

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JENNIFER WILLIAMS	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-VS-	:	
	:	Case No. 2016 AP 03 0016
MINUTE MEN SELECT, INC. AND	:	2016 AP 04 0020
BUREAU OF WORKERS'	:	
COMPENSATION	:	
	:	<u>O P I N I O N</u>
Defendants-Appellees	:	

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2014CW090548
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	October 21, 2016
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APPEARANCES:

For - Appellant	For – Appellee Minute Man Select, Inc.
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Gwin, P.J.

{¶1} Appellant appeals the judgment entries of the Tuscarawas County Court of Common Pleas entering final judgment for appellee after a jury verdict finding appellant was not entitled to participate in workers' compensation for RSD of the left foot and ankle.

Facts & Procedural History

{¶2} On December 28, 2012, appellant Jennifer Williams was employed as a state tested nurse's aide for appellee Minute Men Select, Inc. Appellant slipped and fell in the parking lot while leaving work, injuring her left ankle. Appellant's workers' compensation claim was allowed for: left ankle bimalleolar fracture, major depressive disorder, pain disorder, and post-operation wound infection, left ankle.

{¶3} After the initial allowance of the claim, appellant filed for the additional allowance of reflex sympathetic dystrophy syndrome ("RSD") of the left foot and ankle. The Industrial Commission of Ohio disallowed appellant's claim for RSD. Appellant thus filed a complaint with the trial court on September 11, 2014, contesting the disallowance of her RSD claim.

{¶4} On January 26, 2016, appellee filed a motion in limine to exclude the portions of the medical records made by non-testifying doctors diagnosing appellant with or opining appellant had RSD. Appellant filed a brief in opposition to appellee's motion and argued she should be able to present evidence about the medical opinions of non-testifying doctors. In a February 2, 2016 judgment entry, the trial court granted appellee's motion in limine and found the medical opinions and/or diagnoses of the non-testifying doctors are hearsay and are not subject to the hearsay exceptions contained in either Evid.R. 803(4) or Evid.R. 803(6).

{¶5} Appellant filed a motion in limine of her own on January 28, 2016, regarding separate medical conditions and seeking to exclude certain previous medical records of appellant as irrelevant and as being unfairly prejudicial. Appellee argued evidence of appellant's other health conditions and treatment were relevant to the credibility of her claim and her diagnosis. On February 2, 2016, the trial court filed a judgment entry denying appellant's motion, but stated appellant could renew her motion at trial.

{¶6} A jury trial was held on February 3, 2016 on the disallowance of appellant's claim for RSD of the left foot and ankle. Appellant testified as to her injury and course of treatment. Dr. Hochman ("Hochman"), appellant's expert, testified on appellant's behalf and detailed his exam of appellant. He stated that, his opinion within a reasonable degree of medical probability, is that appellant has RSD of the left foot and ankle. He testified the medical community does not necessarily agree on how to diagnose RSD because doctors do not know the pathophysiology of the condition. Hochman stated there is no gold standard test for RSD and no study to diagnose it, so it is accumulative of the patient's history and the patient's physical exam findings. Hochman testified previous aches and pains and/or infections of appellant are not relevant to the diagnosis of RSD. On cross-examination, Hochman stated he was not aware of any previous prescription or narcotic pain medication prescribed to appellant.

{¶7} Dr. Glazer ("Glazer"), expert for appellee, also testified as to his exam of appellant. Glazer defined RSD as pain out of proportion to an injury, accompanied by certain physiological occurrences. Glazer testified there are a variety of symptoms of RSD and no one knows for sure what causes it. Glazer stated RSD is often misdiagnosed and there is some school of thought that the condition does not exist. According to Glazer,

other conditions commonly confused with RSD include pain disorders and/or psychiatric problems with the manifestation of pain. Glazer testified an accurate medical history is very important to a RSD diagnosis because it is important to determine if the person has a history of being prone to pain and whether they have pain issues. Further, that when diagnosing RSD, Glazer would want to know if a patient has a history of psychiatric conditions and pain complaints.

{¶8} As to the medical records introduced by appellee, Glazer stated he found entries that were probative of appellant not having RSD, including a multitude of emergency room visits with complaints of pain out of proportion to appellant's subjective complaints, and a pattern of going to the emergency room with extreme pain with the doctor not finding anything wrong. Glazer testified about his exam of appellant and stated he asked for her medical history during the exam, but appellant did not identify the various problems she went to the emergency room for to him. Glazer stated this would have been important for him to know. He stated that, his opinion within a reasonable degree of medical probability, is that appellant does not have RSD of the left foot and ankle.

{¶9} Appellant attempted to introduce medical records of Dr. Takla, Dr. Bennett, Dr. Goldner, and Dr. Barrett through the testimony of Hochman. In his deposition, Hochman testified he reviewed the records at issue, all of which contained opinions that appellant has RSD. Appellee objected to certain portions of the records where these doctors listed a diagnosis or assessment of RSD since these doctors did not testify at trial. The trial court sustained appellee's objection, but only as to those portions of the records with the diagnosis or assessment from the non-testifying doctors as to RSD. Thus, only those portions of the medical records at issue were redacted.

{¶10} As to Dr. Takla's records, the portion of the pain management interval notes stating Dr. Bennett diagnosed appellant with RSD and Takla's diagnosis as "possible RSD" were redacted (Exhibit 8). Dr. Bennett's records, including an initial medical exam and progress note, were redacted to exclude his assessment of RSD and his diagnosis that appellant has a "classic case of RSD" (Exhibit 10). Dr. Goldner's chart notes were redacted to exclude his impression that appellant's pain was a result of RSD and his diagnosis of RSD (Exhibit 13).

{¶11} Appellee attempted to introduce other medical records of appellant. Appellant objected to Exhibit A, portions of Exhibit B, portions of Exhibit G, J, K, and L. The trial court sustained appellant's objection and did not admit Exhibits A, J, K, and L. The trial court partially sustained appellant's objections as to the records in Exhibit B, but admitted several medical records submitted by appellee. These included: progress notes in 2011, 2012, and 2013 for appellant having pain everywhere, joint pain, stiffness, severe struggles to walk, contusions after a car accident, anxiety, muscle weakness, soreness in legs, head and chest cold, extreme hip and leg pain, heartburn, and severe cramps in both legs; pain management notes for pain involving appellant's right and left foot, and unbearable pain in the whole body; admission notes of possible RSD in the left foot, and routine visit notes for waking up at night due to pain in the legs. It also included notes on several foot scans and x-rays of appellant's ankle and foot.

{¶12} The trial court overruled appellant's objections and admitted Exhibit G. The exhibit contains records from appellant's emergency room visits for various issues, including: ear and neck pain, a wrist contusion, shortness of breath, chest pain, thumb pain, back pain, chest pain, eye pain, pelvic pain, and back pain. The records also

contained discharge instructions, with a few containing instructions for narcotic pain medication.

{¶13} The jury reached a verdict on February 5, 2016, finding appellant was not entitled to participate in the workers' compensation system for the condition of RSD of the left foot and ankle. The trial court filed a judgment entry on February 9, 2016 rendering judgment for appellee. On March 8, 2016, the trial court entered another judgment entry for appellee with costs included.

{¶14} Appellant appeals the judgment entries of the Tuscarawas County Court of Common Pleas and assigns the following as error:

{¶15} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE MINUTE MEN SELECT'S MOTION TO EXCLUDE MEDICAL OPINIONS OF NON-TESTIFYING DOCTORS.

{¶16} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE RELATING TO PLAINTIFF'S SEPARATE MEDICAL CONDITIONS."

{¶17} In workers' compensation cases pursuant to R.C. 4123.512, the plaintiff has the burden to prove entitlement to participate in the benefits of workers' compensation laws for the specific medical condition addressed by the Industrial Commission and appealed to the common pleas court. *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155. To prevail, the plaintiff must prove, by a preponderance of the evidence, that the requested condition was proximately caused by the work incident. *Fox v. Indus. Comm.*, 162 Ohio St. 569, 125 N.E.2d 1 (1955).

I.

{¶18} In her first assignment of error, appellant argues the trial court erred in granting appellee's motion to exclude the medical records of the non-testifying doctors who diagnosed or assessed appellant as having RSD. The trial court partially admitted the exhibits and did not redact any evidence about appellant's treatment, but excluded the physician's diagnosis and/or opinions because they constituted hearsay. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987).

{¶19} Appellant first contends the redacted portions of the medical records are admissible pursuant to Evid.R. 803(4) as statements made for the purpose of medical treatment. Evid.R. 803(4) provides the following are admissible:

Statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶20} The rule excepts these statements because of the "assumption that a person will be truthful about his physical condition to a physician because of the risk of harmful treatment resulting from untruthful statements." Staff Notes to Evid.R. 803(4). The Staff Notes to Evid.R. 803(4) also specifically state, "the exception is limited to those statements made by the patient which are reasonably pertinent to an accurate diagnosis * * *." Thus, Evid.R. 803(4) applies to statements made by a patient for purposes of that patient's medical diagnosis and treatment. *Johnson v. Cassens Transport Co.*, 158 Ohio App.3d 193, 2004-Ohio-4011, 814 N.E.2d 545 (3rd Dist.); *Guarino-Wong v. Hosler*, 1st

Dist. Hamilton No. C-120453, 2013-Ohio-1625. “It cannot be used to admit opinion testimony of treating physicians.” *Guarino-Wong v. Hosler*, 1st Dist. Hamilton No. C-120453, 2013-Ohio-1625.

{¶21} We find Evid.R. 803(4) to be inapplicable to the case at hand. In this case, the portion of the medical records that were redacted were the opinions and diagnoses of the doctors themselves, not appellant’s statements to the doctors. Thus, we find the trial court did not abuse its discretion in finding the medical diagnoses/opinions were not admissible pursuant to Evid.R. 803(4).

{¶22} Appellant next argues the redacted portions of the medical records are admissible pursuant to Evid.R. 803(6) as records of regularly conducted activity. The business records exception provides that certain documents and records are not excluded as hearsay if they are made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness. Evid.R. 803(6).

{¶23} Appellant encourages this Court to find the instant case analogous to and adopt the reasoning contained in *Smith v. Dillard's Dept. Store*, 8th Dist. Cuyahoga No. 75787, 2000-Ohio-2689. However, as this Court has previously noted, “the great weight of authority in Ohio holds that medical opinions and diagnoses are not within the hearsay exception of Rule 803(6).” *Melton v. Guy*, 5th Dist. Licking No 15-CA-33, 2016-Ohio-194; see also *Ruth v. Moncrief*, 2nd Dist. Montgomery No. 18479, 2001-Ohio-1709; *Bush v. Burchett*, 4th Dist. Athens No. 94CA2237, 1995 WL 356527 (June 13, 1995); *Meyers v.*

Hot Bagels Factory, Inc., 131 Ohio App.3d 82, 721 N.E.2d 1068 (1st Dist. 1999); *Guarino-Wong v. Hosler*, 1st Dist. Hamilton No. C-120453, 2013-Ohio-1625; *Jefferson v. Careworks of Ohio, Ltd.*, 193 Ohio App.3d 615, 2011-Ohio-1940, 953 N.E.2d 353 (10th Dist.).

{¶24} In determining whether a medical diagnosis included as hearsay in a business record is admissible, this Court has previously applied the test set forth by the Tenth District Court of Appeals in *Hytha v. Schwendeman*, 40 Ohio App.2d 478, 320 N.E.2d 312 (10th Dist. 1974). *State v. Boyer*, 5th Dist. Fairfield No. 15-CA-09, 2015-Ohio-4951; *Overcasher v. Northland Cranberries, Inc.*, 5th Dist. Stark No. 2003-CA-00365; *Melton v. Guy*, 5th Dist. Licking No 15-CA-33, 2016-Ohio-194. In *Hytha*, the court set forth several elements which must be present before the record of a medical diagnosis made by a physician may be admitted into evidence. These elements include the following: the record must have been a systematic entry kept in the records of the physician and made in the regular course of business; the diagnosis must have been the result of well-known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination; the diagnosis must not have rested solely upon the subjective complaints of the patient; the diagnosis must have been made by a qualified person; the evidence sought to be introduced must be competent and relevant; and it must be properly authenticated. *Hytha v. Schwendeman*, 40 Ohio App.2d 478, 320 N.E.2d 312 (10th Dist. 1974).

{¶25} In the instant case, appellant did not demonstrate the diagnoses were the result of well-known and accepted objective testing and examining practices and procedures which are not of such a technical nature as to require cross-examination; did

not demonstrate the diagnoses did not rest solely on the subjective complaints of appellant; and did not demonstrate the qualifications of the people making the diagnoses. We therefore conclude that the trial court did not abuse its discretion in finding the medical diagnoses/opinions were not admissible pursuant to Evid.R. 803(6). See *State v. Boyer*, 5th Dist. Fairfield No. 15-CA-09, 2015-Ohio-4951.

{¶26} Further, even if the trial court's exclusion of the diagnoses/opinions portions of the records was in error, we find the exclusion was, at most, harmless error. "An improper evidentiary ruling constitutes reversible error, however, only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Beard v. Meridia Huron Hospital*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323. At issue in this case was whether appellant was entitled to participate in the workers' compensation system for RSD of the left foot and ankle. Appellant presented to the jury the testimony of Dr. Hochman, who opined appellant had RSD as a result of the work incident. Appellant also introduced the medical records of the non-testifying physicians with regards to their treatment of appellant, excluding the physicians' diagnoses of RSD. After appellant rested, appellee presented the testimony of Dr. Glazer to the jury, who opined appellant did not have RSD.

{¶27} We find, based upon the testimony and the medical records that were admitted, any errors in excluding the portions of the medical records with the diagnoses of the non-testifying physicians was not prejudicial. The jury, as the trier of fact, heard testimony from appellant and her expert witness, Dr. Hochman, and the defense expert witness, Dr. Glazer, and determined appellant was not entitled to participate in the workers' compensation system for RSD of the left foot and ankle.

{¶28} Accordingly, we find the trial court did not abuse its discretion in excluding the portions of the medical records consisting of the diagnoses or opinions of non-testifying doctors. Further, assuming arguendo, that the trial court erred in excluding these portions of the records, we find such error was harmless. Appellant's first assignment of error is overruled.

II.

{¶29} In appellant's second assignment of error, she argues the trial court erred in not excluding evidence relating to her separate medical conditions as such evidence was irrelevant, prejudicial, and injected collateral matters which drew the focus of the jury away from the facts relevant to the single issue of RSD.

{¶30} The admission or exclusion of evidence lies in the trial court's sound discretion. *Rigby v. Lake County*, 58 Ohio St.3d 269, 569 N.E.2d 1056 (1991). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶31} Evidence Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to Evidence Rule 403(A), "although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶32} Upon review, we find the trial court did not abuse its discretion in finding the evidence relevant and not substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading of the jury. Hochman testified the medical community does not necessarily agree on how to diagnose RSD because doctors do not know the pathophysiology of the condition. Hochman further stated that since there is no gold standard test for RSD, it is accumulative of the patient's history and the patient's physical exam findings. Glazer testified RSD is often misdiagnosed, some doctors do not believe the condition exists, and an accurate medical history is very important to an RSD diagnosis.

{¶33} As to the records with regards to appellant having pain in various parts of the body, Glazer testified other conditions commonly confused with RSD include pain disorders and/or psychiatric problems with the manifestation of pain. Glazer stated when diagnosing RSD, he would want to know if a patient has a history of pain complaints. Glazer testified that in the medical records introduced by appellee, he found entries probative of appellant not having RSD, including a multitude of emergency room visits with complaints of pain out of portion to appellant's subjective complaints. Glazer stated he asked appellant about her medical history during his examination of her, but she did not inform him of the various problems she went to the emergency room for to him; further, that this information is important for him to know in order to diagnose RSD.

{¶34} With regards to the records regarding narcotic pain medication and psychological conditions, Glazer testified a history of pain medication use, prior pain complaints, and prior psychological issues would affect the diagnosis of RSD. Glazer also read from a treatise stating narcotic pain medication and psychological factors affect the diagnosis of RSD. Hochman stated he was not aware of any previous prescription or narcotic pain mediation prescribed to appellant.

{¶35} Thus, based upon the testimony of both experts, appellant's medical history is relevant to the RSD diagnosis. Additionally, the medical records at issue are relevant to the credibility of the experts. Appellant fails to demonstrate how, based upon the testimony of the experts, the probative value of the evidence is substantially outweighed by any prejudice or misleading of the jury.

{¶36} Further, even if the trial court's admission of these portions of the medical records was in error, we find the admission was, at most, harmless error. "An improper evidentiary ruling constitutes reversible error, however, only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Beard v. Meridia Huron Hospital*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323.

{¶37} In this case, information about appellant's other conditions and previous medical history was introduced via testimony in the case. Both Hochman and Glazer testified about appellant's other medical conditions with little or no objection from appellant. Glazer testified, without objection by appellant, that various other medical conditions were important to the formation of his opinion that appellant did not have RSD and specifically referenced the multiple emergency room visits and the pattern of pain symptoms. Glazer also stated, without objection, that appellant's multiple emergency room visits and the pattern of appellant going to the emergency room with extreme symptoms and finding nothing wrong was probative of her not having RSD. Appellant testified she was seeing a psychologist and a pain management doctor.

{¶38} Finally, as detailed above, the jury, as the trier of fact, heard testimony from appellant and her expert witness, Dr. Hochman, and Dr. Glazer, appellee's expert

witness, and determined appellant was not entitled to participate in the workers' compensation system for RSD of the left foot and ankle.

{¶39} Accordingly, we find the trial court did not abuse its discretion in admitting portions of the medical records in Exhibits B and G. Further, assuming arguendo, that the trial court erred in admitting portions of Exhibits B and G, we find such error was harmless. Appellant's second assignment of error is overruled.

{¶40} Based on the foregoing, the judgment entries of the Tuscarawas County Court of Common Pleas are affirmed.

By Gwin, P.J., and

Baldwin, J., concur;

Hoffman, J., concurs separately

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. CRAIG R. BALDWIN

Hoffman, J., concurring

{¶41} I concur in the majority's analysis and conclusion in the first assignment of error the trial court did not commit error in excluding the medical diagnosis of RSD made by Appellant's medical doctors other than that of Dr. Hochman. I write separately with respect thereto only to note had we, *arguendo*, found such constituted error, I would not have found the error harmless.¹

{¶42} I further concur in the majority's analysis and disposition of Appellant's second assignment of error (including the harmless analysis). I write separately in regard thereto only with respect to the standard of review to be applied by this Court.

{¶43} The majority cites *Rigby v. Lake County*, (1991) 58 Ohio St.3d 269, for the proposition the admission or exclusion of evidence lies in the trial court's sound discretion. (Majority Opinion at ¶30). I do not interpret *Rigby* as making such a bright line rule. Writing for a unanimous court in *Rigby*, Justice Sweeney stated: "**Ordinarily**, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, **so long as** such discretion is exercised in line with the rules of procedure and evidence." *Id.*, at 271, *emphasis added*.² That being said, because the issue in this cause involves the relevancy of Appellant's medical history as it related to the diagnosis of RSD, I agree the appropriate standard of review on this assigned error is abuse of discretion.

¹ Given the majority's analysis the evidence was properly excluded, any further discussion of harmless error is unnecessary.

² The issue in *Rigby* concerned the admissibility of a deposition that was not signed nor did it contain a waiver of signature. The Ohio Supreme Court ruled the issue was waived for review because the plaintiff had failed to file a motion to suppress the deposition.

