

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

WILLIE COLEMAN,	:	
	:	CASE NOS. CA2011-03-049
Plaintiff-Appellant,	:	CA2011-03-050
	:	CA2011-03-051
	:	
- vs -	:	<u>O P I N I O N</u>
	:	9/19/2011
	:	
CITY OF HAMILTON, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case Nos. CV2010-02-0738, CV2010-08-3319

Laura I. Murphy, 432 Ray Noorish Drive, Cincinnati, Ohio 45246, for plaintiff-appellant

Timothy G. Werdmann, One Renaissance Center, Suite 710, 345 High Street, Hamilton, Ohio 45011, for defendant-appellee, city of Hamilton

Jose Martinez, 1700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for defendant-appellee, Administrator, Bureau of Workers' Comp.

PIPER, J.

{¶1} Plaintiff-appellant, Willie Coleman, appeals the decisions of the Butler County Court of Common Pleas, which upheld decisions of the Industrial Commission of Ohio denying Coleman the right to participate in the Ohio Workers' Compensation fund. We affirm the decisions of the common pleas court.¹

1. We have sua sponte removed these cases from the accelerated calendar, and have consolidated the appeals for the purpose of writing this single opinion.

{¶2} Coleman works for the city of Hamilton as a street maintenance worker, and on July 7, 1998, was tearing out old asphalt and raking it into a pile to be picked up. Coleman stepped on a curb, lost his balance and fell. As a result, he hit his head, neck, lower-back, mid-back, and shoulder area on the curb, and suffered a lumbar sprain, contusion, sciatica and cervical sprains. Coleman was permitted to participate in the Workers' Compensation fund for the resulting injuries, and he eventually returned to work.

{¶3} On October 18, 2001, Coleman was operating an asphalt paver on uneven pavement, which caused his body to be jarred. Coleman sought medical treatment that day, and it is undisputed that he suffered injury as a result of the 2001 job-related activity. Coleman participated in the workers' compensation system for a left shoulder strain and a left cervical strain. Coleman continues to work for the city in the same capacity as he did when the 1998 and 2001 injuries occurred.

{¶4} Over time, Coleman's doctors diagnosed him with several other conditions as being attributed to the two work-related injuries. Specific to the 1998 incident, Coleman claimed the following additional conditions: disc herniation with cervical radiculopathy, degenerative disc disease of the thoracic spine, and thoracic outlet syndrome with bilateral neuropathy. Regarding the 2001 incident, Coleman claimed additional conditions of sensory radiculopathy of his spine and degenerative joint disease of the left shoulder. Coleman claimed the additional conditions and sought additional participation in the fund, but was denied participation by the Industrial Commission. Coleman appealed that decision to the Butler County Court of Common Pleas, which held a bench trial for the 1998 incident, and one for the 2001 incident.

{¶5} During the bench trials, Coleman offered deposition testimony of his treating chiropractor, Brian Nobbs, as expert testimony to establish that the additional conditions were

directly caused by the 1998 and 2001 incidents. Coleman also offered multiple exhibits at trial, consisting of medical records, diagnostic test results, and a first report of injury. After Coleman rested his case in each trial, the city of Hamilton offered no exhibits or witnesses.

{¶6} The common pleas court found that Coleman was not entitled to participate in the fund for the additional conditions. Coleman now appeals those decisions, raising the following assignments of error.

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN ENTERING JUDGMENT DENYING HIM THE RIGHT TO PARTICIPATE IN THE OHIO WORKER'S COMPENSATION FUND UNDER CLAIM #01-857232 FOR THE CONDITIONS OF SENSORY RADICULOPATHY AT C8-T1 AND/OR DEGENERATIVE JOINT DISEASE OF THE LEFT SHOULDER."

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN ENTERING JUDGMENT DENYING HIM THE RIGHT TO PARTICIPATE IN THE OHIO WORKERS' COMPENSATION FUNDER UNDER CLAIM #98-468700 FOR THE CONDITIONS OF DISC HERNIATION AT C5-6, DEGENERATIVE JOINT DISEASE OF THE THORACIC SPINE, CERVICAL RADICULOPATHY AT C5 AND/OR THORACIC OUTLET SYNDROME WITH BILATERAL SHOULDER PERIPHERAL NEUROPATHY."

{¶9} In Coleman's assignments of error, he claims that the decisions of the common pleas court denying his participation for the additional conditions were against the manifest weight of the evidence.

{¶10} "In order to establish a right to workers' compensation benefits for harm or death arising from an accidental injury, it is necessary for the claimant to show by a preponderance of the evidence that a direct and proximate causal relationship existed between his injury and the harm or death. *** 'Proximate cause' is a happening or event

which as a natural and continuous sequence produces an injury without which the result would not have occurred." *Randall v. Mihm* (1992), 84 Ohio App.3d 402, 406. (Internal citations omitted.)

{¶11} Before a worker can participate in the Workers' Compensation fund, the employee must demonstrate that the injury was "received in the course of, and arising out of, the injured employee's employment." *Oberhauser v. Mabe*, Butler App. No. CA2008-11-266, 2009-Ohio-3680, ¶15. "The phrase 'in the course of employment' limits compensable injuries to those sustained by an employee while performing a required duty in the employer's service." *Id.* at ¶16. "The phrase, 'arising out of,' refers [to] the 'causal connection between the injury and the employment.'" *Id.* at ¶17, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277-278.

{¶12} The common pleas court reviews a decision from an order of the Industrial Commission de novo, and the claimant has the burden of proof. *Benton v. Hamilton Cty. Educational Serv. Ctr.*, 123 Ohio St.3d 347, 2009-Ohio-4969. An appellate court will not disturb the decision of the common pleas court regarding the ability of an employee to participate in the fund unless that decision is against the manifest weight of the evidence. *Bales v. Miami University*, Butler App. No. 2006-11-295, 2007-Ohio-6032. "A reviewing court must indulge every reasonable presumption in favor of the trial court's judgment and findings of fact. In the event the evidence is susceptible to more than one interpretation, the reviewing court must construe it consistently with the trial court's judgment. In reviewing a bench trial, an appellate court will uphold the trial court's decision unless it appears the record cannot support a reasonable person in concluding as the trial judge did." *Id.* at ¶16.

{¶13} Essentially, Coleman argues that the common pleas court's decisions are against the manifest weight because the expert testimony he presented went uncontroverted

in both instances. Coleman asserts that he produced medical records as well as reports and diagnostic studies explaining his original injuries and how those injuries worsened over time. Coleman suggests that because the city did not produce any expert witness testimony or any evidence to contradict his own, he successfully carried his burden.

{¶14} However, it is well-established that the trier of fact is vested with the power to judge the credibility of witnesses and to determine the weight to be afforded to the evidence presented. A trier of fact is "free to accept or reject" any or all of the testimony of any witness, including testimony of an expert witness. *Weidner v. Blazic* (1994), 98 Ohio App.3d 321, 335. Even when the evidence is undisputed, the trier of fact possesses the inherent right to reject the evidence presented. *Krauss v. Kilgore* (July 27, 1998), Butler App. No. CA97-05-099. The opinion of an expert is not conclusive upon a trier of fact, but is instead an "item of evidence intended to assist the trier of fact in consideration with the other evidence of the case." *Croft v. State Farm Mutual Automobile Insurance Co.*, Allen App. No. 1-01-72, 2002-Ohio-113, 2002 WL 18665, *3. This is true even where expert testimony is not directly controverted by the opposing party's evidence. *State v. Brown* (1983), 5 Ohio St.3d 133. While an expert's opinion may not be "arbitrarily ignored," a trial court may ignore such testimony if there are "some reasons *** objectively present." *Id.* at 135.

{¶15} During Dr. Nobbs' testimony, he stated his opinion that the additional conditions developed because of the 1998 and 2001 incidents. However, Dr. Nobbs testified that a person's weight can affect discs in the back, and that Coleman was 80-90 pounds overweight. Dr. Nobbs further testified that on average, muscle strains such as those Coleman sustained in the 2001 paver incident heal within 12 to 16 weeks. Dr. Nobbs also testified that one of the testing procedures he employed to diagnose Coleman's conditions involved having the test interpreted by an out-of-state doctor, and that he was unaware of the

policy from the American Association of Electrodiagnostic Medicine regarding physician-supervised testing.

{¶16} During his testimony on direct and cross-examination, Dr. Nobbs stated that approximately 70 percent of his practice involves patients who have had personal injuries, and that approximately 30 percent involves patients claiming workers' compensation injuries. Less than one percent of Dr. Nobbs' patients are self-pay or use their insurance benefits. Dr. Nobbs also testified that often times, once patients are no longer eligible to participate in the workers' compensation fund they no longer seek treatment because they are unable or unwilling to pay for his services.

{¶17} As previously stated, the common pleas court was vested with the power to judge the credibility of Dr. Nobbs and to determine the weight to be afforded to the evidence presented. Although the court did not find Dr. Nobbs' testimony credible, it did not arbitrarily ignore the testimony. Instead, the record reveals that there are some reasons objectively present as to why the expert testimony offered by Coleman may have been afforded little weight by the common pleas court.

{¶18} The court was free to consider Dr. Nobbs' testimony in light of his pecuniary interest in Coleman's alleged injuries, or in light of the fact that Dr. Nobbs was unaware of industry standards regarding a test he relied on in diagnosing Coleman's injuries. The court also heard testimony that Coleman was ageing and that his body was naturally deteriorating as a result, as well as the fact that Coleman was overweight.

{¶19} Although the common pleas court did not find Dr. Nobbs' testimony dispositive to establish causation, that fact does not render its decision against the manifest weight of the evidence. Instead, the court found that Coleman failed to demonstrate by a preponderance of the evidence that a direct and proximate causal relationship existed

between his 1998 and 2001 injuries and the additional conditions. After reviewing the record, indulging every reasonable presumption in favor of the common pleas court's judgment and findings of fact, and construing the evidence consistently with the court's judgment, we cannot say that the decisions of the common pleas court were against the manifest weight of the evidence. Coleman's assignments of error are overruled.

{¶20} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.