland received two procedures to improve blood flow to his heart. Holland was discharged six days later and advised to follow up with his primary care provider and cardiologist. Holland's cardiologist filled out a workers' compensation claim form to request occupational disease benefits pursuant to NRS 617.457. The form confirmed that Holland had experienced two heart attacks (a disabling heart disease) and was totally disabled from May 27, 2019, to June 17, 2019.

During annual physical exams throughout his years of employment, Holland was notified that he had predisposing conditions and informed about associated corrective actions to address those conditions. In 2008, the examining physician observed that Holland had a predisposing condition of elevated triglycerides and provided a written recommendation for corrective action of implementing a low-fat diet. In 2009, the examining physician again identified elevated triglycerides, as well as elevated cholesterol, a second predisposing condition.[2] In 2010, the examining physician identified additional abnormal lab results and noted that Holland had low HDL (high-density lipoprotein, or "good" cholesterol). In 2011, the examining physician identified elevated triglycerides, elevated cholesterol, and elevated LDL (low-density lipoprotein, or "bad" cholesterol), with a recommended corrective action plan consisting of a low-fat diet and taking 250 mg/day of slo-niacin. Finally, in 2012, the examining physician identified elevated triglycerides and low HDL and recommended a corrective action of a low-fat diet, increased cardiovascular exercise, and 4 gm/day of omega 3. In 2015, following his retirement, Holland was also

[2]The elevated cholesterol condition is not at issue in this appeal.

diagnosed with high blood pressure and started taking medication for the condition.

After receiving Holland's workers' compensation request, appellant Cannon Cochran Management Services, Inc. (CCMSI), LVMPD's workers' compensation administrator, sent Holland a letter denying his claim for failure to meet the statutory requirements. Holland administratively appealed. The hearing officer affirmed CCMSI's decision, finding that there was "[a] preponderance of the evidence . . . reveal[ing] that [Holland] has failed to meet the requirements of NRS 617.457." Specifically, the hearing officer determined that Holland "has a history of being told of the need to deal with predisposing factors/conditions on a continuous basis."

Holland appealed again, and the appeals officer affirmed. Following the same reasoning as the hearing officer, the appeals officer found that Holland failed "to correct predisposing factors/conditions on a continuous basis" and noted that he had been "warned on multiple occasions that failure to do so could result in exclusion from the benefits." Further, the appeals officer cited to the warnings Holland received in 2011 and 2012 about his elevated triglyceride levels and the examining physician's order to correct them, pointing out that, at the time of Holland's hospital admission, his triglyceride levels were nearly double what they were in 2012. The appeals officer determined that Holland "offered no [contradictory] evidence" and that he "failed to correct his predisposing condition of high triglycerides."

Holland petitioned for judicial review. The district court reversed, finding that the appeals officer's decision was summary and not supported by substantial evidence for four specific reasons. First, the district court found that while, prior to Holland's retirement, there were written instructions by examining physicians to correct predisposing conditions, they "were much too general in nature to effect change." The district court noted that there should have been "specific and pointed advice [such as] a given regimented diet plan and/or given regimented exercise routine" and that these programs should have "laid out diet specific instructions as to what [Holland] could and could not eat, and specific exercise instructions as to what exercises [he] needed to complete, frequency, duration, etc." Second, the district court determined that the physical examination documentation in the record did not show that "correcting the predisposing conditions was within [Holland]'s ability." Third, the district court determined that the reviewing physicians all stated that Holland was in "good health and remain[ed] acceptable for employment." Finally, the district court found that Holland "exercised good faith in adhering to the physician's recommendations," given that he was told that he was in good health and the physicians only provided "minimal recommendations." And because the examining physicians did not prescribe any medications to help control Holland's cholesterol and triglyceride levels, the district court found Holland appeared to have complied with the directives of those physicians and his predisposing conditions apparently were not altered through diet and exercise alone. LVMPD and CCMSI appealed.

DISCUSSION

On appeal, this court's role is the same as the district court's: to review "an appeals officer's decision for clear error or arbitrary abuse of discretion." *Manwill v. Clark County*, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007). In so doing, this court gives deference to "[t]he appeals officer's fact-based conclusions of law" and will not disturb them "if supported by substantial evidence." *Id.* Additionally, this court will "not substitute our judgment for that of the appeals officer as to the weight of the evidence on a question of fact." *Id.* However, "we independently review the appeals officer's purely legal determinations, including those of statutory construction." *Id.* at 242, 162 P.3d at 879.

"When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words," and "the primary consideration is the Legislature's intent." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010); *see also Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). In the context of Nevada workers' compensation laws, "[t]his court has consistently upheld the plain meaning of the statutory scheme." *State Indus. Ins. Sys. v. Prewitt*, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997).

In a claim pursuant to NRS 617.457, the employee bears the initial burden of proof that they are entitled to the conclusive presumption in NRS 617.457(1)

As this court has previously explained, employees typically "must establish, by a preponderance of evidence, that [an occupational] disease arose out of and in the course of employment" to receive workers' compensation benefits for that disease. NRS 617.358(1); *Manwill*, 123 Nev. at 242, 162 P.3d at 879; *see also Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1015, 145 P.3d 1024, 1028 (2006) (discussing the same). However,

when a police officer who has served for two years or more contracts heart disease that renders them disabled, NRS 617.457(1) provides a conclusive presumption that the disease arose out of and in the course of the officer's employment, relieving the officer of that initial burden. *See also Manwill*, 123 Nev. at 242-44, 162 P.3d at 879-80. Once the officer shows that they are disabled as the result of heart disease and that the statutory requirements are met, the heart disease "is covered, despite any preexisting symptom or condition," unless an exclusion exists. *Id.* at 243 & n.12, 162 P.3d at 879 & n.12.

Holland sought workers' compensation benefits pursuant to NRS 617.457(1), and the parties do not dispute that he met the statutory requirements for the statute's conclusive presumption. Holland has heart disease and was disabled in 2019 after experiencing two heart attacks, and he was employed as a police officer with LVMPD for more than 25 years. Thus, the record supports the proposition that Holland made a preliminary showing that he was entitled to the conclusive presumption.

NRS 617.457(11) is an affirmative defense, and the employer bears the burden of proof by a preponderance of evidence

Both appellants and Holland do not dispute that the burden of proof lies with the employer in making the preliminary showing under NRS 617.457(11). Even when an employee meets the subsection 1 requirements, however, an employer may demonstrate that the employee is excluded from use of the conclusive presumption pursuant to NRS 617.457(11). Under this exclusion, "[a]n employer can defend a claim by showing that the employee failed to correct a predisposing condition . . . after being warned to do so in writing." *Daniels*, 122 Nev. at 1016, 145 P.3d at 1029. Because the plain and unambiguous language in NRS 617.457(11) precludes an employee who fails to correct a predisposing condition from relying on the conclusive

presumption in NRS 617.457(1), it may operate as an affirmative defense to such a claim. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557-58, 170 P.3d 508, 513 (2007) ("An affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true.").

NRS 617.457(11) states the following:

> Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to a physical examination required pursuant to subsection 4 or 5 excludes the employee from the benefits of this section if the correction is within the ability of the employee.

It is well-established that a party asserting an affirmative defense has the burden of proving each element of that defense. *See Res. Grp., LLC v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 52, 437 P.3d 154, 158-59 (2019) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979)). Thus, because appellants relied on NRS 617.457(11) to defeat Holland's claim, they bore the burden to prove, by a preponderance of the evidence, that (1) Holland had a predisposing condition that leads to heart disease, (2) Holland was "ordered in writing by the examining physician" to correct the predisposing condition, (3) Holland failed to correct the predisposing condition, and (4) the correction was "within the ability of the employee." *See Gault v. Grose*, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916) ("To maintain an affirmative defense it must be established by a preponderance of the evidence.").

Appellants failed to show Holland had the ability to correct his predisposing condition

Appellants argue that the district court improperly reweighed the evidence from the appeals officer's decision and added new requirements to NRS 617.457(11). Appellants do not dispute that Holland meets the initial requirements to qualify for the conclusive presumption of a claim compensable under NRS 617.457. Appellants contend that Holland failed to provide any evidence to support that he did take steps to correct predisposing conditions or make a good faith effort.

Holland counters that the appeals officer's decision was not supported by the record. Holland argues that appellants did not present any evidence that he had the ability to correct the predisposing conditions. Holland contends he made a consistent effort, although unsuccessful, to control the predisposing conditions. Thus, despite his best efforts, he was not able to obtain normal levels.

The appeals officer determines what weight is given to each piece of evidence. *Manwill*, 123 Nev. at 241, 162 P.3d at 879. We must give deference to the "appeals officer's fact-based conclusions of law" and will not disturb them "if supported by substantial evidence." *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (quoting *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993)).

In raising NRS 617.457(11) as a defense to Holland's claim, appellants were required to show "that [he] failed to correct a predisposing condition" in his control "after being warned to do so in writing." *Daniels*, 122 Nev. at 1016, 145 P.3d at 1029. As to the first element, Holland's medical records from 2008 through 2012 show that he had elevated

triglyceride levels, which the parties agree qualify as a predisposing condition that leads to heart disease.[3] As to the second element, the record also demonstrates that Holland was instructed in writing by his physicians to adopt a low-fat diet, increase cardiovascular exercise, and take certain supplements. Despite these directives, Holland's triglyceride levels continued to rise over time and ultimately, in 2019, they had nearly doubled from when he was last examined in 2012. This supports the proposition that, as to the third element, Holland failed to correct his predisposing condition. Therefore, we conclude that appellants met their burden to establish the first, second, and third elements necessary to maintain their defense under NRS 617.457(11).

However, it is not enough to show that Holland failed to correct the predisposing condition leading to heart disease; appellants also had the burden to show the fourth element, that Holland had the ability to correct the condition. This factor is largely tied to the physician's directives for correcting the condition and whether the corrective action itself is within the employee's ability. Importantly, failure to take the corrective actions ordered by the examining physician may indicate that the employee had the ability to correct the condition but did not do so and thereby preclude the employee from the benefits of NRS 617.457(1). However, failure to correct the predisposing condition, despite the employee's compliance with the corrective action, may indicate instead that the employee did not have the ability to correct the condition.

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[3]While the parties agree that elevated triglycerides are a predisposing condition in this case, we reiterate that it is the employer's burden to show that such was a predisposing condition under the statute.

The record below does not include any testimony about whether correcting the predisposing condition was within Holland's ability. Nor was there evidence to support the argument that Holland failed to take corrective action. Instead, appellants rely solely on the *lack* of evidence and Holland's lack of improvement to his triglyceride levels to show that he failed to take corrective action, but the burden was theirs, and the inference that he thus had the ability to correct the condition does not follow. In fact, the record demonstrates that Holland experienced one of his two heart attacks after visiting the gym, suggesting that he might have increased cardiovascular exercise as directed, and also establishes that he had been seeing a primary care physician concerning his high cholesterol. Although appellants point to evidence showing Holland's weight increase, rising triglyceride levels, and lack of health improvement over the years, this does not necessarily show that Holland did not follow the recommended corrective actions; rather, it could just as well mean that Holland's efforts simply failed to correct the precondition, suggesting that the predisposing condition was not actually within his ability to correct. Appellants bore the burden to show that Holland did not take or attempt to take the corrective actions to correct his predisposing conditions, and their failure to do so is critical. Because appellants failed to make the requisite showing for the fourth element, they are unable to use NRS 617.457(11) to exclude Holland from relying on the statutory presumption that his heart disease arose out of and in the course of his employment with LVMPD.

If the employer makes the necessary showing under NRS 617.457(11), the burden shifts back to the employee to rebut the application

When an employer meets its burden of demonstrating the elements of NRS 617.457(11), the employee then has the opportunity to rebut the employer's evidence. With respect to this last element, the

employee could do so by demonstrating that they complied with the corrective directives but those actions did not correct the predisposing condition. The employee is still entitled to the presumption if they can demonstrate that the predisposing condition could not be corrected through the recommended corrective actions.[4] Here, because appellants failed to show that Holland did not take or attempt to take corrective actions to address his predisposing conditions, and therefore failed to demonstrate their entitlement to the use of NRS 617.457(11) to exclude Holland from the presumption in NRS 617.457(1), we find that Holland had no need to offer any evidence in rebuttal.

CONCLUSION

NRS 617.457(11) is an affirmative defense, and the burden of proof necessarily rests with the employer raising the defense to prove it by a preponderance of the evidence. Because appellants failed to put forth sufficient evidence in the record below demonstrating that Holland had the ability to correct his predisposing condition and failed to do so, appellants failed to meet their burden to exclude Holland from NRS 617.457(1)'s presumption that his heart disease arose out of and in the course of his

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[4]Alternatively, an employee could instead make the necessary showing under NRS 617.358 to seek workers' compensation benefits for occupational disease without the presumption. *Cf. City of Las Vegas v. Evans*, 129 Nev. 291, 297, 301 P.3d 844, 847 (2013) (concluding that an employee who failed to qualify for NRS 617.453's presumption that a firefighter's cancer was a compensable occupational disease could still seek compensation "under NRS 617.440, in conjunction with NRS 617.358").

employment with LVMPD. Therefore, we conclude that the district court properly granted Holland's petition for judicial review, and we affirm.

_____, J.
Herndon

We concur:

_____, C.J.
Stiglich

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Lee

_____, J.
Parraguirre