

IN THE SUPREME COURT, STATE OF WYOMING

2011 WY 149

OCTOBER TERM, A.D. 2011

November 1, 2011

IN THE MATTER OF THE
WORKER'S COMPENSATION
CLAIM OF RICK D. BODILY, AN
EMPLOYEE OF JTL GROUP, INC.:

RICK D. BODILY,

Appellant
(Petitioner),

v.

STATE OF WYOMING ex rel.
WYOMING WORKERS' SAFETY
AND COMPENSATION DIVISION,

Appellee
(Respondent).

S-11-0013

*Appeal from the District Court of Natrona County
The Honorable W. Thomas Sullins, Judge*

Representing Appellant:

Stephenson D. Emery of Williams, Porter, Day & Neville, P.C., Casper, Wyoming

Representing Appellee:

Gregory A. Phillips, Wyoming Attorney General; John W. Renneisen, Deputy Attorney General; James Michael Causey, Senior Assistant Attorney General; Kelly Roseberry, Assistant Attorney General

Before KITE, C.J., and GOLDEN, HILL, VOIGT, and BURKE, JJ.

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GOLDEN, Justice.

[¶1] The Wyoming Workers' Compensation Division (Division) denied Rick D. Bodily (Bodily) benefits for medical expenses related to his L5-S1 micro-lumbar discectomy performed by Dr. Debra Steele on January 8, 2008, because Division determined Mr. Bodily's medical treatment to his lower back after June 2, 2005, was not related to his compensable work-related back injuries of March 11, 1996, and July 8, 2004. Mr. Bodily requested a contested case hearing before the Office of Administrative Hearings (OAH) to challenge Division's denial of benefits. Before conducting the hearing, OAH granted Division's motion for summary judgment against Mr. Bodily. On review of that decision, the district court affirmed.

[¶2] On appeal to this Court, Mr. Bodily contends that genuine issues of material fact about causation of the disc herniation exist and asks that we reverse and remand for a contested case hearing. We agree with Mr. Bodily's contention, reverse OAH's summary judgment, and remand to the district court for remand to OAH for a contested case hearing.

ISSUES¹

¹ Mr. Bodily stated these issues:

- A. Whether the hearing examiner erred when he granted the Division summary judgment without conducting a contested case hearing.
- B. Whether the hearing examiner acted arbitrarily and capriciously by not allowing Appellant to present evidence at and weigh Appellant's testimony at a contested case hearing.
- C. Whether the hearing examiner erred when he determined medical testimony was required to establish Appellant's second compensable low back injury as related to Appellant's original work-related injury.
- D. Whether the hearing examiner erred when he determined Appellant's injury was "most likely" the result of outside work activities and not from Appellant's work injuries.
- E. Whether the hearing examiner acted arbitrarily and capriciously by viewing Dr. Steele's causation opinion in a vacuum.

Division stated this issue:

Did the OAH hearing examiner correctly apply Wyo. Stat. Ann. § 27-14-102(a)(xi)(F) in granting summary judgment?

Mr. Bodily's reply brief stated this issue:

[¶3] The deep issue² in this appeal may be stated as follows:

Claimant received benefits for work-related lifting and twisting lower back injuries in 1996 and 2004, and has experienced back pain intermittently since 1996. Once in 2005 and twice in 2007, he had non-work-related lifting lower back injuries. In early 2008, an MRI revealed a lower back herniated disc which a surgeon then repaired. The surgeon states any one of claimant's several lifting incidents could have caused the herniation. Do claimant's testimony and his surgeon's opinion create a genuine issue of material fact about causation of his disc herniation precluding entry of summary judgment against claimant on his claim for the surgery expenses?

FACTS

[¶4] In keeping with our standard of review, cited below, we shall consider the record in the perspective most favorable to Mr. Bodily and give him the benefit of all favorable inferences which may be fairly drawn from the record. In March 1996, Mr. Bodily injured his lower back while working for JTL Group in Casper, Wyoming. According to Mr. Bodily:

I was in the shop working on a paver taking off an exhaust. I was lifting and turning at the same time when I felt a shooting pain in my lower back that caused me to fall to the ground. I had never felt pain like that before.

The Division found the March 1996 injury was work related and awarded benefits.

[¶5] Although Mr. Bodily received treatment for his work-related injury, he continued to suffer low back pain. According to Mr. Bodily, the "low back pain from [his original] injury [had] never really stopped," and "[s]ince 1996, [he] always had back pain, it just continued to get worse." Over the years, Mr. Bodily treated his low back pain as conservatively as possible until it became intolerable which led him to see his family physician and a chiropractor for treatment of the low back pain.

Whether medical testimony alone is required to prove causation of a compensable injury at the summary judgment stage of proceedings before the hearing examiner.

² The Court commends to all appellate counsel Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 Scribes J. Leg. Writing 1-39 (1994-1995).

[¶6] In 2004, Mr. Bodily reinjured his “lower back from twisting while lifting a box in the main office at work.” Because he reinjured his back, he “attempted to have the medical treatment paid for under his 1996 initial case but in October 2004 a new case was opened at the suggestion of the Division.” Despite a new case being opened, the Division determined he had suffered a compensable work-related injury and awarded benefits. He continued to receive benefits until June 2, 2005.

[¶7] In October 2005, Mr. Bodily reinjured his back “after lifting a car with three other guys at work (the car had to be moved to do asphalt work).” He continued to treat his low back pain conservatively until the pain became intolerable. Once it became intolerable, he saw his family physician and a chiropractor for treatment. His intolerable low back pain was located in the same area of his back as his original compensable work-related injuries.

[¶8] Mr. Bodily first saw Dr. Steele on October 19, 2007. Dr. Steele saw him “for low back pain and left leg pain and obtained a history of off and on low back pain since 1999.” Dr. Steele ordered an MRI which revealed disc dessication at L5-S1 with a herniated disc or bulge. On January 9, 2008, Dr. Steele performed surgery on Mr. Bodily. It was discovered that Mr. Bodily had three extruded disc fragments causing the pain he had been experiencing. According to Dr. Steele:

[T]hree pieces of disc had come loose from the main disc and insinuated themselves to the side of the nerve root, and that was a large piece that had popped out of there. And now I remember that I was impressed with how much disc was sitting out to the side of this nerve root, which you could not truly appreciate based on the MRI imaging.

Dr. Steele testified that “bending while twisting is one of the biggest culprits for causing disc problems.” She also testified in her deposition as follows:

[Question by counsel for Mr. Bodily]. One of the questions I have is, based upon actually seeing that disc and also having reviewed it on the MRI, can you date the onset of that herniation, of the lesion, whatever you call it, and say, yes, that disc herniated back in 1996 or 1999 or 2004? Can you say that at all?

[Dr. Steele]. No.

Q. Did it look like something that had occurred within the last three months or four months? Can you date it that way?

A. Cannot say.

* * * *

Q. So, your opinion that you have expressed here today about the causation of this disc herniation that you addressed in the surgery on January 9th is dependent upon the accuracy of the history that Mr. Bodily provided you.

* * * *

A. I don't know what caused his disc herniation. The history given by Mr. Bodily does guide the treatment plan, however.

Q. And it's certainly possible that he herniated his disc back in 2004 during this incident?

A. It is possible, yes.

Q. It's not inconceivable.

A. Correct.

Q. It's medically possible given what you have seen and your training that he could have herniated his disc back in 2004 as described here on this report.

A. Yes, that is possible.

Later, Dr. Steele testified as follows:

[Question by Division]. My first question is, have you reviewed any other medical records from any source other than your own regarding Mr. Bodily?

A. No.

Q. Let me show you what we're going to mark as Exhibit 3. This is a record from Dr. Rita Emch. Would you please review that quickly?

* * * *

Q. Do you see where he goes in and gives a history of lifting a Buick?

A. Yes.

Q. Could an event such as this have caused the herniation that you operated on in 2008?

A. Yes.

Q. I have another medical record from Urgent Care. Now, progress notes dated 3-27-07 we'll mark as Exhibit 4. I would like you to look at where he gives a history of present illness on that. Do you see where it says he lifted a kitchen table on Friday?

A. Yes.

Q. Pain on Sunday in his back and hips radiating down both legs?

A. Yes.

Q. Could this event have caused the disc herniation at L5-S1 that you operated on in January of 2008?

A. It could have.

Q. I am going to mark this one Number 5. This is from InstaCare of Casper dated September 2, 2007. If you could look at this, patient's complaints there. Do you see where he complains of lifting landscaping rock and injuring his back?

A. Yes.

Q. Could this event have caused the disc herniation which you operated on in January of 2008?

A. It could have.

Q. Looking at Exhibits A, B and C, which are other records of Mr. Bodily, is it possible for you to give an opinion to a reasonable degree of medical probability what caused his disc herniation which you operated on in January 2008?

A. I cannot knowingly state if he had a disc herniation in 1999 or if any one of these events caused the appearance of his abnormal disc that was noted on the 2007 MRI.

[¶9] Dr. Steele sent her bill for Mr. Bodily's surgery to Division. On January 28, 2008, Division issued a "Final Determination Regarding Denial of Benefits," denying payment for medical bills related to the January 9, 2008, operation. Division determined that Mr. Bodily's work injury of July 8, 2004, had resolved, and that any treatment to his back after June 2, 2005, was unrelated to that injury. Mr. Bodily objected to Division's determination, and the matter was referred to OAH on February 28, 2008.

[¶10] A contested case hearing was scheduled; however, prior to the contested case hearing, Division filed a motion for summary judgment. Mr. Bodily opposed Division's motion for summary judgment. Without holding oral arguments on the motion, OAH issued "Findings of Fact, Conclusions of Law, Order Granting Motion for Summary Judgment and Vacating Hearing" (Order). In its Order, OAH affirmed Division's denial of benefits.

[¶11] Mr. Bodily timely appealed OAH's Order to the District Court for the Seventh Judicial District. Following briefing by the parties, the district court issued its "Decision Letter," which affirmed OAH's Order and Division's denial of benefits. Mr. Bodily timely filed his "Notice of Appeal" appealing the district court's "Order Affirming Agency Decision" to this Court.

STANDARD OF REVIEW

[¶12] "As always, we review an agency's conclusions of law *de novo*, and we will affirm an agency's legal conclusion only if it is in accordance with the law." *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 26, 188 P.3d 554, 561-62 (Wyo. 2008) (internal quotations omitted). Review of administrative agency action granting summary judgment in workers' compensation cases will be governed by W.R.C.P. 56(c). *Chavez v. Mem'l Hosp. of Sweetwater Cty.*, 2006 WY 82, ¶ 6, 138 P.3d 185, 188 (Wyo. 2006).

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

W.R.C.P. 56(c). “The record is reviewed . . . from the vantage point most favorable to the party who opposed the motion, and this Court will give that party the benefit of all favorable inferences that may fairly be drawn from the record.” *Chavez*, ¶ 6, 138 P.3d at 188.

DISCUSSION

[¶13] The essence of OAH’s summary judgment decision in favor of Division is found in paragraphs 24 through 27 of the conclusions of law in its order:

24. The Division argued there are not issues of material fact, that medical evidence is required to establish Bodily’s work activities were the cause of his herniated disc, the only medical evidence in the record failed to establish work as the cause of Bodily’s herniated disc and outside intervening causes were more likely the cause of Bodily’s herniated disc and that Summary Judgment is appropriate. Bodily argued there are issues of material fact, this is a “second compensable injury” case and a contested case hearing is appropriate to hear the medical and lay testimony.

25. After considering all the evidence in a light most favorable to Bodily, it is clear the evidence presented established (1) Bodily injured his low back in March 1996 while lifting and twisting at work; (2) Bodily injured or reinjured his low back in July 2004 while lifting and twisting at work; (3) Bodily has had back pain off and on since 1996 with periodic flare ups from activities; (4) Bodily sought medical treatment for low back pain in October 2005 after lifting a Buick with three other men; (5) Bodily sought medical treatment for low back pain in March 2007 after lifting a kitchen table; (6) Bodily sought medical treatment for low back pain after lifting landscaping rocks; (7) an MRI revealed Bodily had a herniated disc and the disc was surgically repaired on January 9, 2008; (8) Dr. Steele was unable to provide a date at which time Bodily’s herniated disc occurred; (9) Dr. Steele indicated the work effort in 2004 was a possible cause for Bodily’s herniated disc and (10) other outside work activities, including lifting a Buick, lifting a kitchen table and lifting landscaping rocks, were also possible causes of Bodily’s herniated disc.

26. Having considered all the evidence presented and applying the “second compensable injury” theory, this Office finds and concludes medical evidence is required to establish causation for Bodily’s herniated disc and the only medical evidence presented was from Dr. Steele. Dr. Steele was unable to date the herniated disc and admitted the work incident in 2004 and a number of outside work activities could have caused Bodily’s herniated disc. Having considered all the evidence, including the fact Bodily suffered off and on back pain since 1996, this Office finds and concludes Bodily’s herniated disc is most likely to have resulted from his outside work activities and not from his work injuries in 1996 or 2004.

27. There are no genuine issues of material fact and the Division’s Motion for Summary Judgment is therefore granted.

[¶14] Mr. Bodily agrees that his case is a “second compensable injury case,” in that in a contested case hearing he must prove by a preponderance of the evidence that Dr. Steele’s treatment of his herniated disc was the direct result of his work-related lifting and twisting lower back injuries of 1996 and/or 2004. As we stated in *Ball v. State ex rel. Wyoming Workers’ Safety & Comp. Div.*, 2010 WY 128, ¶ 25, 239 P.3d 621, 628 (Wyo. 2010), “the second compensable rule is a causation analysis.” Mr. Bodily correctly observes that to avoid Division’s motion for summary judgment, he need only demonstrate that a genuine issue of material fact about causation exists. He argues that he has done just that through his own affidavit and Dr. Steele’s deposition testimony. He argues that OAH erred when it concluded that “medical evidence is required to establish causation for [Mr.] Bodily’s herniated disc” and that “[Mr.] Bodily’s herniated disc is most likely to have resulted from his outside work activities and not from his work injuries in 1996 or 2004.” In support of his argument, Mr. Bodily relies on *Gray v. State ex rel. Wyoming Workers’ Safety & Comp. Div.*, 2008 WY 115, 193 P.3d 246 (Wyo. 2008). Mr. Gray suffered a compensable work-related back strain and contusion injury when he fell off a horse in mid-June 2002. *Id.*, ¶ 3, 193 P.3d at 248. No MRI was performed at that time. *Id.*, ¶ 7, 193 P.3d at 249. In early September 2002, an MRI revealed a disc herniation. *Id.*, ¶ 8, 193 P.3d at 249. Gray informed his doctor that his back had been bothering him ever since the fall from the horse and increasing in intensity. *Id.* In November and December 2002, Division investigated information from an anonymous source that Gray had injured his back in September while moving hay in his backyard. *Id.*, ¶ 11, 193 P.3d at 250. Division also had obtained information from Gray’s ex-girlfriend that Gray’s back popped in mid-July while he was unloading hay at his home. *Id.* In addition, Division had information from a man who had loaded hay with Gray a month or two after Gray’s fall from the horse and from a man who had

worked with Gray on a roofing job a month after Gray's fall from the horse, both of whom related that Gray complained of back and leg pain during those activities. *Id.*, ¶ 12, 193 P.3d 250. In early December 2002, Division refused further benefit payments to Gray, having determined that his herniated disc was not caused by a work-related incident. *Id.*, ¶ 4, 193 P.3d at 248. At the contested case hearing, Division presented the above-mentioned evidence to support its position that Gray's herniated disc was not caused by the June 2002 work-related fall from a horse. Gray, on the other hand, supported his contrary position with his own testimony that he suffered from back and leg pain after his June 2002 work-related fall from a horse and with the testimony of his treating physician, Dr. Skene. *Id.*, ¶¶ 10, 13, 193 P.3d at 250-51. In particular, Dr. Skene "stated his opinion that the disc herniation was recent but could not offer an opinion as to the cause and said that any such determination would be speculation on his part." *Id.*, ¶ 10, 193 P.3d at 250. OAH upheld Division's denial of benefits, and the district court affirmed. *Id.*, ¶ 4, 193 P.3d at 248.

[¶15] On Gray's appeal, this Court reversed, holding that OAH's decision was unsupported by substantial evidence. *Id.*, ¶ 6, 193 P.3d at 249. Of particular interest to Mr. Bodily's appeal is this Court's holding in *Gray* that OAH erred when it required Mr. Gray to present conclusive medical testimony in order to meet his burden of proof. *Id.*, ¶¶ 16-17, 193 P.3d at 251-52. Addressing OAH's conclusion that Mr. Gray could not meet his burden of proof because Dr. Skene's medical opinion was expressed in terms of "can," "could," or "possibly," we said:

There is no requirement that medical testimony be presented in any specific form in a workers' compensation case. "Generally, when a single incident is alleged to have caused an injury, medical testimony is not required if it is not essential to establish a causal connection between the occurrence and the injury. However, under certain circumstances, medical testimony may be essential to establish a causal connection." *Thornberg v. State ex. rel. Wyo. Workers' Safety & Comp. Div.*, 913 P.2d 863, 867 (Wyo. 1996) (citations omitted). In *Hansen v. Mr. D's Food Center*, 827 P.2d 371, 374 (Wyo. 1992), we found that an employee who had an original compensable injury and was claiming a recurrence of that injury more than a year later had met her burden of proof without medical testimony. **Here, the medical evidence showed that Appellant was injured and that the injury he suffered was of the sort that could have occurred during the work-related incident. That testimony alone may not have been sufficient to meet Appellant's burden of proof on causation, given the gap in time between the incident and the MRI that showed the**

injury. However, it was certainly permissible for Appellant to fill that gap with evidence of his symptoms between the incident and the diagnosis. The hearing examiner erred as a matter of law when he required Appellant conclusively to prove causation through medical testimony.

Gray, ¶ 17, 193 P.3d at 251-52 (emphasis added). Mr. Bodily argues that OAH in his case erred in the same way that OAH in *Gray* erred, namely, by concluding that “medical evidence is required to establish causation for [Mr.] Bodily’s herniated disc and the only medical evidence presented was from Dr. Steele. Dr. Steele was unable to date the herniated disc and admitted the work incident in 2004 and a number of outside work activities could have caused [Mr.] Bodily’s herniated disc.”

[¶16] We agree. Moreover, when OAH stated that it considered “all the evidence” and concluded Mr. Bodily’s herniated disc “is most likely to have resulted from his outside work activities and not from his work injuries in 1996 or 2004,” OAH erroneously strayed from its function at the summary judgment stage to determine whether a genuine issue of material fact as to causation existed, giving the non-movant, Mr. Bodily, the benefit of all favorable inferences, and OAH erroneously engaged in weighing all the evidence and making credibility determinations. OAH was erroneously acting as the trier of fact which was not its judicial function at the summary judgment stage of this contested case. The main issue in this case – whether Mr. Bodily’s work-related back injuries in 1996 and 2004 are causally connected to his 2008 herniated disc surgery – is in factual dispute, and the evidence presented to OAH, including Mr. Bodily’s testimony and Dr. Steele’s testimony, permit more than one reasonable inference as to causation to be drawn therefrom.

[¶17] We reverse the summary judgment in favor of Division and remand to the district court for remand to OAH for a contested case hearing.