[Cite as *Nevinski v. Dunkin's Diamonds*, 2010-Ohio-3004.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DANIEL B. NEVINSKI	C. A. No. 24405
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DUNKIN'S DIAMONDS, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2007 01 0470

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

Per Curiam

{¶1} Appellant, Daniel Nevinski, appeals from the decision of the Summit County Court of Common Pleas. This Court reverses and remands for proceedings consistent with this opinion.

I.

{¶2} Daniel Nevinski worked as a jeweler for Dunkin's Diamonds from 1993 to 1997 and again from 2000 to 2004. In October of 2004, Nevinski filed a first report of an injury, occupational disease or death with the Industrial Commission of Ohio, alleging that he sustained an injury in the course of and arising out of his employment with Dunkin's Diamonds. He asserted that he suffered from levator ani syndrome, which was described as "pain in his posterior." He alleged that this pain arose from sitting for 50 to 70 hours at his workbench.

{¶3} Nevinski's workers' compensation claim was allowed at the administrative level. Dunkin's Diamonds timely filed a notice of appeal with the Summit County Court of Common

Pleas. As a result, Nevinski filed his complaint, alleging that he was entitled to participate in the workers' compensation fund. In July of 2007, Dunkin's Diamonds filed its motion for summary judgment. Nevinski responded, and the trial court denied the summary judgment motion. Nevinski waived a jury trial, and on August 4, 2008, the case was tried to the bench. On August 8, 2008, the trial court concluded that Nevinski was "not entitled to participate in the benefits of the workers' compensation system for the condition of 'levator ani syndrome[.]'" Nevinski timely appealed this decision and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT'S FINDING THAT NEVINSKI FAILED TO ESTABLISH THAT HIS EXERTIONS AT WORK WERE NOT GREATER THAN THOSE ENCOUNTERED IN ORDINARY, NON OCCUPATIONAL ACTIVITIES WAS PREMISED UPON A MISTAKE OF LAW AND FACT."

{¶4} In his first assignment of error, Nevinski contends that the trial court's conclusion that he failed to establish that his exertions at work were not greater than those encountered in ordinary, non-occupational activities was premised upon a mistake of law and fact. We agree.

> "[A]ppeals of actions of the industrial commission or the bureau of workers' compensation are governed by *** R.C. Chapter 4123. Decisions of the industrial commission concerning the right of an employee to participate in the state's workers' compensation fund may be appealed to a court of common pleas under R.C. 4123.512. The appeal authorized by R.C. 4123.512 *** is in the nature of a new trial in the common pleas court. Such appeals are governed by the Ohio Rules of Civil Procedure. Thus, upon the filing of a notice of appeal, the action proceeds like any other civil action." (Internal citations omitted.) *Luo v. Gao*, 9th Dist. No. 23310, 2007-Ohio-959, at ¶6.

{¶5} Specifically, Nevinski contends that the trial court misstated the law applicable to his claim to participate in the Ohio workers' compensation fund. Thus, he argues that the trial court's decision was based upon an incorrect standard of law. "'In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court, since an

important function of appellate courts is to resolve disputed propositions of law.'" *Zenfa Labs, Inc. v. Big Lots Stores, Inc .*, 10th Dist. No. 05AP-343, 2006-Ohio-2069, at ¶24, quoting *Castlebrook Ltd. v. Dayton Properties Ltd. Partnership* (1992), 78 Ohio App.3d 340, 346; see, also, *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721, citing *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506 (observing that "[a]n appellate court's review of the interpretation and application of a statute is *de novo*" (Italics sic)).

{¶6} R.C. 4123.512(A) provides in pertinent part: "The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case[.]" Accordingly, a claim that one is eligible to participate in the workers' compensation fund can be based upon an injury or occupational disease.

{¶7} R.C. 4123.01(F) defines occupational disease and requires the claimant to show the following elements: "(1) the disease is contracted in the course of employment; (2) the disease is peculiar to the claimant's employment by its causes and the characteristics of its manifestation or the conditions of the employment result in a hazard which distinguishes the employment in character from employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally." *Brophey v. Bur. of Workers' Comp.*, 7th Dist. No. 07 MA 24, 2008-Ohio-646, ¶17.

{¶8} R.C. 4123.01(C) also defines a compensable injury as one that was "received in the course of, and ar[ose] out of, the injured employee's employment." R.C. 4123.01(C). Thus, this section presents a two prong test, in which both elements must be met before compensation will be allowed. *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277.

{¶9} "[T]here is a clear and distinct methodology that separates a 'disease' from an 'injury.'" *Dewalt v. Tuscarawas Cty. Health Dept*., 5th Dist. No. 2008 AP 06 0045, 2009-Ohio-2467, at ¶26. Nevinski alleges that the trial court conflated the elements of the two distinct tests to determine whether he was eligible to participate in the workers' compensation fund. Therefore, according to Nevinski, the trial court essentially required him to prove an additional legal element contrary to law.

{¶10} The trial court concluded that Nevinski was not eligible to participate in the workers' compensation fund, determining that "Plaintiff's exertions at work were not greater than those encountered in an ordinary, non-occupational activities [sic]. The Court finds that the Plaintiff was not injured in the course of and arising out of his employment with Dunkin's Diamonds." This language appears at the beginning of the trial court's judgment entry and at the conclusion portion of its entry. Nevinski correctly states that whether his exertions at work were greater than those encountered in ordinary activities is not a factor to be considered pursuant to R.C. 4123.01(C). Rather, this factor is relevant to whether the claim is based upon an occupational disease.

{¶11} It is not clear that the trial court appropriately recognized that "there is a clear and distinct methodology that separates a 'disease' from an 'injury.'" *Dewalt*, supra, at ¶26. Further, it is not clear to this Court that the trial court utilized the appropriate, *distinct,* test to determine 1) whether Nevinski suffered an injury that he received in the course of and arising out of his employment or 2) whether he suffered from an occupational disease. Accordingly, we remand to the trial court to consider the merits of Nevinski's complaint pursuant to the two, separate and distinct, tests. Nevinski's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE FINAL JUDGMENT DENYING [NEVINSKI'S] RIGHT TO PARTICIPATE IN THE OHIO WORKERS' COMPENSATION FUND IS BASED UPON A MISTAKE OF FACT."

{¶12} In his second assignment of error, Nevinski contends that the trial court's judgment was based upon a mistake of fact with regard to the elements of his case. This assignment of error is not yet ripe for review, therefore we decline to address it. "The Supreme Court of Ohio has repeatedly voiced its desire to avoid piecemeal litigation in our court system." *Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Cent. Ohio*, 10th Dist. No. 09AP-505, 09AP-506, 2009-Ohio-6849, at ¶25, citing *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 597. Accordingly, we decline to address Nevinski's second assignment of error at this time.

III.

{¶13} Nevinski's first assignment of error is sustained. We decline to address his second assignment of error. The judgment of the Summit County Court of Common Pleas is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

MOORE, J.
DISSENTS, SAYING:

{¶14} I respectfully dissent from the majority's conclusion that it is not clear whether the trial court utilized the appropriate tests to determine whether 1) Nevinski suffered from an injury and/or 2) he suffered from an occupational disease. Although the trial court's entry could have been more clear, I would conclude that the trial court conducted two analyses and determined that Nevinski did not satisfy *either* test to allow him to participate in the workers' compensation fund.

{¶15} The trial court concluded that "Plaintiff's exertions at work were not greater than those encountered in an ordinary, non-occupational activities [sic]. The Court finds that the Plaintiff was not injured in the course of and arising out of his employment with Dunkin's Diamonds." Nevinski states that the trial court clearly confused the correct standard to determine whether he suffered from an injury, as it required him to show that his exertions at work were not greater than those encountered in an ordinary, non-occupational activity. The

latter factor relates solely to whether Nevinski suffered from an occupational disease. As the majority aptly points out, an occupational disease is a separate and distinct determination from an injury. In support of his contention that the court utilized the wrong standard, Nevinski contends that he "never contended that he sustained an occupational disease[.]" This statement, however, is not supported by the record.

{¶16} In his complaint, Nevinski alleged generally that he was "entitled to receive workers' compensation pursuant to Article II, Section 35 of the Ohio Constitution and Chapters 4121 and 4123 of the Ohio Revised Code as previously ordered by the Bureau of Workers' Compensation and Industrial Commission of Ohio." He did not limit his claim to an "injury". Further, Dunkin's Diamonds based its entire motion for summary judgment on Nevinski's failure to establish that his workplace exertion or cumulative workplace exertion was greater than those encountered in ordinarily non-occupational activities. Nevinski responded to this motion, contending that compensation was available because his injury was received in the course of and arising out of, his employment with Dunkin's Diamonds. With regard to Dunkin's Diamonds' assertion that Nevinski failed to establish that his workplace exertion was greater than those encountered in ordinarily non-occupational activities, Nevinski argued that this was not the primary issue in awarding compensation and that "[e]ven if this where [sic] construed as the main issue, the question of whether or not Nevinski's activities constituted a risk greater than that encountered in the ordinary non-occupational activities remains a disputed fact." He did not argue below, as he argues here, that his claim to receive workers' compensation was based upon an injury rather than an occupational disease. Thus, I would conclude that Nevinski's claim that whether he suffered from an occupational disease was never before the trial court is without merit.

{¶17} Finally, I would conclude that the trial court's statement as quoted above, does not indicate that the trial court conflated the two distinct standards. Instead, the trial court's statements reveal that it concluded that Nevinski simply did not establish the necessary elements for *either* test. It does not indicate that the trial court required Nevinski to satisfy the elements of *both* the occupational disease test *and* the injury test. Because Nevinski did not establish that his exertions at work were greater than those encountered in ordinary, non-occupational activities, he did not satisfy the test to establish that he had an occupational disease. As he failed to establish one element of that test, the trial court did not need to discuss the remaining two elements. Next, the trial court concluded that Nevinski was not injured in the course of and arising out of his employment, thus failing to establish that he had an injury. Again, because he failed to establish one element of that test, there was no need for the trial court to discuss the second element.

{¶18} Accordingly, I would conclude that the trial court did not misapply the law when it ultimately concluded that Nevinski was "not entitled to participate under the workers' compensation law and receive compensation for 'levator ani syndrome.'"

{¶19} With regard to Nevinski's second assignment of error, I would conclude that because he failed to provide this Court with the necessary transcripts, we must presume regularity in the trial court.

{¶20} The record before this Court contains the transcribed videotaped deposition testimony of Nevinski and Dunkin's Diamonds' expert witnesses, as well as Nevinski's deposition testimony. The record does not include, however, a transcript of the bench trial. Accordingly, we are without any record of what occurred in the trial court. As appellant in this matter, it was Nevinski's duty to provide a transcript for appellate review because he bore the

burden of demonstrating error by reference to matters in the record. *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163.

{¶21} To determine whether the trial court's judgment, "considering all of the testimony, arguments, and evidence" presented at trial, was based upon a mistake of fact, we would need to review the entire record before the trial court. Without this record, we could not be certain that, even if Nevinski's statement was true that the trial court's statement was an incorrect rendering of the evidence at trial, Nevinski suffered any prejudice from the trial court's "mistake." App.R. 9(B) required him to order from the reporter the portion of the transcript that he deemed necessary for the resolution of assigned errors. Nevinski has not met the burden of producing a transcript of the trial from which he claims error.

{¶22} Further, although the record contains the depositions, there is no indication whether the depositions were submitted at trial as a whole or in part. We are limited in our review to the evidence presented to the trial court, and in the absence of a record of the proceedings, we cannot determine exactly what evidence was before the trial court. See *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *1, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus ("A reviewing court cannot consider an exhibit unless the record demonstrates that the exhibit was formally admitted into evidence in the lower court"). Thus, we cannot rely solely upon the deposition testimony of Nevinski's expert to conclude that the trial court's decision was unsupported by the evidence, requiring us to overturn the trial court's judgment. We have consistently held that without the necessary transcript, we must presume regularity of the proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, I would overrule Nevinski's second assignment of error.

APPEARANCES:

M. SCOTT KIDD, Attorney at Law, for Appellant.

TIMOTHY C. CAMPBELL, and JOHN R. CHLYSTA, Attorneys at Law, for Appellee.