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N. Lake Tahoe Protection Dist. v. Bd. of Admin., 134 Nev. Adv. Op. 93 (Dec. 6, 2018) (en banc)

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ADMINISTRATIVE LAW: WORKERS' COMPENSATION

Summary

The Court determined that NRS 616B.578(4)² does not require an employer to know the precise medical terminology for an employee's permanent physical impairment before the subsequent injury. However, the statute requires that an employee's preexisting permanent physical impairment be fairly and reasonably observed from a written record and the impairment must amount to at least 6% whole person impairment.

Background

In 1981, the North Lake Tahoe Fire Protection District hired an employee as a paramedic and firefighter. After 20 years without a documented injury, the employee injured his back on multiple occasions between 2002 and 2007 while on duty. Doctors diagnosed the employee with various back conditions. The employee injured his back once more while on duty in 2007.

Doctors diagnosed the employee with spondylolisthesis. The employee received back surgery and retired a year later. After the employee retired, a doctor conducted a permanent partial disability evaluation on the employee and rated the employee with a 21% whole person impairment (WPI) with no apportionment for any preexisting condition. After reviewing the employee's medical records, a second doctor disagreed about the no apportionment and found that the spondylolisthesis was a preexisting condition. Thus, the second doctor found that at least half of the 21% WPI should be apportioned to the employee's preexisting conditions and 11% (10.5% rounded up) should be apportioned to the 2007 injury.

The insurer, Public Agency Compensation Trust (PACT), paid the employee 11% permanent partial disability after apportionment. PACT then sought reimbursement from the Nevada Department of Business and Industry under NRS 616B.578.³ Following a hearing before the Board of Administration of the Subsequent Injury Account for the Association of Self-Insured Public or Private Employers (the Board), the Board concluded that NRS 616B.578 required appellants to prove, by written record, that the North Lake Tahoe Fire Protection District knew of a preexisting permanent physical impairment amounting to a rating of at least 6% WPI. Additionally, the Board found that the appellant was required to show that the North Lake Tahoe Fire Protection District specifically knew about the employee's spondylolisthesis before the 2007 injury. Thus, the Board denied PACT's reimbursement application and the district court affirmed the Board's decision. This appeal followed.

¹ By Hannah Nelson.

² NEV. REV. STAT. § 616B.578(4) (2017).

³ NEV. REV. STAT. § 616B.578 (2017).

Discussion

Standard of Review

This Court's review of an administrative agency's decision is identical to that of the district court, without giving deference to the district court's order denying a petition for judicial review. Moreover, this Court reviews an administrative agency's factual findings for clear error or an abuse of discretion. An administrative agency's decision will only be overturned if the findings are not supported by substantial evidence.

Whether the Board erred in denying appellants reimbursement

Appellants argue that the Board committed clear legal error by interpreting "permanent physical injury" as requiring proof that appellants had specific knowledge of spondylolisthesis prior to the employee's subsequent injury. Appellants argue that an employer's general knowledge of a permanent and preexisting condition that could impact employment or reemployment satisfies the "permanent physical injury" requirement. However, respondents argue that this interpretation disregards the 6% WPI requirement.

Both of these interpretations are correct. Employers are not required to demonstrate that they knew the employee's specific diagnosis to satisfy NRS 616B.578. However, NRS 616.578(3) requires a condition to amount to at least 6% WPI to be considered a permanent physical impairment.

The Board's interpretation of NRS 616B.578 was reasonable in part

NRS 616B.578(1) allows for reimbursement of workers' compensation when an employee sustains a more significant injury in the course of employment, due to the effects of a preexisting impairment, than would have occurred without the preexisting injury. However, the statute requires that the employer establish by written record that the employer knew of the permanent physical impairment at the time of hiring; or that the employer retained the employee after learning of the permanent physical impairment. However, the employer must acquire this knowledge before the subsequent injury occurs in order to qualify for reimbursement.

Based on the plain meaning of the statute's subsections, the Board correctly interpreted NRS 616B.578 as mandating an employer to prove by written record that it knew of a preexisting permanent physical impairment with a rating of at least 6% whole person impairment. However, after reviewing *VECO Alaska, Inc. v. State Dep't of Labor, Div. of Workers' Comp., Second Injury Fund*⁴, the Nevada Supreme Court determined that NRS 616B.578(4) does not require that an employer be aware of an employee's specific medical condition before the subsequent injury because NRS 616B.578(3) only requires a showing of *any* permanent condition. An employer is not required to have the knowledge of the employee or the employee's doctor. Therefore, an employer is entitled to reimbursement if a written record fairly and reasonably infers an employee's disability. This interpretation supports the public policy of encouraging employers to hire and maintain employees suffering from preexisting permanent physical impairment.

⁴ *VECO Alaska, Inc. v. State, Dep't of Labor, Div. of Workers' Comp., Second Injury Fund*, 189 P.3d 983, 989 (Alaska 2008).

None of the employer's other numerous back conditions satisfy the 6% whole person impairment requirement of the written record; therefore, the statute recognizes only spondylolisthesis as the employee's permanent physical impairment. While the employer is not required to show knowledge of the spondylolisthesis specifically, knowledge of the permanent impairment must be reasonably inferred from the written record. Here, it is unclear whether the North Lake Tahoe Fire Protection District was aware of any permanent impairment and it is unclear whether the employer could reasonably infer the employee's spondylolisthesis from the written record.

Conclusion

The Court reversed the district court's decision and remanded to the district court to further remand to the Board for proceedings consistent with this opinion as to knowledge of the employee's preexisting permanent impairment.