[Cite as *George v. Miracle Solutions, Inc.*, 2009-Ohio-3659.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ANITA LEE GEORGE	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00088
MIRACLE SOLUTIONS, INC., ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 08-CV-4181
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 27, 2009

APPEARANCES:
For Plaintiff-Appellant:

ANITA LEE GEORGE, pro se
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Canton, OH 44706

For Defendant-Appellee
Miracle Solutions, Inc:

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For Defendant-Appellee
Administrator, Ohio Bureau of Workers' Compensation:

VINCENT T. LOMBARDO
State Office Bldg., 11th Floor
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Cleveland, OH 44113

Gwin, P.J.

{¶1} Plaintiff-appellant, Anita Lee George appeals a summary judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of defendants-appellees Miracle Solutions, Inc. and the Administrator of Ohio Bureau of Workers' Compensation. Appellant assigns three errors to the trial court:

{¶2} "I. THE TRIAL COMMITTED ERROR WHEN IT GRANTED THE APPELLEES, B.W.C. AND MIRACLE SOLUTION INC. (sic) MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW WHEN THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT DO EXIST IN THE FIRST INJURY REPORT AND THE MARCH 5, 2008 PHYSICIAN DIAGNOSIS OF TRIGGER AND CARPAL TUNNELL SYNDROME WAS NEVER SUBMITTED IN THE PLAINTIFF'S CLAIM.

{¶3} "II. THE TRIAL COURT COMMITTED ERROR WHEN APPELLEE, BWC LAW DIRECTOR WAS ALLOWED TO FILE AN UNTIMELY ANSWER THAT WAS MORE THAN 100 DAYS LATE WHEN THERE WAS NO EXTENSION REQUESTED AND THE APPELLANT'S MOTION TO STRIKE AND MOTION FOR DEFAULT JUDGMENT WAS NOT WELL TAKEN.

{¶4} "III. THE TRIAL COURT COMMITTED ERROR WHEN THE PLAINTIFF WAS NOT ALLOWED TO SUBMIT AN EXPERT WITNESS ON HER WORK RELATED INJURY OF TRIGGER FINGER AND THE COURT FAILED TO HAVE BOTH APPELLEES TO SUBMIT A QUALIFIED WITNESS THAT WILL ADDRESS THE MATTER AT ISSUE."

{¶5} The record indicates appellant filed a Workers' Compensation claim, asserting she had sustained an occupational injury or disease while employed by

Miracle Solutions, Inc. Her claim was for trigger fingers of the right thumb, right second finger, right fourth finger, left third finger, left fourth finger, and bilateral carpel tunnel syndrome. Appellant's claim was disallowed at all administrative levels. Appellant then filed an appeal to the Stark County Court of Common Pleas.

{¶6} It appears appellant had a prior Workers' Compensation claim which was allowed for bilateral carpel tunnel syndrome, trigger fingers of left thumb, right fifth finger, right second finger, left second finger, left fifth finger, right third finger, as well as bilateral wrist strain and bilateral ulnar collateral ligament strain.

{¶7} On January 30, 2009, appellee Administrator filed a motion to dismiss appellant's complaint, in which the appellee Miracle Solutions, Inc. joined on February 2. The court converted the motion to dismiss to a motion for summary judgment. Appellees asserted appellant had stated she would not be presenting any medical expert testimony at trial to establish a causal connection between any alleged injury and work incident or work activity. Appellant denies making this statement. The court's pre-trial order directed all discovery in the case, including expert witness identification and production of expert reports, must be completed on or before March 9, 2009.

{¶8} The trial court's judgment entry granting summary judgment found as of the date of filing, March 12, 2009, appellant had not identified an expert witness, nor had she provided a report from an expert witness demonstrating her medical condition was proximately caused by her workplace injury.

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

{¶10} "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."

{¶11} 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.

{¶12} 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.

{¶13} 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.

I. & III.

{¶14} Appellant alleges the court erred both as a matter of law and because the case presents genuine issues of material fact, and also erred by not permitting her to submit an expert witness report and not requiring either appellee to do so.

{¶15} Appellant carries the burden of proof, and must meet her burden by a preponderance of the evidence, *Stevens v. Industrial Commission* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E.2d 198 . Appellant must establish she has received an injury and it was the proximate cause of her disability, *Phillips v. Ingersoll-Humphreys Division, Borg-Warner Corporation* (1972), 32 Ohio St. 2d 266, 61 O.O. 493, 291 N.E.2d 736. When the causal connection between an injury and a subsequent physical disability involves a question not within the knowledge of lay witnesses or members of the jury, expert testimony must be presented to establish the causal connection by probability, and not mere possibility, *Stacey v. Carnegie-Illinois Corp.* (1951), 156 Ohio St. 205, 101 N.E.2d 897.

{¶16} Appellant appears to concede expert medical evidence is necessary here. Appellant did not comply with the court's pretrial order to disclose her expert and the expert's written opinion within the deadline, and did not request an extension of time.

{¶17} The court found on the first report of injury, the examining doctor checked the "yes" box in response to the inquiry "is the injury causally related to the industrial accident?" The court found this did not qualify as an expert report and did not state the doctor's opinion in terms of the probability appellant's condition was caused by her employment. The court concluded appellant had not come forward with evidence of causation, and thus had failed to meet her burden of proof. We agree.

{¶18} Appellant urges appellees did not produce any fair and impartial expert witnesses. Nevertheless, because appellant bears the burden of proof, the court did not err in not requiring expert testimony from either appellee.

{¶19} The first and third assignments of error are overruled.

II

{¶20} In her second assignment of error, appellant argues the court erred by permitting appellee the Bureau of Workers' Compensation to file an untimely answer when it had not requested the extension of time.

{¶21} The court overruled appellant's motion to strike the answer and noted she had not filed for default judgment before appellee Administrator filed the answer. The court found the defendant employer, appellee Miracle Solutions, Inc., had filed a timely answer, and for this reason, it was not appropriate to strike the Administrator's answer, and not appropriate to enter default judgment against it. We agree.

{¶22} The second assignment of error is overruled.

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

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0708

[Cite as *George v. Miracle Solutions, Inc.*, 2009-Ohio-3659.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ANITA LEE GEORGE	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MIRACLE SOLUTIONS, INC., ET AL	:	
Defendant-Appellee	:	CASE NO. 2009-CA-00088

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE