[Cite as *Herron v. Baker Hi-Way Express,* 2004-Ohio-6681.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BILLY E. HERRON

Plaintiff-Appellee

-vs-

BAKER HI-WAY EXPRESS, et al.

Defendants-Appellants

JUDGES:
Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. John F. Boggins, J.

Case No. 2003 AP 10 0080

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2002 CW 100678
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 8, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant BWC
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Wise, P. J.

{¶1} Appellant Ohio Bureau of Workers' Compensation ("BWC") appeals the decision of the Court of Common Pleas, Tuscarawas County, which ruled in favor of Appellee Billy E. Herron following a jury trial, allowing him to further participate in the Ohio Workers' Compensation Fund. The relevant facts leading to this appeal are as follows.

{¶2} On October 11, 1999, appellee was employed as a truck driver with Baker Hi-Way Express ("Baker").[1] On that date, appellee was attempting to throw a tarp onto the back of a truck when he experienced a sudden pain in his neck area. Appellee shortly thereafter filed a workers' compensation claim, which was allowed under Claim No. 99-541985 for "sprain of the neck." On November 27, 2001, appellee filed a motion with the Industrial Commission, seeking further allowance for aggravation of three spinal-related conditions.[2] The District Hearing Officer allowed all three conditions on January 22, 2002; however, upon BWC's appeal, the Staff Hearing Officer vacated the

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[1] Baker has not filed a brief with this Court in the present appeal.

[2] The additional conditions are specified as follows:
(1) Aggravation of pre-existing disc protrusion at C4-5.
(2) Aggravation of pre-existing spinal stenosis at C5-6 with mild neural foraminal stenosis at C4-5 left; C5-6 and C6-7 bilateral.
(3)Aggravation of pre-existing cervical spondylosis with degenerative disc disease at C4-5, C5-6, and C6-7.

DHO order on August 1, 2002. The Industrial Commission subsequently refused appellee's appeal. Appellee thereupon appealed to the Tuscarawas County Court of Common Pleas pursuant to R.C. 4123.512. The matter proceeded to a jury trial on September 17, 2003.

{¶3} Appellee, during his case-in-chief, called Richard L. Brown, D.C., who had treated appellee a few months before the 1999 tarp-lifting incident. Dr. Brown testified that appellee had suffered an earlier neck injury in 1984, and that in his opinion appellee had suffered deterioration of his neck area following the 1984 injury. Dr. Brown nonetheless opined that the 1999 incident proximately caused aggravation of appellee's three conditions.

{¶4} Later in the trial, counsel for BWC played for the jury a videotaped deposition of the State's medical expert, Gordon Zellers, M.D., as further analyzed infra. Appellee himself also testified.

{¶5} The jury ultimately returned a verdict in favor of appellee as to all three medical conditions. On October 9, 2003, BWC filed a notice of appeal, and it herein raises the following three Assignments of Error:

{¶6} "I. THE TRIAL COURT IMPROPERLY PERMITTED DR. ZELLERS' TESTIMONY REGARDING THE HEARSAY REPORT OF A NON-TESTIFYING PHYSICIAN TO BE PRESENTED TO THE JURY.

{¶7} "II. THE TRIAL COURT ERRED BY FAILING TO GIVE A LEGALLY PERMISSIBLE JURY INSTRUCTION REGARDING THE NON-COMPENSABILITY OF CONDITIONS CAUSED BY NATURAL DETERIORATION, WHICH HAD BEEN

REQUESTED BY COUNSEL FOR THE ADMINISTRATOR, AND BY FAILING TO CORRECT THE JURY CHARGE ONCE AN OBJECTION WAS MADE.

{¶8} "III. THE TRIAL COURT ERRED BY PERMITTING TESTIMONY ON CROSS-EXAMINATION OF DR. ZELLERS REGARDING AN ALTERNATE MECHANISM OF INJURY THAN THAT ASSERTED ADMINISTRATIVELY, OR IN THE COMPLAINT ON APPEAL."

I.

{¶9} In its First Assignment of Error, BWC challenges the introduction of alleged hearsay evidence during the presentation of the videotaped deposition of BWC's expert, Dr. Zellers.

{¶10} The deposition at issue included the following exchange between counsel and Dr. Zellers:

{¶11} "Q. I want to show you what I'm going to mark as Plaintiff's Exhibit Number 3.

{¶12} "(Plaintiff's Exhibit 3, report from Dr. Gutlove to Dr. Weaver dated December 13, 2001, was marked for purposes of identification.)

{¶13} "Q. - - and ask you if you have been provided with a copy of this? And it is a report dated December 13, 2001 written by Dr. Gutlove.

{¶14} "Mr. Reis: Object. But let me take a look at it.

{¶15} "Mr. Mertes: Can we go off the record for a second?

{¶16} "(Thereupon, a discussion was held off the record.)

{¶17} "By: Mr. Tsangeos:

{¶18} "Q. Doctor, I'm going to show you what we marked as Plaintiff's Exhibit Number 3. Were you provided with a copy of that?

{¶19} "Mr. Reis: Objection, and continuing objection to all questions pertaining to this exhibit and contents thereof.

{¶20} "THE WITNESS: Do I answer?

{¶21} "Q. Yes.

{¶22} "A. No, sir. I was not.

{¶23} "Q. Okay you will agree with me that the physicians don't always agree in their opinions of what causes what?

{¶24} "A. Sure.

{¶25} "Mr. Reis: I'm sorry. May I have a continuing objection, Jim?

{¶26} "Mr. Tsangeos: Sure.

{¶27} "Q. Would you turn to page 2 of that report, and would you refer to the paragraph that begins 'in summary'?

{¶28} "A. Sure.

{¶29} "Q. And would you read that to the jury?

{¶30} "A. 'In summary, this is a very pleasant 64-year-old gentleman status post work-related injury on October 11, 1999 who previously carried an allowed claim diagnosis of cervical sprain. Given his mechanism of injury, the report from Dr. Dan Dorfman (dated 4/18/01), as well as the cervical MRI results dated 4/9/01, it is my opinion that his cervical spondylosis was a preexisting condition that was clearly aggravated as a result of his industrial injury of October 11, 1999.'

{¶31} "Mr. Reis: Objection. Move to strike.

{¶32} "Q. You will agree with me that Dr. Gutlove disagrees with you?

{¶33} "A. Sure.

{¶34} "Q. In the sense that he feels that the cervical spondylosis was clearly aggravated, and you believe that it has not been?

{¶35} "A. Correct.

{¶36} "Mr. Reis: Objection. Move to strike.

{¶37} "The Witness: We definitely disagree." Dr. Zellers' Depo. Pp. 62-64.

{¶38} Since Dr. Gutlove, to whom Dr. Zellers referred in the deposition, did not testify at trial, BWC's counsel objected and later asked that the aforesaid exchange not be presented to the jury. However, the trial court overruled the objection and permitted the playing of the disputed videotape portion.

{¶39} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. Our task is to look at the totality of the circumstances in the particular case under appeal, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App. No.1999CA00027. As a general rule, all relevant evidence is admissible. Evid.R. 402. However, under Evid.R. 802, hearsay evidence is not admissible, "except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio."

{¶40} BWC essentially argues that the court's allowance of appellee's cross-examination of the BWC expert, Dr. Zellers, as to Dr. Gutlove's contrary conclusions improperly gave the jury the impression that two physicians, not just one, disagreed with Dr. Zellers' opinion that no aggravation was extant.

{¶41} Appellee responds that under Evid.R. 705, an "expert may testify in terms of opinion or inference and give his reasons therefor after disclosure of the underlying facts or data." Thus, urges appellee, the purpose of the Dr. Gutlove reference was not to prove the truth of the matter asserted, but was instead to impeach BWC's expert by suggesting that physicians can disagree on medical opinions. Cf., e.g., *Baker v. Doctors Hosp. of Stark Co., Inc*. (June 20, 1994), Stark App. No. CA 9425.

{¶42} Assuming, arguendo, the expert's references to Dr. Gutlove's opinions were hearsay, we are nonetheless disinclined to find reversible error under the facts and circumstances of this case. Dr. Gutlove's out-of-court statements went to only one of the three conditions sought by appellee, i.e., aggravation of cervical spondylosis. Additionally, Dr. Gutlove's opinion was rather limited and ambiguous even as to this one condition. His statements as presented certainly referenced the cervical spondylosis, but did not specify cervical spondylosis *with* degenerative disc disease at C4-5, C5-6, and C6-7, as appellee provided in his third claimed condition. See footnote 2, supra. Moreover, it is undisputed that appellee's main witness, Dr. Brown, had testified before the jury as to all three medical conditions before the videotape of Dr. Zellers was played. Finally, although an objection to the pertinent testimony per se was indeed raised, we note nothing in the record demonstrates that BWC requested a cautionary instruction to the jury regarding the opinion of Dr. Gutlove. See, e.g., *State v. Smith*,

Wayne App. Nos. 01CA0039, 01CA0055, 2002-Ohio-4402, ¶ 73. Likewise, in the absence of jury interrogatories, BWC is forced to rely on conjecture as to what weight, if any, the jury gave to the disputed videotape portions.

{¶43} Under the totality of the circumstances and evidence, we do not find a demonstration of an abuse of discretion in the court's evidentiary ruling at issue. Accordingly, BWC's First Assignment of Error is overruled.

II.

{¶44} In its Second Assignment of Error, BWC argues the trial court erred in declining to give a requested jury instruction regarding "natural deterioration." We disagree.

{¶45} Our standard of review on a claim of improper instructions is to consider the jury charge as a whole, and determine whether the charge given misled the jury in a manner materially affecting the party's substantial rights. *Kokitka v. Ford Motor Company* (1995), 73 Ohio St.3d 89, 93. A jury is presumed to follow the instructions given it by the court. *State v. Henderson* (1988), 39 Ohio St.3d 24.

{¶46} In the case sub judice, BWC counsel unsuccessfully requested the judge give the following jury instruction:

{¶47} "DEGENERATION/NATURAL DETERIORATION: A condition that is caused primarily by the natural deterioration of tissue, an organ, or part of the body is not compensable."

{¶48} The trial court read the following instructions to the jury, in pertinent part:

{¶49} "Under the workers' compensation law, injury includes any injury whether caused by external accidental means or accidental in character and result received in

the course of and arising out of the injury employee's employment. Injury includes physical harm that is accidental and the result of an external means that is a sudden mishap occurring by chance unexpected and not in the usual course of events. An injury includes a physical harm caused by [an] unforeseen, unexpected, or unusual event even though the worker is doing what he intended to do in his job and no outside or external force caused the harm.

{¶50} "Participate in the workers' compensation fund means to be entitled to receive benefits from it. To participate means the same thing, excuse me, to participate means the same as the claim being allowed or further allowed.

{¶51} "Billy E. Herron must prove by a greater weight of the evidence that his employment with Baker Hi-Way Express was a direct and proximate cause of the aggravation of preexisting degenerative conditions in the cervical spine and neck. An injury arises out of employment when it is directly and proximately caused by something that occurred as part of the activities, conditions, or risks of the workplace. The plaintiff must establish by a greater weight of the evidence that the aggravation of preexisting degenerative condition in his cervical spine and neck was directly and proximately caused by his employment with Baker Hi-Way Express, Inc.

{¶52} "Proximate cause is something which, in the natural and continuous sequence, produces an injury and without which the result would not have occurred. An injury was proximately caused if it was produced in the natural and continuous sequence by something that occurred as part of the activities, conditions, and risks of the workplace. There may be more than one proximate cause of injury. When workplace activities, conditions, and risks, combined with other causes to directly or

proximately produce the injury, each is a proximate cause. It is not necessary that each cause occur at the same time or place.

{¶53} "* * *" Tr. at 327-328.

{¶54} The Seventh District Court of Appeals addressed a similar question regarding the lack of a specific "natural deterioration" instruction in *Mokros v. Conrad* (Oct. 29, 1999), Monroe App. No. 802, concluding under the facts of that case: "By the jury instructions it is abundantly clear that the jury could find that Appellee's condition could have been caused by something other than the accident in question, including natural deterioration. The court emphasized that to be compensable, Appellee's condition must have been proximately caused by the * * * accident." Id.

{¶55} Upon review of the jury instructions, as a whole, in the case sub judice, we are likewise disinclined to find an abuse of discretion by the trial court, as urged by BWC. "Where the jury instructions, as a whole, are sufficiently clear to enable the jury to understand the law as applied to the facts of the case, the instruction is not improper." *Mokros*, quoting *Morell v. St. Elizabeth Hosp*. (May 20, 1996), Mahoning App. No. 95 CA 1.

{¶56} Therefore, BWC's Second Assignment of Error is overruled.

III.

{¶57} In its Third Assignment of Error, BWC contends the trial court erroneously permitted appellee to cross-examine an expert witness regarding an alternate theory of the mechanism of appellee's injury. We disagree.

{¶58} An appellate court may not reverse a trial court's decision with respect to the scope of cross-examination absent an abuse of discretion. *Calderon v. Sharkey*

(1982), 70 Ohio St.2d 218, 436 N.E.2d 1008. BWC asserts that it was reversible error for the court to allow the following question to Dr. Zellers: "Can repetitive use, industrial job requirements worsen or add insult to an injury?" Zellers' Deposition at 60. Given that appellee based his claim on the tarp-throwing incident of October 11, 1999, BWC contends that the allowance of this question allowed appellee to add a mechanism of injury that was not pleaded administratively. However, in the context of the entire trial, we are unpersuaded by BWC's theory and decline to find that the allowance of this isolated question constituted an abuse of discretion.

{¶59} Accordingly, BWC's Third Assignment of Error is overruled.

{¶60} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio, is hereby affirmed.

By: Wise, P. J.

Edwards, J., and

Boggins, J., concur.

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JUDGES

JWW/d 1027

[Cite as *Herron v. Baker Hi-Way Express,* 2004-Ohio-6681.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BILLY E. HERRON	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BAKER HI-WAY EXPRESS, et al.	:	
	:	
Defendants-Appellants	:	Case No. 2003 AP 10 0080

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs to Appellant BWC.

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JUDGES