

SUPREME COURT OF WYOMING

Mahaffey v. State ex rel. Wyoming Workers' Safety & Compensation
Division

249 P.3d 234 (Wyo. 2011) · Decided March 11, 2011

SUMMARY

The Wyoming Supreme Court reviewed an administrative decision awarding Donald Dial permanent partial disability benefits under the Wyoming Workers' Safety and Compensation Act. The court held that substantial evidence supported the Office of Administrative Hearings' determination that Dial was unable to obtain employment at a wage at least 95% of his pre-injury earnings. The court reversed the district court and remanded with directions to reinstate the benefits award.

CASE DETAILS

COURT	Supreme Court of Wyoming
WRITING FOR THE COURT	Kite, C.J.; Burke; Davis; Golden; Hill; Kite; Voigt
JURISDICTION	Wyoming
DECIDED	March 11, 2011
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Workers' Compensation Division denied Donald Dial's application for permanent partial disability benefits. The Office of Administrative Hearings awarded benefits, but the district court reversed. After Dial died, Sandra Mahaffey, the personal representative of his estate, was substituted and appealed to the Wyoming Supreme Court.
STANDARD OF REVIEW	The Supreme Court reviews the case as if it came directly from the administrative agency and gives no special deference to the district court. Agency factual findings are reviewed for substantial evidence, meaning relevant evidence a reasonable mind might accept as adequate to support a conclusion. Agency legal conclusions are reviewed de novo and are affirmed only if they are in accordance with the law. Agency action is also reviewed under Wyo. Stat. Ann. § 16-3-114(c) for arbitrariness, capriciousness, abuse of discretion, legal error, and prejudicial error.
PRECEDENTIAL VALUE	Published opinion; precedential

PARTIES

Sandra Mahaffey, personal representative of the estate of Donald Dial
v. State ex rel. Wyoming Workers' Safety & Compensation Division

TOPICS

workers compensation

judicial review of agency action

administrative law

standard of review

appellate procedure

PRACTICE AREAS

workers compensation

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether substantial evidence supported the OAH's determination that Dial was unable, because of his work-related injury, to return to employment paying at least 95 percent of his pre-injury wage.
2. Whether the OAH acted arbitrarily, capriciously, abused its discretion, or acted contrary to law in awarding permanent partial disability benefits.
3. Whether the district court improperly substituted its judgment for that of the administrative fact finder.

HOLDINGS

1. Substantial evidence supported the OAH's finding that Dial was unable, because of his work-related injury, to obtain employment at a wage at least 95 percent of his pre-injury earnings.
2. The district court improperly substituted its judgment for that of the OAH, which was the fact finder responsible for weighing the evidence and determining witness credibility.

KEY QUOTATIONS

"The district court improperly substituted its judgment for the fact finder's when it reversed the OAH decision awarding Mr. Dial benefits." (240)

"Although the evidence in this case may be subject to different interpretations, substantial evidence was presented to support the OAH's determination that Mr. Dial was not able to drive on a regular basis because of his injury." (239)

FACTUAL BACKGROUND

Donald Dial suffered a compensable neck injury while lifting a 290-pound reel of wire rope at work and later underwent a two-level cervical discectomy and fusion. Medical and functional-capacity evaluations found a permanent impairment and restricted him to medium work, while also identifying limitations involving neck movement and repetitive overhead work. A vocational evaluator initially found no jobs paying at least 95 percent of his pre-injury wage, but later identified three driving jobs after receiving an affidavit stating that Dial's medical condition did not prevent driving. The OAH credited evidence that Dial could not safely drive because of his injury and awarded permanent partial disability benefits.

PROCEDURAL HISTORY

The Division denied Dial's application for a permanent partial disability award after determining that he could return to employment at a comparable wage. Following a hearing, the Office of Administrative Hearings awarded benefits. The district court reversed the OAH decision, and the Wyoming Supreme Court reversed the district court and remanded with directions to return the case to the OAH for reinstatement of its benefits order.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The case was remanded to the district court with directions to return it to the Office of Administrative Hearings for reinstatement of the order awarding permanent partial disability benefits.

CASES CITED

- Dale v. S & S Builders, LLC, 2008 WY 84, 188 P.3d 554
- Moss v. State ex rel. Wyo. Workers' Safety and Comp. Div., 2010 WY 66, 232 P.3d 1
- Bonsell v. State ex rel. Wyo. Workers' Safety & Comp. Div., 2006 WY 114, 142 P.3d 686

OPINION

KITE, J.

KITE, Chief Justice. [T1] After suffering a compensable work injury, Donald Dial applied for permanent partial disability (PPD) benefits in accordance with the Wyoming Workers' Safety and Compensation Act. The Workers' Compensation Division (Division) denied the application and Mr. Dial requested a hearing. Following the hearing, the Office of Administrative Hearing's (OAH) awarded him benefits, and the Division appealed the award to the district court.

The district court reversed the OAH decision, and Mr. Dial appealed to this Court. After the appeal was filed, Mr. Dial passed away and Sandra Ma-haffey, the personal representative of his estate, was substituted as the party of record. Finding that substantial evidence supported the OAH decision, we reverse the district court order. ISSUES [12] The issues for our determination are whether the OAH's decision was supported by substantial evidence or whether the OAH abused its discretion or acted arbitrarily, capriciously or not in accordance with the law when it awarded benefits.

FACTS [T3] On June 10, 2004, Mr. Dial was working as a counter sales person for Howard Supply Company in Casper, Wyoming. While assisting a customer, he picked up a 290 pound reel of wire rope and suffered a neck injury. He consulted his doctor and began conservative treatment for the injury, consisting of medication, physical therapy and injections. His condition did not

improve and, on March 15, 2005, Dr. Thomas Kopitnik performed a two level anterior cervical discectomy and fusion to repair the injury.

On September 27, 2005, Mr. Ken Rodeman, a physical therapist, performed a functional capacity evaluation of Mr. Dial to determine whether he could return to his employment at Howard Supply Company. Based upon the evaluation, Mr. Rodeman assigned Mr. Dial a 25% permanent partial impairment rating. He also advised that Mr. Dial could not return to the heavy physical work required of him at his job as a counter salesman, but could return to medium physical work.

[15] On September 29, 2005, Dr. Tuenis D. Zondag performed an independent medical evaluation of Mr. Dial. Dr. Zondag reported that Mr. Dial would be at maximum medical improvement by October 28, 2005, and would have "disability to extend his head and disability to do repetitive work above his shoulder." Dr. Zondag rated Mr. Dial at 26% whole person impairment and concluded he would be able to work within a medium work capacity.

[T6] Based upon the functional capacity and independent medical evaluations, the Division awarded Mr. Dial a permanent partial impairment benefit of \$18,574.33 on November 2, 2005. A year later, on November 29, 2006, Mr. Dial submitted an application for a PPD award.

The Division arranged for him to meet with Ms. Kelly White, a vocational expert, to evaluate whether he could return to employment at a wage that was at least 95% of his monthly gross earnings at the time he was injured.

In her initial report, she identified no jobs at 95% or above of his pre-injury salary. She did not include jobs that required driving because Mr. Dial had stated he was frightened of driving and worried he might cause an accident due to the limited range of motion in his neck. [T7] After Ms. White's initial report, the Division obtained an affidavit from Dr. Zondag in which he attested that Mr. Dial's work-related medical condition was not preventing him from driving.

As a result, Ms. White amended her evaluation to include jobs involving driving. Three of the jobs identified paid 95% of Mr. Dial's pre-injury earnings. On the basis of Ms. White's report, the Division denied Mr. Dial's application for a PPD award, stating that "the information indicates *237that you can return to an occupation at a comparable wage."

[18] Upon Mr. Dial's request the OAH convened a hearing on October 31, 2007. The focus of the hearing was whether Mr. Dial could return to work making at least 95% of his gross pre-injury earnings. Mr. Dial presented evidence that he was not able to drive due to his injury and could not, therefore, perform the jobs Ms. White had identified.

The Division attempted to show that Mr. Dial's inability to drive was not due to his injury but was instead because he had been stopped in 2006 for driving under the influence, had pled guilty to reckless driving, and his driver's license had not been reinstated.

On November 30, 2007, the OAH issued an order awarding PPD benefits, concluding from the evidence presented that as a result of his injury Mr. Dial was unable to obtain employment at a comparable wage. [19] The Division filed a petition for judicial review in the district court.

The Division asserted the OAH's findings, conclusions and order were inadequate and substantial evidence showed Mr. Dial could have returned to work earning a wage comparable to what he was making before his injury.

On March 18, 2009, the district court issued an order reversing the OAH's order. The district court concluded Mr. Dial "failed to establish, by a preponderance of [the] evidence, that he was incapable of finding employment in Wyoming at a wage that was at least 95% of the preinjury wage." Mr. Dial timely appealed from the district court's order. STANDARD OF REVIEW [{10}] In considering an appeal from a district court's review of an administrative agency's decision, we give no special deference to the district court's decision.

Dale v. S & S Builders, LLC, 2008 WY 84, ¶ 8, 188 P.3d 554, 557 (Wyo.2008). Instead, we review the case as if it had come directly to us from the administrative agency. Id. Our review is governed by Wyo. Stat. Ann. § 16-3-114(c) (LexisNexis 2009), which states: (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: (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. [¥11] We review an agency's factual findings for substantial evidence.

Dale, ¶ 10, 188 P.3d at 558. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Moss v. State ex rel. Wyo. Workers' Safety and Comp. Div., 2010 WY 66, ¶ 10, 232 P.3d 1, 4 (Wyo.2010). 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.

Id. [112] We review an agency's conclusions of law de novo, and will affirm an agency's legal conclusion only if it is in accordance with the law. Dale, 188 P.3d at 561-62. DISCUSSION [T18] "Permanent partial disability" is defined as "the economic loss to an injured employee... resulting

from a permanent physical impairment[.]” Wyo. Stat. *238Ann. § 27-14-102(a)(xyv) (LexisNexis 2009).

In order to be eligible for PPD benefits, a claimant must demonstrate he has suffered a loss of earning capacity due to a work-related injury. *Bonsell v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2006 WY 114, ¶ 10, 142 P.3d 686, 689 (Wyo.2006) (citations omitted). An injured worker has the burden to prove each of the elements of his claim by a preponderance of the evidence.

Id. [114] Wyo. Stat. Ann. § 27-14-405(b) (LexisNexis 2009) incorporates the "loss of earnings" concept into the statutory requirements for PPD benefits: (h) An injured employee awarded permanent partial impairment benefits may apply for a permanent disability award subject to the following terms and conditions: (i) The injured employee is because of the injury, unable to return to employment at a wage that is at least ninety-five percent (95%) of the monthly gross earnings the employee was earning at the time of injury; (ii) An application for permanent partial disability is filed not before three (8) months after the date of ascertainable loss or three (8) months before the last scheduled impairment payment, whichever occurs later, but in no event later than one (1) year following the later date; and (ii) The employee has actively sought suitable work, considering the employee's health, education, training and experience.

There was no dispute that Mr. Dial timely filed his application for PPD benefits and actively sought work as required by subsections (bh)G@) and (iil). The only issue was whether he proved he was unable to return to work at a job paying at least 95% of what he was earning before the work injury as required in subsection (h)G). [T15] Ms. Mahaffey asserts the OAH's determination that Mr. Dial met his burden of proving that he was unable to obtain employment at a comparable wage was supported by substantial evidence and the district court erred in reversing that determination.

She contends substantial evidence was presented showing that Mr. Dial was unable to drive due to his injury; the only available jobs paying a comparable wage identified by the vocational evaluator required driving; therefore, he was unable to return to work at a wage comparable to his pre-injury earnings.

The Division asserts the district court correctly concluded Mr. Dial failed to prove that he was unable to return to work at a comparable wage. It points to evidence that two jobs were available, both of which paid more than his pre-injury wage.

The Division asserts Mr. Dial's inability to drive resulted not from his work-related condition but from the suspension of his driver's license as a consequence of his arrest for driving while intoxicated. [116] In determining whether an employee has suffered a loss of earning capacity both medical and non-medical evidence may be relevant. *Bonsell*, ¶ 12, 142 P.3d at 689.

The following considerations are relevant to the loss of earning capacity inquiry: "the employee's physical impairment, including the nature and extent of his injury; age; education; actual earnings, including pre-injury and post-injury earnings; ability to continue pre-injury employment; and post-injury employment prospects." *Id.* No one factor is determinative and the agency, as the fact finder, has the discretion to assign such weight to the individual factors as it deems appropriate.

Id. [T17] In concluding Mr. Dial had suffered a loss of earning capacity and was entitled to an award of PPD benefits, the OAH cited the testimony of Ms. Mahaffey, Mr. Dial's fiancée at the time, that Mr. Dial had limited range of motion, difficulty turning his head and poor concentration and she did not think it was safe for him to drive.

The OAH also cited Mr. Dial's testimony that he was released to return to work but was unable to return to jobs that he knew, and had worked in the past in the oil field, as a landscaper and as a truck driver, but no longer felt comfortable driving because of his slow range of motion. Additionally, the OAH referenced Mr. Rodeman's testimony that he had concerns about whether Mr. Dial could safely perform the identified available jobs.

[118] It is clear from the OAH's conclusions of law that it considered the relevant *239 factors, including Mr. Dial's physical impairment, age, education, actual earnings and post-injury employment prospects, The OAH placed particular emphasis on this Court's statement in *Bonsell*, ¶ 25, 142 P.3d at 692, that the focus of § 27-14-405(h) is "on the injured worker's true ability to earn a living."

The OAH found Mr. Dial to be a credible witness after having the opportunity to observe him and weigh his testimony, an opportunity neither the district court nor this Court had. From all of the evidence, and "plac[ing] its primary focus... on Mr. Dial's true ability to earn a living after sustaining a significant, on-the-job injury to his neck and left shoulder which resulted in a two level fusion," the OAH concluded he was unable to obtain employment at a comparable wage and was entitled to PPD benefits.

[T19] The Division claims Mr. Dial's application for benefits should have been denied because the evidence showed jobs were available at a comparable wage. The jobs the Division references-as a county assessor and as a Schwann's delivery truck driver-both required driving on a regular basis.

The Division contends the affidavit of Dr. Zondag showed Mr. Dial's medical condition did not prevent him from driving; rather, the only factor preventing him from doing so was that he had lost his driver's license as a result of his arrest for DUI.

[120] In considering the evidence, the OAH gave greater weight to the testimony of Mr. Dial and Ms. Mahaffey than it did to Dr. Zondag's affidavit or Ms. White's testimony. Determining the weight to be assigned to the evidence is the responsibility of the finder of fact. *Bonsell*, ¶ 24, 142 P.3d at 692.

Although the evidence in this case may be subject to different interpretations, substantial evidence was presented to support the OAH's determination that Mr. Dial was not able to drive on a regular basis because of his injury.

[121] In addition to Mr. Dial's and Ms. Mahaffey's testimony at the hearing, the OAH had before it the statements Mr. Dial made to Ms. White during the vocational evaluation to the effect that he was afraid to drive because the stiffness and slow range of motion in his neck potentially would cause him to run into someone or something and Ms. Mahaffey was willing to drive him to work.

These statements, made in late 2006 or early 2007, were consistent with his testimony at the hearing in October of 2007. The Division asserts Mr. Dial's inability to drive was due not to his injury but to his arrest for DUI and the suspension of his license. Evidence was presented that in 2006, a year after the surgery in 2005, Mr. Dial was arrested for DUI, convicted of reckless driving, his license was suspended and it had not been reinstated at the time of the hearing.

The OAH was required to weigh this evidence against the evidence indicating Mr. Dial could not drive because of his injury. Giving the evidence the weight to which it deemed it was entitled, the OAH apparently believed Mr. Dial's testimony.

In light of Mr. Dial's testimony, and that of Ms. Mahaffey, we are not willing to conclude there was no rational premise for the OAH's finding. This is especially true given other evidence in the record corroborating Mr. Dial's testimony and credibility.

[122] Mr. Rodeman's report confirmed that Mr. Dial's coordination and timing were slow. Mr. Rodeman also concluded that Mr. Dial's subjective reports of pain and associated disability were reasonable and reliable and that he put forth maximum physical effort during the testing even though he was in the unusual position of being sent for a functional capacity evaluation only six months post-operative.

While Mr. Rodeman indicated in his 2005 report that Mr. Dial could drive occasionally, the available jobs identified by Ms. White required extensive driving on a daily basis. Mr. Rodeman also expressed disagreement with some of the conclusions reached by Dr. Zondag and Ms. White.

Having considered the record as a whole, the OAH's determination that Mr. Dial met his burden of proving that he was entitled to PPD benefits is supported by substantial evidence and is not, in any other fashion, arbitrary, capricious or contrary to law. CONCLUSION [123] The district court improperly substituted its judgment for the fact finder's *240 when it reversed the OAH decision awarding Mr. Dial benefits.

The OAH decision was supported by substantial evidence and was not otherwise arbitrary, capricious or contrary to law. Consequently, we reverse and remand to the district court with

directions the case be returned to the OAH for reinstatement of the order awarding benefits to Mr. Dial. KITE, C.J., delivers the opinion of the Court; GOLDEN, J., files a dissenting opinion.

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/wyoming-supreme-court-of-wyoming/2011/mahaffey-v-state-ex-rel-wyoming-workers-safety-and-9rqi4ym>