[Cite as *Todd v. Todd Heating Plumbing Bldg. Co., Inc.*, 2010-Ohio-5299.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHRIS L. TODD	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
TODD HEATING PLUMBING	:	Case No. 10CA000017
BUILDING CO., INC., ET AL.	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 09-WC-270
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 29, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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For Administrator, Bureau of Workers' Compensation

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Farmer, J.

{¶1} On July 26, 2005, appellant, Chris Todd, struck his head on some trusses while working for appellee, Todd Heating and Plumbing Company, Inc. On July 7, 2006, appellant filed an application for payment of medical benefits or first report of injury. The Bureau of Workers' Compensation (hereinafter "Bureau") denied the claim on July 28, 2008. Appellant did not appeal this decision.

{¶2} On January 17, 2008, appellant filed a second report of injury for the same injury. On January 17, 2009, the Industrial Commission denied the claim. This order was affirmed on February 27, 2009.

{¶3} On May 15, 2009, appellant filed his complaint with the Court of Common Pleas of Guernsey County, Ohio. On January 15, 2010, the Bureau filed a motion to dismiss or in the alternative, a motion for summary judgment, asserting the doctrine of res judicata barred appellant's claims. Appellant also filed a motion for summary judgment. By entry filed March 16, 2010, the trial court denied the Bureau's motion to dismiss, but granted it's motion for summary judgment

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THIS COURT SHOULD VACATE THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT AND INSTEAD FIND SUMMARY JUDGMENT IN THE APPELLANT'S FAVOR THAT THE BUREAU OF WORKERS' COMPENSATION SHOULD CONSIDER THE APPELLANT'S CASE ON THE MERITS BECAUSE

GREENE MANDATES THAT *RES JUDICATA* DOES NOT APPLY TO THE APPELLANT'S FIRST CLAIM."

I

{¶6} Appellant claims the trial court erred in granting summary judgment to appellee and in finding that res judicata bars the relitigation of his right to participate in the workers' compensation program. We disagree.

{¶7} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶8} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶10} Appellant argues the trial court erred in deciding the doctrine of res judicata is applicable sub judice. Res judicata is defined as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 1995-Ohio-331, syllabus.

{¶11} In support of his position, appellant argues his case was not litigated on the merits and the holding of *Greene v. Conrad,* (August 21, 1997), Franklin App. No. 96APE12-1780, at 3, applies:

{¶12} "The doctrine of *res judicata* is applicable to the orders of administrative agencies, but only when the order is the product of administrative proceedings that are 'of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding.' *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263, 510 N.E.2d 373 (quoting *Superior's Brand v. Lindley* [1980], 62 Ohio St.2d 133, 403 N.E.2d 996, syllabus); see *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 283, 466 N.E.2d 848 (holding that doctrine was inapplicable because FCC order was legislative rather than adjudicative in nature); *Gerstenberger v. Macedonia* (1994), 97 Ohio App.3d 167, 173-174, 646 N.E.2d 489 (holding that doctrine was inapplicable to prior civil service commission order because, *inter alia,* city did not have opportunity to fully litigate all issues presented); *Independence v. Maynard* (1985), 25 Ohio App.3d 20, 28, 495 N.E.2d 444 (holding that doctrine was inapplicable to EPA order granting landfill installation permit), certiorari denied (1986), 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 717. In defining the scope of judicial review of administrative proceedings under R.C. 2506.01, the Supreme Court

held: 'Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence.' *M.J. Kelley Co. v. Cleveland* (1972), 32 Ohio St.2d 150, 290 N.E.2d 562, paragraph two of the syllabus. The Second Restatement of Judgments adopts the doctrine of *res judicata* as to any 'adjudicative determination by an administrative tribunal***only insofar as the proceedings resulting in the determination entailed the essential elements of adjudication.' Restatement of the Law 2d, Judgments (1980) 266, Section 83. Comment *b* to Section 83 summarizes this requirement as that of 'the essential procedural characteristics of a court.' *Id.* at 269."

{¶13} Under the specific facts of *Greene,* our brethren from the Tenth District found the Bureau did not conduct an adjudicative proceeding as guaranteed by statute. As framed by the *Greene* case, the extent of our inquiry is limited to whether there was a review by the Administrator "of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved." *Set Products, Inc.,* supra.

{¶14} In *Greene,* the only review made was via telephone calls to the claimant's physician relative to the claimant's condition. The phone calls were not returned. There was no presentation of a treating physician's report or an independent review by a physician from the Bureau.

{¶15} The motion for summary judgment filed by appellee in this case included the verified file of the Bureau. The Bureau requested a physician's review of appellant's claim which was conducted by Charles Lindquist, Jr., D.C., the records of appellant's treating physician, Howard Marsh, M.D., and the records of appellant's chiropractic physician, Dr. Michael T. Robinson.

{¶16} Dr. Marsh's impressions were consistently reported as hypertension and recurrent episodes of dysequilibrium. A radiology report dated April 2006 listed the admitting diagnosis as "disequilibrium" caused by "disequilibrium":

{¶17} "FINDINGS: There is no abnormal intraaxial or extraaxial fluid collections, no mass, nor hematoma. The ventricles and subarachnoid spaces are within normal limits. There is no shift in midline. There is normal gray/white matter signal characteristics. However, there is prominent FLAIR signal of the anterior horns of the lateral ventricles bilaterally. This is particularly seen on the left. The internal auditory canals are symmetric. The cerebellar pontine angles are maintained. There is no abnormal restricted water diffusion.

{¶18} "IMPRESSION: There is prominent periventricular high FLAIR signal seen around the frontal horns bilaterally, left greater than right. This could represent asymmetrically prominent frontal horn 'caps' or 'ependymitis granularis' which is a normal finding. However, due to the asymmetry correlation to exclude another demyelinating process is suggested. No other lesions are evident."

{¶19} A report from Good Samaritan Emergency dated June 9, 2006, indicating appellant reported recurrent dizziness, contained the following diagnosis: "Final: Primary: Chronic Dizziness – Uncertain Etiology, Additional: Chronic Tension Headache."

{¶20} Appellant's chiropractor physician, Dr. Robinson, opined in a letter dated July 17, 2006, that appellant's "dizziness and lightheadedness associated with head and neck pain" "may be the result of his injury on July 26, 2005."

{¶21} In a report dated July 24, 2006, the Bureau's reviewing physician, Dr. Lindquist, found no medical evidence of a relationship between appellant's claimed injury and the dizziness:

{¶22} "On 5/18/06, Mr. Todd approaches Dr. Robinson, who provides no medical records, medical history, history of prior trauma, or more importantly interim history. Dr. Robinson provides no examination and the only cervical spine documentation is the MRI of 6/27/06, showing some reduction in normal cervical lordotic curve, which can be the baseline, as well as some relative canal narrowing from C3 through C5, which may be developmental. There is no evidence whatsoever of a retrolisthesis, which is a posterior motion of one vertebral body upon the other, and in order for this to be unstable, that movement must be greater than 3.5 mm. This is not in evidence. In fact, the MRI of 6/27/05 states, 'Straightening of the cervical spine can reflect a degree of muscular spasm. Alignment is otherwise unremarkable.' Dr. Robinson provides no appropriate documentation to show any form of industrial injury, no evidence of a Fitz-Ritson test, no evidence of a retrolisthesis, and provides for supposition as per patient complaint only. The documentation provided in this file from Dr. Marsh and Good Samaritan Hospital provides no evidence at all of an industrial injury from 7/26/05."

{¶23} Appellant argues Dr. Lindquist's reference to the "Fitz-Ritson" test as the proper diagnostic test relative to appellant's claimed condition shifted the burden, and further, appellant implies there was no adjudicative review for both sides to present their case à la the *Greene* rational.

{¶24} We disagree with appellant's interpretation of the evidence. Dr. Lindquist found the evidence to be lacking to substantiate the claimed condition. The time to challenge that decision was an appeal of the 2006 claim's denial. Appellant chose not to appeal the decision.

{¶25} We find given the specific fact of this case, *Greene* does not apply. With the reports of two of appellant's own physicians, plus the review of Dr. Linquist, there was an adjudication of appellant's claim.

{¶26} We find this case is similar to *Godfrey v. Administrator, Ohio Bureau of Workers' Compensation,* Hamilton App. No. C-061055, 2007-Ohio-5575, ¶12:

{¶27} "Godfrey contends that there was insufficient information available to the BWC to adjudicate her first claim upon the merits. But the record reveals that the BWC received and reviewed medical records and medical notes from Drs. James Johnson and Janet Cobb regarding Godfrey's claim. The BWC also received and reviewed documentation from Godfrey and her employer prior to denying her claim. Thus, the BWC did not deny Godfrey's application based upon a lack of information or a failure to provide requested information, but rather upon conflicting evidence in the record.***Consequently, the *Greene* case and Industrial Commission Resolution 98-1-02 did not apply to her claim." (Footnote omitted.)

{¶28} In this case as in *Godfrey,* appellant's position à la the medical records and opinions of appellant's physicians was in the record for review. The fact that a test for a specific condition was not given does not abrogate the quasi-adjudicative process sub judice.

{¶29} Upon review, we concur with the trial court's analysis that res judicata applied because the same issue was adjudicated via the first complaint in 2006.

{¶30} The sole assignment of error is denied.

{¶31} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/sg920

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CHRIS L. TODD	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TODD HEATING PLUMBING BUILDING CO., INC., ET AL.	:	
Defendants-Appellees	:	CASE NO. 10CA000017

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

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES