[Cite as *Kinsey v. Apex Bolt & Machine Co.*, 2013-Ohio-630.]

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

Kyle Kinsey	Court of Appeals No. L-12-1027
Appellant	Trial Court No. CI0201002872
v.	
Apex Bolt & Machine Company, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: February 22, 2013

* * * * *

Clint M. McBee, for appellant.

Jeffrey J. Perkins, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a summary judgment in favor of his employer by the Lucas County Court of Common Pleas in an R.C. 4123.512 appeal from denial of a workers' compensation claim. Because we conclude that appellant failed to present evidence showing that his claim arose from his workplace, we affirm.

{¶ 2} On July 24, 2007, appellant, Kyle Kinsey, was employed as a welder by appellee, Apex Bolt & Machine Company. According to appellant's deposition

testimony, at some point early in his shift that day, he began to experience gradually increasing pain and stiffness in his right wrist. He even declined to work overtime because of this discomfort.

{¶ 3} That evening he went to a hospital emergency room where he told the examining physician that he believed he had injured his wrist in repetitive welding at work. The emergency room doctor diagnosed a wrist strain with a possible fracture in the carpal area. She immobilized the wrist and prescribed analgesics and an anti-inflammatory medication. The doctor also completed a workers' compensation first report of injury form suggesting that appellant's injury was work related.

{¶ 4} Two days later, appellant was examined by an orthopedic specialist, Dr. Robert Kalb, who observed swelling in the wrist and suspected a right scaphoid fracture and right carpal tunnel syndrome due to swelling. Dr. Kalb prescribed pain medication and scheduled a follow-up in three weeks. A few days later, appellant returned to Dr. Kalb with extreme pain, swelling and nausea. The doctor observed redness and swelling in the wrist due to abscesses within the wrist. Dr. Kalb admitted appellant to the hospital and scheduled an arthroscopy for the next day.

{¶ 5} An MRI and x-rays failed to detect any fracture. The tests did reveal pockets of infection in the wrist. The abscesses in appellant's wrist were drained and surgically cleaned. Appellant was prescribed an antibiotic regimen and eventually received physical therapy to recover use of the hand. He now reports that he has yet to regain the full use of the hand.

{¶ 6} Appellant's workers' compensation claim for right wrist carpal tunnel syndrome and sepsis was initially allowed. Appellee appealed this decision. On appeal, a district hearing officer disallowed the carpal tunnel and sepsis, but allowed a claim for a strained right wrist. A further appeal to a staff hearing officer resulted in an allowance of wrist strain, carpal tunnel, sepsis, scaphoid fracture and cellulitis. The Industrial Commission of Ohio declined further appeal.

{¶ 7} On March 29, 2008, appellee instituted an R.C. 4123.512 appeal in the trial court. Appellant then filed his complaint, but later voluntarily dismissed and refiled. The matter proceeded to trial on March 29, 2011, but a mistrial was declared. On April 20, 2011, appellee moved for summary judgment, arguing that appellant was incapable of showing that his injuries were work related. Appellant filed a memorandum in opposition, pointing to the deposition testimony of Dr. Kalb that the injury appellant sustained was almost always work related when found in a young, healthy man like appellant.

{¶ 8} Appellee responded, asserting that the record was devoid of any evidence of a wrist fracture or stress induced carpal tunnel syndrome. Concerning the remainder of appellant's claims, appellee too pointed to Dr. Kalb's testimony. That testimony, appellee maintained, only supported conditions (infection, cellulitis, swelling induced carpal tunnel) that the doctor testified could only be induced by a cut or skin abrasion. Yet there was no testimony that appellant received a cut or skin abrasion at work. Indeed, in his own deposition testimony, appellant repeatedly denied sustaining any cut

or abrasion to his wrist at work. Absent evidence of a cut or abrasion at work, appellee argued, appellant failed to present evidence that his injury was causally related to his employment. Dr. Kalb's testimony that an injury like that of appellant was usually work related was pure speculation and could not form the basis of an award, appellee maintained.

{¶ 9} The trial court concluded that appellant failed to present evidence of a causal relationship between his injury and his employment and granted appellee's summary judgment motion. From this judgment, appellant brings this appeal.

{¶ 10} Appellant sets forth the following two assignments of error:

> I. The trial court committed error when it granted summary judgment because there was no evidence in the record to support its decision.
>
> II. The trial court committed error by granting summary judgment for Defendant/Appellant [sic] Apex Bolt & Machine Co.

{¶ 11} Since both of appellant's assignments of error assert essentially the same thing, we shall combine our discussion.

{¶ 12} Whenever there is an administrative determination of a claimant's right to participate in the workers' compensation fund, either the employer or the claimant may initiate an appeal. R.C. 4123.512(A). Irrespective of which party appeals, it is the claimant's responsibility to file a complaint in the appropriate common pleas court stating a cause of action to participate in the fund. *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d

411, 412, 704 N.E.2d 1212 (1998). Even, "where an employer appeals an unfavorable administrative decision to the court the claimant must, in effect, re-establish his workers' compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level." *Zuljevic v. Midland-Ross Corp.*, 62 Ohio St.2d 116, 118, 403 N.E.2d 986 (1980).

{¶ 13} The proceeding before the common pleas court is de novo, *Youghiogheny & Ohio Coal Co. v. Mayfield,* 11 Ohio St.3d 70, 71, 464 N.E.2d 133 (1984), and subject to the rules of civil procedure, including summary judgment pursuant to Civ.R. 56. *Robinson v. B.O.C. Group Gen. Motors Corp.,* 81 Ohio St.3d 361, 366-367, 691 N.E.2d 667 (1998), *rev'd on other grounds, Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482.

> In order to establish a right to workmen's compensation for harm or disability claimed to have resulted from an accidental injury, it is necessary for the claimant to show by a preponderance of the evidence, medical or otherwise, not only that his injury arose out of and in the course of his employment, but also that a direct or proximate causal relationship existed between his injury and his harm or disability. *White Motor Corp. v. Moore*, 48 Ohio St.2d 156, 357 N.E.2d 1069 (1976), paragraph one of the syllabus. (Citation omitted.)

{¶ 14} Appellate review of a summary judgment is also de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The appeals court employs

the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 15} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826,

675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 16} In this matter, the trial court concluded that appellant failed to present sufficient evidence to give rise to a question of fact concerning a causal relationship between his injury and his employment. The critical testimony comes from Dr. Kalb, appellant's own medical expert.

{¶ 17} First, Dr. Kalb's testimony undermined the existence of some of the medical conditions that the Industrial Commission allowed. Notwithstanding an initial tentative diagnosis of a fracture, multiple x-rays and an MRI failed to reveal any fracture. Dr. Kalb testified that the location of the pain in the wrist frequently leads an examining physician to suspect a fracture, but in hindsight it became apparent that the pain was due to the infection that was eventually found. The same was true of a tentative diagnosis of repetitive stress carpal tunnel syndrome. Once the swelling that induced the carpal tunnel syndrome is found to be associated with infection, this finding supersedes the tentative conclusion of repetitive stress carpal tunnel syndrome.

{¶ 18} The conditions that remain are cellulitis, swelling induced carpal tunnel syndrome due to infection and sepsis, the infection itself. All of these are associated with the infection, which both Dr. Kalb and appellee's medical expert testified could only be caused by a cut or abrasion to the skin somewhere near the site where the infection was found.

Dr. Kalb found no cut or abrasion near the site when he drained the infection. There is no notation of any cut or abrasion near the site from any of the medical records presented. Appellant, in his own deposition testimony, denied ever receiving a cut or abrasion near his wrist at work or anywhere else.

{¶ 19} The workers' compensation claimant has the duty to produce some evidence that his or her injury is causally connected to his employment. It is not enough that an illness or injury manifest itself at work; there must be a causal connection. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 277-278, 551 N.E.2d 1271 (1990). While this requirement must be liberally construed in favor of the claimant, there must be some evidence in support. *Id*. In this matter, appellant has simply failed to present any evidence that his wrist infection occurred as the result of his work.

{¶ 20} Consequently, even construing the facts most favorably to the non-moving party, appellant failed to present evidence sufficient to create a question of fact as to a causative connection between his employment and his infection. Appellee is entitled to judgment as a matter of law. Both of appellant's assignments of error are found not well-taken.

{¶ 21} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE