IN THE SUPREME COURT, STATE OF WYOMING

2012 WY 117

APRIL TERM, A.D. 2012

September 7, 2012

IN THE MATTER OF THE WORKER'S COMPENSATION CLAIM OF: TODD ROGERS, AN EMPLOYEE OF R.A. MANNING CONSTRUCTION, Appellant (Petitioner), v. STATE OF WYOMING, ex rel., WYOMING WORKERS' SAFETY AND COMPENSATION DIVISION, Appellee (Respondent).	S-12-0001

Appeal from the District Court of Teton County
The Honorable Timothy C. Day, Judge

Representing Appellant:
Jack D. Edwards of Edwards Law Office, P.C., Etna, WY.

Representing Appellee:
Gregory A. Phillips, Wyoming Attorney General; John D. Rossetti, Deputy Attorney General; Michael J. Finn, Senior Assistant Attorney General; and Kelly Roseberry, Assistant Attorney General.

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

HILL, Justice.

[¶1] Todd Rogers challenges an order from the Office of Administrative Hearings (OAH) denying benefits to him for lower back treatment. The OAH ruled that Rogers did not prove his 2010 condition was related to his 2002 work injury. We affirm.

ISSUE

[¶2] Rogers phrases his single issue as follows:

> 1. Did the hearing examiner error [sic], as a matter of law, in concluding that Mr. Rogers failed to meet his burden of proof that his 2010 injuries are related to his 2002 work injury?

FACTS

[¶3] In March of 2002 Rogers, while working as a carpenter, slipped on ice and fell down a flight of stairs. He injured his shoulder, left elbow, and his back. After seeking treatment in the emergency room, Rogers began seeing Dr. Alvis Forbes, who noted bruising in Rogers's upper lumbar area. After a CT scan revealed no evidence of fracture, Dr. Forbes prescribed pain medicine and physical therapy.

[¶4] In April of 2002 the Worker's Compensation Division (Division) issued a final determination opening the case for an injury to "Back and Left Arm – Elbow." Later that same month, Dr. Forbes referred Rogers to Dr. Geoffrey Skene after Dr. Forbes began to believe the "magnitude of Rogers's pain complaint … far exceeds my diagnosed pathology."

[¶5] After receiving his new patient, Dr. Skene ordered an MRI of Rogers's lumbar spine, which showed that Rogers suffered degenerative disc disease. Rogers was then referred to Dr. Mary Neal for further treatment. Rogers also received chiropractic care and physical therapy. By July of 2003 Rogers had discontinued treatment. Rogers did not submit any bills for medical benefits between 2004 and 2010.

[¶6] Until June of 2010, Rogers did not seek any further treatment for his back. According to Rogers, he continued to have back pain but he treated himself with over-the-counter pain medication, an adjustable bed, and a hot tub. However, on June 16, 2010 Rogers sought treatment with a chiropractor, Dr. John Zendler. Dr. Zendler diagnosed Rogers with lumbago, thoracic spine pain, and muscle spasms. Rogers submitted claims for benefits for his three visits to Dr. Zendler but the Division denied the claims writing that Rogers's "current treatment to the lumbar spine is not related to

the thoracic sprain on March 21, 2002." Rogers objected and his case was referred to the OAH.

[¶7] The OAH conducted a contested case hearing on November 18, 2010 and again Rogers's claims for benefits were denied. The OAH concluded that Rogers

> …. has not met the jurisdictional requirements of Wyo. Stat. Ann. § 27-14-605 which clearly applies since no claim for benefits was received within the four year period and because the Office also finds that there was insufficient proof to establish a second compensable injury.
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> 77. As stated above, the only medical evidence in this case that Rogers['s] condition in 2010 is causally related to the 2002 injury is the response to the questionnaire filled out by Dr. Neal. … That questionnaire and the answers by Dr. Neal do not meet the standard of Wyo. Stat. Ann. § 27-14-605 in this Hearing Officer's estimation. That conclusion is based upon the following,
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> a) Dr. Neal had not examined Rogers since 2004.
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> b) It is not clear that Dr. Neal reviewed any medical records as she did not fill in the blank at the bottom of the form regarding time spent on reviewing records. In any event it does not appear from the cover letter to Dr. Neal that Dr. Neal was provided with the x-rays taken by Dr. Zendler.
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> c) Dr. Neal did not provide any basis for her opinion or explain how treatment in 2010 was causally related to the 2002 injury. She has not addressed the source of his current problems and how that relates to the strain Dr. Forbes diagnosed or the myofascial pain she diagnosed.
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> d) Dr. Neal did not have the benefit of nor did she address comments by Rogers that stress and the everyday activities of his work caused his back to become worse.
>
> 78. In short, the affirmative answers to the questions provided to Dr. Neal, simply did not rise to the level to show

> that Rogers['s] condition in 2010 was directly related to the injuries suffered in 2002. The jurisdictional statute clearly requires proof by "competent medical authority and to a reasonable degree of medical certainty that the condition is directly related to the original injury." Rogers has failed to meet his burden of proof in this regard.
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> 79. Given the statutory mandate for competent medical authority, given the lapse of seven years from date of the last treatment to date of the current treatment and finally given the suggestion that there may be something more involved in Rogers['s] current condition such as a disc problem, this is not a case in which the Hearing Officer can would [sic] award benefits solely on the basis of the claimant's condition.
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> 80. For the same reasons set forth above, Rogers has failed to meet his burden of proof to show a second compensable injury which would take his case out from under Wyo. Stat. Ann. § 27-14-605. Again the medical testimony is insufficient to show the direct causal connection.

[¶8] On review in the district court, the court affirmed the OAH's denial of benefits. This appeal followed.

STANDARD OF REVIEW

[¶9] When reviewing worker's compensation cases on appeal, we begin with the factors set forth in the Wyoming Administrative Procedure Act, which provides:

> (c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:
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> (i) Compel agency action unlawfully withheld or unreasonably delayed; and

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege or immunity;

(C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right

(D) Without observance of procedure required by law; or

(E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

Wyo. Stat. Ann. § 16-3-114(c) (LexisNexis 2011).

[¶10] This Court has stated in relation to the foregoing statute as follows:

> Under this statute, we review an agency's findings of fact by applying the substantial evidence standard. *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 22, 188 P.3d 554, 561 (Wyo. 2008). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bush v. State ex rel. Wyo. Workers' Comp. Div.*, 2005 WY 120, ¶ 5, 120 P.3d 176, 179 (Wyo. 2005). "'Findings of fact are supported by substantial evidence if, from the evidence preserved in the record, we can discern a rational premise for those findings.'" *Kenyon v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2011 WY 14, ¶ 11, 247 P.3d 845, 849 (Wyo. 2011) (quoting *Bush*, ¶ 5, 120 P.3d at 179).
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> With regard to an agency's determination that a claimant did not satisfy his burden of proof, this Court has said:
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> > If the hearing examiner determines that the burdened party failed to meet his burden of proof, we will decide

> whether there is substantial evidence to support the agency's decision to reject the evidence offered by the burdened party by considering whether that conclusion was contrary to the overwhelming weight of the evidence in the record as a whole. If, in the course of its decision making process, the agency disregards certain evidence and explains its reasons for doing so based upon determinations of credibility or other factors contained in the record, its decision will be sustainable under the substantial evidence test. Importantly, our review of any particular decision turns not on whether we agree with the outcome, but on whether the agency could reasonably conclude as it did, based on all the evidence before it.
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> *Kenyon* ¶ 12, 247 P.3d at 849 (quoting *Dale*, ¶ 22, 188 P.3d at 561).

McMasters v. State ex rel. Wyo. Workers' Safety & Comp. Div., 2012 WY 32, ¶¶ 55-58, 271 P.3d 422, 435 (Wyo. 2012).

[¶11] We review an agency's conclusions of law *de novo* and will affirm only if the agency's conclusions are in accordance with the law. *McMasters*, ¶ 58, 271 P.3d 436. In an appeal from a district court's appellate review of an administrative decision, we review the case as if it came directly from the hearing examiner, affording no deference to the district court's decision. *Id.*

DISCUSSION

[¶12] Despite his initial phrasing of his single issue on appeal, Rogers's only issue on appeal is that the OAH's decision was not supported by substantial evidence. He argues that the Division did not rebut his prima facie showing that his 2010 condition is causally related to his 2002 work injury. Specifically, Rogers argues that the OAH's basis for disregarding Dr. Neal's opinion is not supported by the record and is based upon erroneous findings, and that Dr. Zendler's records provide more evidence of the causal connection.

[¶13] In response, the Division submits that there was substantial evidence to support the hearing examiner's decision. First, the Division argues that the OAH properly analyzed Rogers's case under Wyo. Stat. Ann. § 27-14-605(c)(ii) and the second compensable injury rule, and properly required Rogers to prove that his 2010 treatment was causally related to the 2002 work injury. Furthermore, the Division contends that Dr. Neal's opinion did not provide the requisite causal connection and that the OAH

appropriately gave little weight to the opinions of Dr. Neal and Dr. Zendler and explained its reasons for doing so.

[¶14] Wyo. Stat. Ann. § 27-14-605(c)(ii) (LexisNexis 2011) states as follows:

> **§ 27-14-605. Application for modification of benefits; time limitation; grounds; termination of case; exceptions.**
>
> (a) If a determination is made in favor of or on behalf of an employee for any benefits under this act, an application may be made to the division by any party within four (4) years from the date of the last payment for additional benefits or for a modification of the amount of benefits on the ground of increase or decrease of incapacity due solely to the injury, or upon grounds of mistake or fraud. The division may, upon the same grounds and within the same time period, apply for modification of medical and disability benefits to a hearing examiner or the medical commission, as appropriate.
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> (b) Any right to benefits shall be terminated and is no longer under the jurisdiction of this act if a claim for any benefit is not filed with the division within the four (4) year limitation prescribed under subsection (a) of this section.
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> (c) A claim for medical benefits which would otherwise be terminated under subsection (b) of this section and barred under W.S. 27-14-503(a) and (b) may be paid by the division if the claimant:
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> (i) Submits medical reports to the division substantiating his claim;
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> (ii) Proves by competent medical authority and to a reasonable degree of medical certainty that the condition is directly related to the original injury; and
>
> (iii) Submits to an examination by a health care provider selected by the division and results of the examination validate his claim.

In the context of this statute, we have said about subsequent injuries: "The second compensable injury rule applies when an initial compensable injury ripens into a condition requiring additional medical intervention." *Alvarez v. State ex rel. Wyo.*

Workers' Safety & Comp. Div., 2007 WY 126, ¶ 18, 164 P.3d 548, 552 (Wyo. 2007) (citing *Yenne-Tulle v. Workers' Safety & Comp. Div.*, 12 P.3d 170, 172 (Wyo. 2000)). "Under the rule, a subsequent injury is compensable if it is causally related to the initial compensable work injury." *Id.*

[¶15] To prove entitlement to an award of benefits, Rogers had to sustain an "injury" as defined by Wyo. Stat. Ann. § 27-14-102(a)(xi) (LexisNexis 2011):

> [A]ny harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business.

As we have stated before, the requirement that the injury "arise out of and in the course of employment" is premised upon a determination of whether or not the relationship between the injury and the employment is sufficient that the injury should be compensable. *Haagensen v. State ex rel. Wyoming Workers' Compensation Div.*, 949 P.2d 865, 867 (Wyo. 1997). A causal connection exists between the employee's injury and the course of employment when "there is a nexus between the injury and some condition, activity, environment or requirement of the employment." *Id.*

[¶16] There is no dispute that Rogers suffered a compensable injury in 2002 and properly received medical benefits and a 5% whole person total disability award based on that injury. However, the hearing examiner concluded that Rogers did not meet his burden to show that his need for treatment in 2010 was causally related to his 2002 work injury. In her order, the hearing examiner explained how she reached this conclusion based upon four sets of factual findings:

> (a) Dr. Neal had not examined Rogers since 2004.
>
> (b) It is not clear that Dr. Neal reviewed any medical records as she did not fill in the blank at the bottom of the form regarding time spent on reviewing records. In any event it does not appear from the cover letter to Dr. Neal that Dr. Neal was provided with the x-rays taken by Dr. Zendler.
>
> (c) Dr. Neal did not provide any basis for her opinion or explain how treatment in 2010 was causally related to the 2002 injury. She has not addressed the source of his current

> problems and how that relates to the strain Dr. Forbes diagnosed or the myofascial pain she diagnosed.
>
> (d) Dr. Neal did not have the benefit of nor did she address comments by Rogers that stress and the everyday activities of his work caused his back to become worse.

[¶17] Dr. Neal did opine in a questionnaire that it was "more likely than not" that Rogers's 2010 issues were related to the 2002 work injury. However, in a letter Dr. Neal expounded on that opinion and wrote:

> Difficult to know for sure, but they certainly could be [related]. An MRI scan may help in that determination, but someone must first agree to pay for the study (regardless of results) in order to get the information. The MRI scan may or may not be decisive with regarding [sic] to ruling in a linkage, but may be very helpful with regard to ruling out a linkage. What I mean is this: If there are findings that could be "old" or could be part of a degenerative process related to an injury in 2002, it would be impossible to definitely say that the findings are or are not linked. If there are findings that are "new," then it would be possible to definitively say that the findings are not linked to his 2002 accident.

Based upon that explanation, the hearing examiner seems to appropriately have discounted Dr. Neal's opinion.

[¶18] With regard to Dr. Zendler, Rogers contends that his chiropractic notes prove the requisite causal connection. Dr. Zendler did not testify but the court reviewed his notes and noted that his treatment appeared to be focused on specific levels of the spine but found that the records never identified a specific area of injury. Also, the hearing examiner found that while Rogers testified that Dr. Zendler told him that there was a disc injury caused by the original injury, the evidence in Dr. Zendler's records, including his one x-ray with no interpreting notes, was insufficient to draw such a conclusion. Furthermore, there was conflicting testimony that Rogers had or had not told Dr. Zendler in 2010 that he fell off a ladder "five or six years ago," possibly inferring that his 2010 problems were not causally connected to the 2002 work injury. Lastly, Dr. Zendler did not treat Rogers until June of 2010--over eight years after Rogers's compensable injury. Any indication of a causal connection contained within his chiropractic notes was based entirely on the history provided by Rogers, not on his objective findings.

[¶19] The OAH's decision included a detailed review of the testimony and evidence presented and careful explanation of why it treated the evidence the way it did. The only

evidence that Rogers presented to connect his 2010 back issues to his 2002 work injury were Dr. Neal's testimony and Dr. Zendler's medical records. The OAH decision to discount both doctors' contributions to the case was, in Dr. Neal's case, based upon contrary and relatively uncertain conclusions, and in Dr. Zendler's case, based upon conflicting testimony and the fact that Dr. Zendler's findings were not "objective." It is the hearing examiner's duty to weigh the credibility of witnesses and the hearing examiner may disregard expert testimony that is unreasonable. *McCall-Presse v. State (In re Worker's Comp. Claim of McCall-Presse)*, 2011 WY 34, ¶ 11, 247 P.3d 505, 511 (Wyo. 2011). The evidence presented at the hearing, in light of the testimony presented and other facts in the record, supported the hearing examiner's conclusion that Rogers did not meet his burden of proving that his 2010 treatment was the result of his 2002 work-related injuries. The OAH decision is not against the overwhelming weight of the evidence and is, therefore, supported by substantial evidence in the record. Affirmed.