[Cite as *Edney v. Life Ambulance Serv., Inc.*, 2012-Ohio-4305.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Barry D. Edney,	:	
Plaintiff-Appellant,	:	
		No. 11AP-1090
v.	:	(C.P.C. No. 10CVD 09 13131)
Life Ambulance Service, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 20, 2012

Barry D. Edney, pro se.

Michael Soto, for appellee Life Ambulance Service, Inc.

Michael DeWine, Attorney General, and *Colleen C. Erdman*, for appellee Administrator, Bureau of Workers' Compensation.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Barry D. Edney ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Life Ambulance Service, Inc., and the Administrator of the Bureau of Workers' Compensation ("Administrator") (collectively "appellees"). Because we conclude that appellant's workers' compensation claim was not compensable and appellees were entitled to judgment as a matter of law, we affirm.

{¶ 2} On February 26, 2008, appellant filed a claim with the Ohio Bureau of Workers' Compensation ("BWC") seeking benefits for an alleged workplace injury that

occurred on February 21, 2008. Appellant claimed that he began coughing and wheezing and became short of breath after being exposed to secondhand smoke from coworkers who were smoking in the workplace. Appellant submitted a claim for compensation for "chest pain NOS [not otherwise specified]."[1] The BWC found that appellant had not sustained a compensable injury and denied his claim. Appellant appealed the BWC's order, and it was referred to the Industrial Commission of Ohio, which also denied the claim as not compensable.

{¶ 3} Appellant appealed the Industrial Commission's denial of his claim to the Franklin County Court of Common Pleas. Appellees moved for summary judgment, arguing that appellant's claim failed to establish a compensable injury. Appellant did not file a response to the motion for summary judgment. The common pleas court concluded that appellant's unspecified chest pain was not compensable under workers' compensation law because it constituted a symptom, rather than a compensable injury, and that appellant failed to show that he suffered a compensable injury in the course of his employment. Based on this conclusion, the lower court granted summary judgment in favor of appellees.

{¶ 4} Appellant appeals from the common pleas court's judgment, assigning three errors for this court's review:

> **APPELLANT'S FIRST ASSIGNMENT OF ERROR**
>
> THE COMMON PLEAS JUDGE ERRED IN HER AWARDING OF SUMMARY JUDGMENT TO THE DEFENDANTS SINCE THE EDNEY DEPOSITION CONTAINED CLEAR STATEMENTS OF ILLEGAL WORKPLACE ACITVITY [sic] THAT AGGRAVATED A PRE-EXISTING CONDITION.
>
> **APPELLANT'S SECOND ASSIGNMENT OF ERROR**
>
> THE COMMON PLEAS JUDGE ERRED BY ACCEPTING DEFENDANT'S [sic] ARGUMENT THAT BECAUSE PLAINTIFF'S ASTHAM [sic] PRE-EXISTED, IT WAS NOT

[1] Although it was not made explicit in appellant's claim, the abbreviation "NOS" in a medical context generally means "not otherwise specified." *See e.g. Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, ¶ 33; *Schottenstein v. Schottenstein*, 10th Dist. No. 02AP-842, 2003-Ohio-5032, ¶ 25.

ELIGIBLE FOR COMPENSATION BECAUSE IT WAS NOT "CONTRACTED" AT WORK.

APPELLANT'S THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DISMISSING THE CASE DESPITE THE FACT THAT PLAINTIFF NEVER RECEIVED DEFENDANTS [sic] MOTION FOR SUMMARY JUDGMENT BRIEF, DESPITE HAVING PLAINTIFF'S CORRECT NEW ADDRESS, DEFENDANT FAILED TO MAIL THE BRIEF TO THE NEW ADDRESS.

{¶ 5} We review a grant of summary judgment de novo. *Capella III, L.L.C. v. Wilcox,* 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16 (10th Dist.), citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State,* 10th Dist. No. 10AP–214, 2010-Ohio-6529, ¶ 9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III* at ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. Therefore, we undertake an independent review to determine whether appellees were entitled to judgment as a matter of law.

{¶ 6} Appellant failed to respond to appellees' motion for summary judgment before the lower court, and on appeal he asserts that he was not served with a copy of the motion prior to the lower court's ruling. Therefore, we begin by considering appellant's third assignment of error, in which he asserts that the lower court erred in granting summary judgment because appellees did not mail the motion for summary judgment to the correct address and because he did not receive the motion for summary judgment.

{¶ 7} Under Civ.R. 5(B)(2)(c), a party may be served with a motion by mailing it to the person's last known address by United States mail. If this method of service is used, service is complete upon mailing. Civ.R. 5(B)(2)(c). "Where a party follows the Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence." *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. No.

09AP-510, 2009-Ohio-6852, ¶ 22. " '[U]nsworn statements, such as bare allegations in an appellate brief, do not constitute evidence and are not sufficient to rebut the presumption of proper service.' " *Id.*, quoting *Poorman v. Ohio Adult Parole Auth.*, 4th Dist. No. 01CA16, 2002-Ohio-1059.

{¶ 8} In this case, appellees filed their joint motion for summary judgment on July 11, 2011. The filing included a certificate of service signed by counsel for the Administrator attesting that a copy of the motion was sent to appellant by United States mail at an address on Mount Vernon Avenue in Columbus, Ohio. Eight days later, appellees re-filed their joint motion for summary judgment. The re-filed version included a certificate of service signed by counsel for the Administrator attesting that a copy of the motion was sent to appellant by United States mail at an address on East Broad Street in Columbus, Ohio. Appellees filed a notice with the common pleas court explaining that the first version of the motion for summary judgment had been served on appellant at his prior address and that appellees were re-filing the motion in order to serve appellant at his current address. We note that the East Broad Street address is the same address that appellant has listed on his filings before this court.

{¶ 9} On November 14, 2011, the same day the lower court granted summary judgment, appellant filed a motion to postpone the trial. In the motion, appellant claimed that he had been out of the state since at least February 23, 2011, undergoing medical treatment. The motion also included an unsworn statement from a physician indicating that appellant had been receiving medical treatment in Virginia beginning February 23, 2011. Although appellant did not expressly make the argument on appeal, it would appear that his absence from the state was related to his alleged failure to receive notice of the motion for summary judgment.

{¶ 10} As explained above, Civ.R. 5(B) permitted appellees to serve the motion for summary judgment on appellant by mail. The use of an authorized method of service creates a presumption of proper service. The unsworn statements contained in appellant's motion to postpone the trial are insufficient to rebut the presumption of proper service. Moreover, these statements are insufficient to establish that appellant did not receive a copy of the motion for summary judgment, which was mailed to appellant's current address. A claim that appellant was not served with a copy of the motion for

summary judgment would be best addressed through a motion for relief from judgment under Civ.R. 60(B) before the lower court, rather than through a direct appeal. *See Morris v. Anderson*, 10th Dist. No. 94APE06-881 (Jan. 10, 1995); *PFG Ventures, L.P. v. King*, 8th Dist. No. 95352, 2011-Ohio-1248, ¶ 4 ("[Appellant] could have offered evidentiary support for his argument [that he was not served with the motion for summary judgment] by seeking relief from the summary judgment under Civ.R. 60(B), but he failed to do so."); *Stringer v. Boardman Nissan*, 7th Dist. No. 05 MA 86, 2006-Ohio-672, ¶ 18 ("If a plaintiff fails to respond to a motion for summary judgment through no fault of his own (for example, if he was not served with a copy of the motion), then he would still have the opportunity to demonstrate a meritorious claim once he moved to vacate the adverse judgment.").

{¶ 11} Absent sufficient evidence to rebut the presumption of proper service and establish that he was not served with a copy of appellees' motion for summary judgment, appellant has failed to establish that the common pleas court erred by granting the motion for summary judgment. Appellant's third assignment of error is without merit and is overruled.

{¶ 12} Next, we turn to appellant's first and second assignments of error. We will address these two assignments of error together because they both involve appellant's assertion that the lower court erred by granting summary judgment because he was entitled to compensation for aggravation of asthma.

{¶ 13} Appellant submitted a claim for workers' compensation benefits for a condition of "chest pain NOS." The Industrial Commission denied appellant's claim, and appellant appealed pursuant to R.C. 4123.512. The lower court concluded that appellant failed to show a compensable injury under workers' compensation law and granted summary judgment in favor of appellees.

{¶ 14} R.C. 4123.54(A) provides that, with certain exceptions, every employee who is injured or contracts an occupational disease is entitled to receive compensation for the loss sustained due to the injury or occupational disease. R.C. 4123.68 also provides that every employee who is disabled due to the contraction of an occupational disease is entitled to compensation. The law defines "injury" as "any injury, whether caused by external accidental means or accidental in character and result, received in the course of,

and arising out of, the injured employee's employment." R.C. 4123.01(C). " 'Occupational disease' means 'a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general.' " R.C. 4123.01(F).

{¶ 15} Appellant's claim sought compensation for a condition of chest pain. Appellees argue that this claim was not compensable because appellant's chest pain was a symptom, rather than an injury. A "symptom" may be defined as "subjective evidence of disease or physical disturbance observed by the patient." *Webster's Third New International Dictionary* 2318 (1966). Thus, a symptom is a manifestation of some underlying condition, rather than a condition unto itself. *See Black's Law Dictionary* 518 (9th Ed.2009) (defining "diagnosis" as "[t]he determination of a medical condition (such as a disease) by physical examination or by study of its symptoms"). Based on our review of the record and similar cases, we conclude that appellant's claim for chest pain was not compensable because he had not established that he suffered an injury within the statutory definition. The medical records from appellant's hospital visit indicate that he was diagnosed with chest pain of an unclear etiology or cause. This diagnosis indicates that there was some underlying cause for appellant's pain, although the medical professionals examining him were unable to identify the cause at that time.

{¶ 16} Other appellate courts have held that various forms of pain do not constitute compensable injuries under workers' compensation law. *See Foor v. Rockwell Internatl.*, 5th Dist. No. 92 CA 109 (Aug. 10, 1993) (holding that radiculopathy and/or pain is not a separate injury, but that pain was a symptom flowing from the initial injury for which a claim had been allowed); *Kaplan v. Mayfield*, 7th Dist. No. 86-J-25 (July 8, 1987) (holding that angina was a symptom, rather than a disease or injury, and was not compensable); *Brown v. Connor*, 2d Dist. No. CA 8943 (Apr. 10, 1985) (holding that chest pain called angina was not a compensable injury). Although we have not previously addressed whether pain is compensable, this court has previously held that atrial fibrillation, or a rapid irregular heartbeat, is not an injury for purposes of workers' compensation law, absent a showing that the atrial fibrillation caused a physical injury.

Beard v. Mayfield, 73 Ohio App.3d 173, 176 (10th Dist.1991). Similarly, in this case, appellant has made no showing that his chest pain was an injury, rather than a symptom of some other injury or condition. We conclude that, under the circumstances presented here, there is no indication that appellant's chest pain constituted a compensable injury. Therefore, summary judgment in favor of appellees was proper.

{¶ 17} Appellant also argues that the common pleas court erred in granting summary judgment because there was clear evidence to establish that exposure to secondhand smoke in the workplace aggravated his asthma and that the court erred by accepting appellees' argument that his asthma aggravation claim was not compensable. In the order granting summary judgment, the lower court noted that appellees anticipated appellant making an argument regarding aggravation of his asthma. However, the lower court correctly noted that appellant had not submitted a claim to the BWC based on aggravated asthma, nor had he expressly raised such a claim before the lower court. Thus, the court expressly stated that it would not address the aggravated asthma claim and restricted its decision to the question of whether denial of appellant's chest pain claim was proper.

{¶ 18} The lower court did not err by limiting its decision to the question of whether appellant was entitled to compensation for his claim for chest pain. The Supreme Court of Ohio has held that "[a] claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken." *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, syllabus. "Thus, the question before a finder of fact in an R.C. 4123.512 appeal is whether a claimant may participate in the workers' compensation fund for the medical condition asserted at the administrative level, and not any other additional injury." *Bradley v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-409, 2012-Ohio-451, ¶ 34, citing *Ward* at ¶ 8-9. Appellant's claim to the BWC only sought compensation for "chest pain NOS"; therefore, the lower court correctly limited itself to considering whether the BWC and the Industrial Commission properly denied that claim.

{¶ 19} The lower court did not err by granting summary judgment in favor of appellees in this case. Under the circumstances presented in this case, appellant's claim for the condition of chest pain was not compensable through the workers' compensation

system. Further, appellant did not present a claim for aggravation of his asthma to the Industrial Commission or to the lower court. Appellees were entitled to judgment as a matter of law.

{¶ 20} Accordingly, appellant's first and second assignments of error are without merit and are overruled.

{¶ 21} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
