[Cite as *Thomas v. Timken Co.*, 2009-Ohio-3441.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
DENNIS J. THOMAS	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00189
THE TIMKEN COMPANY, ET AL	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2007-CV-04354
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	July 13, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
A. JAMES TSANGEOS 1810 36th Street N.W. Canton, OH 44709-2739	STEPHEN E. MATASICH Millennium Centre – Suite 300 200 Market Avenue North Box 24213 Canton, OH 44701-4213

Gwin, P.J.

{¶1} Plaintiff-appellant Dennis J. Thomas appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, which found he is not entitled to receive Workers' Compensation benefits for injuries arising out of his employment with defendant-appellee, The Timken Company. Appellant assigns a single error to the trial court:

{¶2} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO THE ISSUE OF WHETHER PLAINTIFF SUFFERED A COMPENSABLE INJURY."

{¶3} The record indicates on December 30, 2004, appellant was operating a rubber wheeled forklift, known as a "picker", in the scope of his employment at appellee's facility. In order to operate the picker, appellant stood on a platform in the compartment of the picker. The platform measured approximately 16 inches by 16 inches, and was elevated off the floor approximately 14 inches. Appellant fell backwards off the picker and struck his head on the cement floor, resulting in a 2.5 centimeter scalp laceration. Appellant asserts he does not recall anything about the accident.

{¶4} Appellee rejected appellant's Workers' Compensation claim. Appellant was unsuccessful throughout the administrative appeal. Appellant appealed the matter to the Court of Common Pleas, and filed a complaint alleging simply that he had sustained an accidental injury during the course of and arising out of his employment. The trial court entered summary judgment on behalf of appellee, and appellant appealed to this court.

{¶5} Civ. R. 56 states in pertinent part:

{¶6} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶7} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶8} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The*

Wedding Party, Inc. (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶10} R.C. 4123.01(C) states that for an injury to be compensable from the workers' compensation fund, it must be "received in the course of, and arising out of, the injured employee's employment." *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 551 N.E.2d 1271. We must construe the element "arising out of" considering the totality of the circumstances to determine if a causal connection exists between an employee's injury and his employment. Id. at 277, citing *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 20 O.O.3d 376, 423 N.E.2d 96.

{¶11} When a worker is injured, but does not recall the accident and is not able to identify the cause of his injury, and there are no witnesses who can offer an explanation, there are two possible scenarios. The injured worker may have been previously healthy, or may have had an existing medical condition which could have precipitated the accident. If the injured worker has been previously healthy, the Ohio

Supreme Court has held if the employee comes forward with evidence eliminating any idiopathic cause for the injury, then there is a presumption the injury was caused by something in the work conditions or environment. *Waller v. Mayfield* (1988), 37 Ohio St.3d 118, 524 N.E.2d 458.

{¶12} On the other hand, an injured employee may have a physical condition which caused the accident. Under these circumstances, the employee must show that although the workplace conditions did not cause him to fall, his working conditions and surroundings caused him to suffer worse injuries. An injury sustained from a fall brought on by an idiopathic condition is compensable "if the employment significantly contributed to the injury by placing the employee in a position which increased the dangerous effects of the fall." Id. at 123, citing *Industrial Commission v. Nelson* (1933), 127 Ohio St. 41, 186 N.E. 735.

{¶13} Appellant's complaint did not identify which theory of recovery applied to his accident. Appellee's motion for summary judgment asserted appellant could not eliminate all the idiopathic reasons for his fall. In response, appellant argued appellee had not come forward with evidence appellant had any physical problems which could have caused the accident. Appellant also asserted that even if there was an idiopathic reason for him to fall, the fact he fell from a height onto a concrete floor worsened his injuries.

{¶14} Appellee responded by arguing appellant had no expert testimony in support of his assertion a fall from a height of 14 inches onto a concrete floor would produce an injury more severe than if he had been standing directly on the floor.

{¶15} The record indicates prior to the accident appellant had suffered from migraine headaches, involving severe pain, nausea, vomiting, and visual disturbances. In his deposition, appellant testified Dr. Casanova told appellant he had epileptic type seizures, but in the doctor's opinion, appellant had a seizure because he hit his head rather than before he hit his head.

{¶16} Appellant took the deposition of Constance Buckridge, a co-worker. She testified she was standing on another picker waiting for appellant to finish the job he was doing so she could go get some other material. She testified as she watched him, his arm came up stiffly from his side, and his face was contorted. He fell over backwards. When she got to him, he was lying on the floor unresponsive and bleeding. She yelled his name and he did not respond. Appellant was shaking, his eyes were rolling around in his head, and his teeth were clenched.

{¶17} Appellant also took the deposition of Janice Arnold, another co-worker. She testified she did not see appellant fall because her back was turned, but when she heard Constance Buckridge scream, she ran over to appellant. Arnold testified blood was gushing from appellant's head, his face was "tight", and his teeth clenched. She testified appellant was moving, but she did not notice his eyes.

{¶18} Contrary to appellant's assertions, appellee does not have the burden of demonstrating something in his medical history caused him to fall. *Waller*, supra. Appellant bore the burden of eliminating all idiopathic causes, and we agree with the trial court he did not meet this burden.

{¶19} In addition, the trial court found appellant had not presented expert testimony that his injuries were made worse because he fell from a height of 14 inches.

We find the court erred. We find that this is a question of fact within the experience and understanding of a lay person, and expert testimony is not required to raise an issue of fact. If an issue is "within the common knowledge and experience of jurors, expert testimony is not required." *Berdyck v. Shinde*, 66 Ohio St.3d 573, 581, 1993 -Ohio- 183, 613 N.E.2d 1014, citation deleted.

{¶20} Under R.C. 4123.512(A), an injured worker may only appeal to the common pleas court a decision involving the "right to participate" in the workers' compensation fund. See *White v. Conrad,* 102 Ohio St.3d 125, 2004-Ohio-2148, 807 N.E.2d 327, at paragraphs10-13; *State ex rel. Liposchak v. Industrial Commission* (2000), 90 Ohio St.3d 276, 278-279, 737 N.E.2d 519. This means the only question subject to judicial review is "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." Id. at 279. A decision regarding the extent of a claimant's injury or disability is not appealable to the common pleas court, Id. We conclude appellant need only demonstrate the workplace conditions worsened his injury, but not how much worse the injury was because of the work conditions and environment. The extent of appellant's injury is for the Commission to determine.

{¶21} We find reasonable minds could differ on this issue of whether appellant's injury was exacerbated by the work conditions, and we conclude the trial court erred in granting summary judgment in favor of appellee.

{¶22} The assignment of error is sustained.

{¶23} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed.

By Gwin, J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

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[Cite as *Thomas v. Timken Co.*, 2009-Ohio-3441.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DENNIS J. THOMAS Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
THE TIMKEN COMPANY, ET AL Defendant-Appellee	:	CASE NO. 2008-CA-00189

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY