[Cite as *Mahone v. Conrad*, 2003-Ohio-874.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81204

THOMAS C. MAHONE Plaintiff-appellant -vs- JAMES CONRAD, ADMIN., BUREAU OF WORKER'S COMPENSATION, ET AL. Defendants-appellees	:	JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION:	FEBRUARY 27, 2003
CHARACTER OF PROCEEDING:	Civil appeal from the Court of Common Pleas Case No. CV-452333 CV-397105
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	

APPEARANCES:

For Plaintiff-Appellant:	THOMAS C. MAHONE, PRO SE 23700 Emery Road Warrensville Hts., Ohio 44128
For Defendant-Appellee:	PATRICIA F. WEISBERG, ESQ. JONATHAN D. GREENBERG, ESQ. WALTER & HAVERFIELD 1300 Terminal Tower

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ANN DYKE, J.:

{¶1} Plaintiff-appellant Thomas C. Mahone ("appellant") appeals from the judgment of the trial court which, after a jury trial, returned a verdict in favor Defendants-appellees James Conrad, Administrator, Bureau of Workers' Compensation ("appellee") and Industrial Security Service, Inc. ("ISS"). For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} On November 22, 1999, appellant filed a lawsuit in the Cuyahoga County Court of Common Pleas pursuant to R.C. 4123.512 appealing from the order of the Industrial Commission of Ohio disallowing his claims for personal injuries he suffered while on the job at ISS. On November 5, 2001, appellant filed a second lawsuit appealing the Industrial Commission of Ohio's order denying his request that the same Workers' Compensation claim be allowed for a separate alleged injury. The cases were consolidated, as both cases involved injuries arising out of the same incident and under the same Workers' Compensation claim number. The matter proceeded to trial on March 11, 2002, after which the jury returned a verdict in favor of ISS on all counts. On March 24, 2002, the appellant filed a statement of the evidence, pursuant to App.R. 9(C), to which the

ISS filed its own statement of the evidence and objections to appellant's statement of the evidence. By journal entry dated October 25, 2002, the trial court adopted ISS's statement of the evidence filed on July 18, 2002.

{¶3} The Statement of Evidence revealed that on January 17, 1999, appellant was employed by ISS after having been on disability for many years due to a chronic cervical lumbar spine condition. That evening, he slipped on a patch of ice and fell. The issue before the court was whether appellant suffered from a head injury, left shoulder contusion and strain, contusion of his left chest wall, cervical sprain, upper and lower back strain and a left torn rotator cuff as a result of his fall.

{¶4} Appellant offered the testimony of Dr. Lonnie Marsh as a lay witness.[1] Dr. Marsh testified that he examined appellant subsequent to his fall.

{¶5} ISS presented Dr. Dean Erickson as an expert, who testified that the medical records from the Marymount Hospital emergency room indicated that appellant had no trauma to his left shoulder, and that he had full range of motion but tenderness in the lumbar spine and along the chest wall. Further, Dr. Erickson testified that his report indicated that his neurological exam was normal and that x-rays of the cervical spine, chest and lumbosacral spine revealed no acute fractures, but there did exist a narrowing between C5/6. According to the hospital records, appellant was discharged that evening with a blunt head trauma and multiple contusions of the neck and low back. The matter was submitted to the jury, which found in favor of ISS on all counts. It is from this ruling that appellant now appeals, asserting four assignments of error for our review.

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[1]ISS moved to exclude Dr. Marsh's testimony because his license to practice medicine in Ohio was suspended at the time of trial. The court allowed Dr. Marsh's testimony as a lay witness.

{¶6} "I. The trial court abused its discretion when the trial court denied appellant's jury instructions relating to aggravation from being read to the jury."

{¶7} Appellant contends that the trial court erred in failing to instruct the jury that he would be entitled to participate in the Workers' Compensation Fund if he demonstrated that the incident aggravated his alleged pre-existing condition.

{¶8} We initially note that the duty to provide a record of the trial court proceedings for appellate review rests upon the appellant. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. When, as in this case, a transcript is unavailable, the appellant may prepare a statement of the evidence pursuant to App.R. 9(C). In this case, the appellant complied with App.R. 9(C) and filed a statement of the evidence, to which the appellee filed objections. The trial court thereafter adopted the appellee's statement of the evidence. However, the statement of the evidence is incomplete and inadequate with regard to the jury instructions. In the absence of a complete record, this court must presume the regularity of the trial court proceedings. *Knapp*, supra. We therefore overrule appellant's first assignment of error.

{¶9} "II. The trial court abused its discretion when it denied any and all medical evidence that had been filed with the Bureau of Worker's Compensation Program from going before the court or being admitted in court or before the jury for its deliberation thereby denying appellant a de novo trial."

{¶10} In his second assignment of error, appellant essentially avers that the trial court improperly granted a motion in limine to exclude evidence pertaining to the findings made by the Bureau of Workers' Compensation. He argues that he should have been permitted to introduce evidence of the proceedings before the Bureau and the Industrial

Commission. Appellant also claims that the trial court excluded "any and all evidence" that he presented in the administrative proceedings, which effectively denied him of a de novo proceeding before the court of common pleas.

{¶11} Pursuant to R.C. 4123.519, an appeal from the Industrial Commission is a de novo determination of both the facts and the law. The claimant is not limited to the record of evidence presented at the Industrial Commission but may offer evidence before the court of common pleas, as in any civil action. As the trier of fact, the jury decides de novo a single issue of the claimant's right to participate in the fund without deference to the decision of the Industrial Commission. *Grant v. Ohio Dept. of Liquor Control* (1993) 86 Ohio App.3d 76, citing *Maitland v. St. Anthony Hosp.* (Oct. 3, 1985), Franklin App. No. 85AP-301; *Marcum v. Barry* (1991), 76 Ohio App.3d 536. In a de novo appeal to the court of common pleas, the findings of the Industrial Commission become "irrelevant." *Skerya v. Indus. Comm.* (1986), 30 Ohio App.3d 154, 155. Unless the parties so stipulate, it is error for the trial court to rely upon the evidence presented before the commission. *Kiefer v. Daugherty* (Sept. 12, 1979), Crawford App. No. 3-78-15.

{¶12} The Statement of Evidence in this case indicates that appellant was permitted to introduce evidence of his injuries, including his medical records and testimony of a treating physician from the evening of his fall. He was not denied the opportunity to present evidence of his injuries, rather he was denied the opportunity to present the findings of the Industrial Commission. This denial was proper. We therefore overrule appellant's second assignment of error.

{¶13} "III. The trial court failed to address the issue of fraud, conspiracy and already allowed conditions omitted from appellant allow allowances. (sic)"

{¶14} In his third assignment of error, appellant claims that the trial court failed to address all of the issues he wished to present at trial. Specifically, he contends that he should have been able to present evidence of fraud and conspiracy on the part of the appellees in denying him workers' compensation benefits. We find no merit to appellant's assignment of error.

{¶15} We first note that appellant failed to raise claims of fraud or conspiracy in his complaint. Although issues not raised in the pleadings may be treated as if they had been raised in the pleadings when tried by express or implied consent of the parties, Civ.R. 15(B) requires that the amendment must be requested by motion. There is no indication in this case that appellant moved to amend the pleadings to conform to the evidence. We therefore find that the trial court was not required to afford relief that was not sought and accordingly overrule this assignment of error.

{¶16} "IV. The trial court committed reversible error when it refused, over plaintiff objection, to allowed (sic) any case law to be put before the jury and the court during the trial proceeding."

{¶17} In his final assignment of error, appellant avers that he should have been permitted to introduce case law supporting his position to the jury prior to deliberations and throughout the trial. We disagree.

{¶18} It is axiomatic that it is within the trial court's province to provide the jury with the appropriate standards of law which are sufficiently clear to allow a jury to apply the law to the facts of the case. *Schade v. Carnegio Body Co.* (1982), 70 Ohio St.2d 207, 210. The function of the trial court's general charge to the jury is to state clearly and concisely the principles of law necessary to enable the jury to accomplish the purpose desired.

Pickering v. Cirell (1955), 163 Ohio St. 1, 4. We find no support for appellant's contention that he should have been permitted to present case law to the jury and therefore overrule this assignment of error.

Judgment affirmed.

TIMOTHY E. MCMONAGLE, J., CONCURS.

PATRICIA ANN BLACKMON, P.J., DISSENTS.

(SEE ATTACHED DISSENTING OPINION)

ANN DYKE
JUDGE

PATRICIA ANN BLACKMON, P.J., DISSENTING:

{¶19} I respectfully dissent from the majority opinion. I believe the trial court abused its discretion when it limited Dr. Lonnie Marsh from testifying as an expert medical doctor for Mahone. At the time of the injury, Dr. Marsh examined and formed an opinion as to Mahone's compensable injury. At the time of trial, Dr. Marsh had lost his medical license, the loss not related to this case. The trial court allowed Dr. Marsh to testify as a lay witness, but disallowed his testimony with a degree of certainty as to compensable injury; although he had at the time of his examination reached a conclusion as to the compensable injury.

{¶20} I understand that this pro se litigant has not specifically raised this as error, but I believe we should look at

this issue to avoid a manifest miscarriage of justice, since Industrial Security Services, Inc. moved to exclude Marsh's testimony because of the license suspension. See *State v. Long*.[2] Whether Marsh is licensed or not is just one factor in determining whether he should be allowed to give his expert opinion. The law states a witness need not have a special certification or license in order to qualify as an expert so long as the knowledge the witness imparts will aid the trier of fact in understanding the evidence or determining a fact in issue.[3] Consequently, I would have reversed this decision for a new trial.

[2](1978), 53 Ohio St.2d 91.

[3]*State v. Boston* (1999), 85 Ohio St.3d 418, 709 N.E.2d 128.