[Cite as *Bennett v. Goodremonts, Inc.*, 2011-Ohio-1264.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett	Court of Appeals No. L-10-1185
Appellant	Trial Court No. CI0200605864
v.	
Goodremont's, Inc., et al.	**DECISION AND JUDGMENT**
Appellee	Decided: March 18, 2011

* * * * *

Paul E. Hoeffel, for appellant.

Mike DeWine, Attorney General of Ohio, and Joshua W. Lanzinger, Assistant Attorney General, for appellee Administrator, Bureau of Workers' Compensation.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted the Administrator of the Bureau of Workers' Compensation's ("BWC") motion for a directed verdict on appellant's civil action to participate in the

Ohio workers' compensation fund for alleged injuries incurred during an automobile accident on February 28, 2006. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Mark A. Bennett, sets forth the following two assignments of error:

{¶ 3} "ASSIGNMENT OF ERROR NO. 1: The Court erred in directing a verdict for Appellees on the issue of "injury" which was not a finding made in the decision of the Industrial Commission that was appealed.

{¶ 4} "ASSIGNMENT OF ERROR NO. 2: The Court erred in directing a verdict where there was sufficient evidence that reasonable minds could well differ as to Appellant sustaining an injury, if such proof was necessary."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. In January 2006, appellant was hired by defendant, Goodremont's, as a territory manager. In this position, appellant spent approximately 80 percent of his work time contacting current and prospective clients at their places of business to demonstrate and sell photocopiers.

{¶ 6} On February 28, 2006, appellant was en route to Goodremont's central office for a presentation to a prospective client. While waiting at a yield on an exit ramp for the expressway, appellant's automobile was struck in the rear by another motorist.

{¶ 7} On March 29, 2006, appellant filed a claim with the BWC for alleged injuries to his back and neck sustained in the above accident. The BWC denied the claim

based on its determination that appellant was coming or going to work. As such, it did not arise out of appellant's employment. Appellant appealed this decision to a district hearing officer, and later to a staff hearing officer of the Industrial Commission. Both officers sustained the decision of the BWC. After the Industrial Commission denied appellant's further appeal, appellant began an action in the Lucas County Court of Common Pleas to "determine the claimant's right to participate in the fund upon the evidence adduced at the hearing."

{¶ 8} In May 2008, the trial court granted summary judgment to the BWC and Goodremont's, Inc., finding that appellant was barred from participation in the workers' compensation fund by the coming and going rule. On appeal of that decision, this court determined that the trial court's analysis of appellant's status as a semi-fixed situs employee was in error and remanded for further proceedings.

{¶ 9} On remand, a bench trial was conducted on April 16, 2010. At the close of appellant's case, appellee moved for a directed verdict based on appellant's failure to provide evidence of a compensable injury. The trial court heard arguments and considered post-trial briefs on the matter. The court then determined that appellant's alleged injuries were not of the sort that were common knowledge and required medical testimony to establish proximate cause.

{¶ 10} On June 24, 2010, based on this determination, and appellant's failure to offer any medical testimony establishing the proximate cause of appellant's injuries, the trial court granted appellee's motion for directed verdict. This appeal ensued.

{¶ 11} We begin our review by noting the well-established rule that, when an appeal is made to a trial court from a denial of claim of the Industrial Commission under R.C. 4123.512, the court has a mandatory duty to determine a claimant's right to participate in the workers' compensation fund. *Wagner v. Fulton Indus.* (1997) 116 Ohio App.3d 51, 54. See, also, *Marcum v. Barry* (1991), 76 Ohio App.3d 536, 539-40. It is not within the court's discretion to remand the case back to the Industrial Commission. *Wagner* at 54.

{¶ 12} A trial court conducting a hearing pursuant to R.C. 4123.512 does so de novo, regarding the specific medical condition that was presented to the Industrial Commission. *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, ¶ 8-9. The decision is based upon the evidence before it, not the evidence that was before the Industrial Commission. *Marcum* at 539-40; R.C. 4123.512(D). A claimant's right to participate in the fund will be predicated on his showing to the court by a preponderance of evidence, not only that his "injury rose out of and in the course of employment, but also that a direct or proximate causal relationship existed between his injury and his harm or disability." *White Motor Corp. v. Moore* (1976), 48 Ohio St.2d 156, paragraph one of the syllabus.

{¶ 13} In his first assignment of error, appellant claims that, where the Industrial Commission did not make a finding on the issue of injury, the trial court could not base its decision on this. However, once the decision of the Industrial Commission was appealed to the court, the issue to be determined was whether appellant had a right to

participate in the fund. To decide this issue, the court, in its de novo review, had to make a determination, based on the evidence before it, of whether the accident was a proximate cause of the alleged injuries.

{¶ 14} Appellant suggests that the trial court should have only ruled on whether the injury happened in the course of employment, and left the Industrial Commission to determine whether or not there was proximate cause. But, as stated above, once a court takes jurisdiction of an appeal from the Industrial Commission the court cannot remand it back to the commission. The court must make the determination of whether or not the claimant can participate in the fund. In doing so, both the issue of whether the injury occurred during the course of employment and whether there is a causal relationship between the accident and the injury being claimed must be addressed. Where the claimant fails to show a causal relationship, as occurred here, there is no error in directing a verdict adverse to the claimant. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, he claims that sufficient evidence and inferences were adduced at trial to support his claim of injury resulting from the automobile accident. In this assignment, appellant reiterates the argument made from his first assignment of error that the issue of injury was not before the court. Given that we have already determined this argument to be without merit, no further discussion of it is warranted. Rather, our inquiry in appellant's second assignment of error will focus on

whether appellant entered sufficient evidence or inferences to the court showing a causal relationship between his accident and his alleged injuries to avoid a directed verdict.

{¶ 16} When a claimant attempts to prove proximate cause of his injury, two general types of cases arise. *White Motor Corp.* at 159. In the first type, where the injury and the subsequent disability are matters of common knowledge, no medical testimony is required to carry the claimant's burden. Courts have interpreted these types of injuries to include such things as a visible bruise, id. at 160, or a fractured ankle, *Canterbury v. Skulina*, 11th Dist. No. 2000-0-0060, 2001-Ohio-8768.

{¶ 17} However, where the injury is "internal and elusive in nature, unaccompanied by any observable evidence," *Gibbs v. General Motors Corp.* (Mar. 27, 1987), 11th Dist. No. 3625, then the injury moves outside the realm of common knowledge and requires medical testimony to establish a causal link. Id. This standard has been applied in cases involving neck and back injuries caused by lifting heavy weights, *Howard v. Seaway Food Town, Inc.* (Aug. 14, 1998), 6th Dist. No. L-97-1322, neck and back injuries caused by being pushed, *Wright v. City of Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759, ¶ 19, and neck and back injuries caused in automobile accidents. *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131. See, also, *Krull v. Ryan*, 1st Dist. No. C-100019, 2010-Ohio-4422, ¶ 13 (discussing the applicability of *Rogers* to workers' compensation cases).

{¶ 18} In the present case, appellant's claimed injury is generic. The testimony by both appellant and his wife vaguely alleges only that appellant was injured without any

specific substance or detail. This by itself puts appellant's claim at odds with *Ward*, which requires a claimant to state a specific injury or medical condition upon which he seeks to participate in the fund. *Ward* at ¶ 10. Nonetheless, even were we to accept appellant's statements made in discovery that he injured his neck and back, his claim would still fail.

{¶ 19} As previously determined by this court, back and neck injuries require medical testimony to show a causal relationship. *Howard*, supra. These injuries are not normally visible, like a bruise or a break. A common person cannot ordinarily verify the cause or existence of such injuries in another person. Instead, they fit very neatly into the category of "internal or elusive injuries." Given the nature of such injuries, it is logical that a court must require expert medical testimony to prove causation for such injuries. See *Chilson v. Conrad*, 11th Dist. No. 2005-P-0044, 2006-Ohio-3423, ¶ 25.

{¶ 20} Appellant's argument that injury can be inferred by the fact that he was in an automobile accident is also unconvincing. There is no special category for automobile accidents that waives the need to provide expert medical testimony to show causation of injuries. Neck and back injuries suffered in automobile accidents cannot be determined by using the common knowledge standard. Expert medical testimony to show proximate cause is required. See *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131; *Mahaffey v. Stenzel* (Jan. 25, 1999), 4th Dist. No. 97CA2391, *Langford v. Dean* (Sept. 30, 1999), 8th Dist. No. 74854.

{¶ 21} Appellant failed to claim a specific injury for which he was seeking a right to participate in the fund, or provide any expert medical testimony showing a proximate causal relationship between any alleged injuries and his automobile accident. For the reasons stated herein, we find appellant's second assignment of error not well-taken.

{¶ 22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE