[Cite as *Smith v. Conrad*, 2004-Ohio-2075.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

GREGORY SMITH,	:	
Plaintiff-Appellant,	:	CASE NO. CA2002-09-036
	:	O P I N I O N
- vs -		4/26/2004
	:	
C. JAMES CONRAD, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVD-2000-0578

Cornyn & Hughes, Christopher J. Cornyn, 10 Fairway Drive, Springboro, Ohio 45066, for plaintiff-appellant

Jim Petro, Ohio Attorney General, Jacob Dobres, 150 East Gay Street, 22nd Fl., Columbus, Ohio 43215, for defendant, Administrator, Bureau of Workers' Compensation

Schottenstein, Zox & Dunn, Corey V. Crognale, P.O. Box 165020, Columbus, Ohio 43216, for defendant-appellee, John R. Jurgensen Company

VALEN, J.

{¶1} Appellant, Gregory Smith, appeals the judgment of the Clinton County Court of Common Pleas denying his right to

participate in the workers' compensation fund for his claimed injuries. Judgment affirmed.

{¶2} Appellant was a roller operator on a road-paving crew for John R. Jurgensen Company ("Jurgensen") when an incident occurred at the construction site with a member of the motoring public. Appellant testified that he left his roller and engaged in an exchange with a motorist to keep the motorist from driving onto the work surface. Appellant claimed that he was dragged by the motorist's vehicle, fell to the ground, and sustained injuries to his knees and lower back.

{¶3} This matter came before the trial court on appellant's appeal from the Industrial Commission's decision to deny fund participation for a tear of the lateral meniscus of the right knee and aggravation of the pre-existing chondromalacia of the patella in both knees and Jurgensen's appeal of the commission's decision to allow participation for a lumbar strain.

{¶4} During a trial before a jury, the trial court granted a directed verdict against appellant on the issue of the lateral meniscus tear. The jury returned a verdict denying appellant's right to participate in the fund for the aggravation of chondromalacia and the lumbar strain. Appellant's motion for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a motion for a new trial was denied. Appellant instituted the instant appeal, setting forth two assignments of error. We will address appellant's

assignments of error out of order.

{¶5} Assignment of Error No. 2:

THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT ON THE ISSUE OF WHETHER APPELLANT SUFFERED A TEAR OF THE LATERAL MENISCUS.

{¶6} To be entitled to workers' compensation benefits, an employee must prove, by a preponderance of the evidence, that he sustained an injury during the course of his employment, that the injury arose from his employment, and that, as a direct and proximate result of that injury, he was harmed or disabled. Cook v. Mayfield (1989), 45 Ohio St.3d 200, 204.

{¶7} Under Civ.R. 50(A)(4), a directed verdict is properly granted when the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue, reasonable minds could come to but one conclusion on the evidence submitted and that conclusion is adverse to such party. Rondy, Inc. v. Goodyear Tire Rubber Co., Summit App. No. 21608, 2004-Ohio-835, at ¶6; see, also, Posin v. A.B.C. Motor Court Hotel, Inc. (1976), 45 Ohio St.2d 271, 275. If the party opposing the motion for a directed verdict fails to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. Rondy. Conversely, the motion must be denied where substantial evidence exists upon which reasonable minds may reach different conclusions. Id.

{¶8} Jurgensen presented the videotaped deposition

testimony of Dr. Alan Kohlhaas, a physician who evaluated appellant for this case. Dr. Kohlhaas testified that he could not render a diagnosis of a lateral meniscus tear related to work trauma. Dr. Pietro Seni, appellant's physician, testified that a tear was suspected from MRI imaging, but that surgery would be required to confirm or refute the presence of a tear.[1]

{¶9} Reviewing the evidence before us on the issue of a lateral meniscus tear, reasonable minds could come to but one conclusion and that conclusion is adverse to appellant. Appellant failed to provide evidence of a lateral meniscus tear related to a work incident to survive a directed verdict on that issue. See Zavasnik v. Lyons Transp. Lines, Inc. (1996), 115 Ohio App.3d 374, 376; Sommer v. Conrad (1999), 134 Ohio App.3d 291, 295-296.

{¶10} Appellant's second assignment of error is overruled.

{¶11} Assignment of Error No. 1:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING APPELLANT'S MOTION FOR NEW TRIAL AND/OR MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT."

{¶12} A grant of a motion for a new trial as an alternative to granting a motion for JNOV is within the sound discretion of the trial court. Highfield v. Liberty Christian Academy (1987), 34 Ohio App.3d 311, 315; Civ.R. 50(B); Civ.R. 59. To find an abuse of discretion, a reviewing court must determine

1. We note that this court was not provided with the exhibits admitted at trial. Also, the depositions of Dr. Pietro Seni and Dr. Alan Kohlhaas were

that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217.

{¶13} In ruling on a motion for JNOV, the evidence is construed most strongly in favor of the nonmovant, in this case, Jurgensen, who is also given the benefit of all reasonable inferences from the evidence. Singh v. New York Frozen Foods, Cuyahoga App. Nos. 82284,and 82775, 2004-Ohio 1257, at ¶6. The Court must not weigh the evidence or the credibility of the witnesses when reviewing such a motion. Id. A motion for judgment notwithstanding the verdict should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. Id; Civ.R. 50(B).

{¶14} We will address appellant's arguments under this assignment of error out of order.

{¶15} Appellant argues that a new trial or JNOV should have been granted because it was error to exclude both Dr. Seni's opinion concerning the diagnosis of lumbar strain and the notes of Dr. Marcus Amongero. The record indicates that Dr. Seni did not evaluate or treat appellant for his back, but referred him to Dr. Amongero, another orthropedic physician in the same office.

{¶16} Jurgensen had filed a pretrial motion in limine regarding this portion of Dr. Seni's testimony. Appellant

---

not part of the record transmitted to this court, but were provided later

failed to direct this court to portions of the record that indicate the trial court's rulings concerning the motion in limine and Dr. Seni's testimony about the lumbar strain diagnosis.

{¶17} Dr. Seni's deposition was read into the record for the jury, but this court was not provided with the exact transcript that included the objections and court rulings. Appellant provided a copy of the deposition, but it did not include the court rulings on objections. Further, other exhibits admitted at trial were not provided to this court. Accordingly, we will presume the regularity of the proceedings for which no record was provided. Wilhoite v. Kast, Warren App. No. CA2001-01-001, 2001-Ohio-8621; Singh at ¶21.

{¶18} The admission or exclusion of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon a showing of an abuse of that discretion. Shoemake v. Hay, Clermont App. No. CA2002-06-048, 2003-Ohio-2782, at ¶9, citing Renfro v. Black (1990), 52 Ohio St.3d 27, 32; Evid.R. 104.

{¶19} After reviewing the record before us, we cannot say that the trial court's decision to exclude Dr. Seni's opinion testimony and the notes of Dr. Amongero on the lumbar strain was an abuse of discretion. Accordingly, the trial court did not err in denying appellant's motions for JNOV and a new trial on this issue.

---

by the party on whose behalf the witness testified.

{¶20} Appellant next argues that a new trial or JNOV should have been granted because his evidence concerning the lumbar sprain was undisputed. As part of his argument, appellant specifically asserts that Dr. Kohlhaas's testimony, which disputed the lumbar strain, was "crushed" when it was demonstrated that the witness was not aware of reports that appellant had complained of lower back tenderness at the emergency room the day of the work incident.

{¶21} After reviewing the evidence provided to this court under the applicable standards for motions for a new trial and JNOV, we find there was substantial evidence upon which reasonable minds could come to different conclusions on the diagnosis of lumbar strain related to the work accident. The trial court did not err in denying appellant's motions on this issue.

{¶22} Appellant finally argues under this assignment of error that a new trial or JNOV should have been granted because the decision of the jury on the issue of lumbar strain was against the manifest weight of the evidence.

{¶23} Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. Wingfield v. Cleveland Clinic Foundation (Dec. 11, 1997), Cuyahoga App. Nos. 71427, 71428, and 71429. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court

as being against the manifest weight of the evidence. C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, syllabus.

{¶24} Based upon the record before us, we find that the jury's decision that appellant should not be permitted to participate in the workers' compensation fund for the lumbar strain was supported by competent, credible evidence. Appellant's motions for a new trial and for JNOV were properly denied. Appellant's first assignment of error is overruled.

{¶25} The judgment is affirmed.

Judgment affirmed.

YOUNG, P.J., and WALSH, J., concur.