

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN C. BANNER	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	
FRESH MARK, INC.	:	Case No. 2008CA00261
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2008CV00081

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, P.J.

{¶1} Appellee, John Banner, worked for appellant, Fresh Mark, Inc. On January 15, 2003, appellant sustained an injury during the course and scope of his employment. Appellant pursued a workers' compensation claim. Appellee, a self-insured employer, voluntarily recognized the claim for the following conditions: sprain of the neck, sprain of the lumbar region, and contusion of the left elbow.

{¶2} On November 14, 2003, appellant filed a motion for the further allowance of "L5 radiculopathy and aggravation for pre-existing spondylolisthesis at L5-S1." By decision dated January 29, 2004, the district hearing officer allowed the additional conditions. On appeal, the staff hearing officer allowed the condition of L5 radiculopathy and denied the condition of aggravation for pre-existing spondylolisthesis at L5-S1. Both parties appealed the staff hearing officer's decision to the Industrial Commission. In a decision mailed May 7, 2004, the Industrial Commission affirmed the staff hearing officer's decision.

{¶3} Appeals were filed with the Court of Common Pleas of Stark County, Ohio (Case No. 2004CV02217). Following a jury trial, the jury found appellant was entitled to participate in the workers' compensation fund for the condition of L5 radiculopathy, but not entitled to participate in the fund for the condition of aggravation of pre-existing spondylolisthesis.

{¶4} Prior to the trial, appellant had filed a second motion with the Bureau of Workers' Compensation for the further allowance of "aggravation of pre-existing degenerative disc disease L5-S1 and foraminal stenosis at L5-S1 bilaterally causing impingement on the L5 nerve roots" on August 12, 2004. By decision dated October 23,

2004, the district hearing officer denied the allowance of the additional claims. On December 11, 2004, the staff hearing officer affirmed the district hearing officer's decision. On January 4, 2005, the Industrial Commission affirmed the staff hearing officer's decision.

{¶5} In March of 2005, appellant filed an appeal with the Court of Common Pleas of Stark County, Ohio. Appellee filed a motion for summary judgment on July 11, 2005. By judgment entry filed January 24, 2006, the trial court granted the motion. On appeal, this court reversed the trial court's decision. See, *Banner v. Fresh Mark, Inc.*, Stark App. No. 2006CA00055, 2007-Ohio-3359. Upon remand, appellee filed a notice of dismissal pursuant to Civ.R. 41(A).

{¶6} On January 4, 2008, appellee refiled his complaint. A jury trial commenced on October 22, 2008. The jury found appellee was entitled to participate in the workers' compensation fund for the conditions of aggravation of pre-existing degenerative disc disease and aggravation of foraminal stenosis at L5-S1 bilaterally causing impingement on the L5 nerve roots.

{¶7} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶8} "THE TRIAL COURT IMPROPERLY EXCLUDED TESTIMONY OF APPELLEE'S EXPERT REGARDING THE TIMING OF HIS OPINIONS IN RELATION TO DECISIONS OF THE INDUSTRIAL COMMISSION."

II

{¶9} "THE TRIAL COURT ERRED IN ISSUING INCONSISTENT RULINGS ON THE ADMISSIBILITY OF CROSS-EXAMINATION POSED TO APPELLEE'S EXPERT."

I, II

{¶10} Appellant claims the trial court erred in restricting the cross-examination of appellee's expert, Douglas J. Burik, D.C. Appellant also claims the trial court misled its trial counsel on the issue during its ruling on appellee's motion in limine. We disagree.

{¶11} Prior to trial, appellee filed a detailed motion in limine on October 15, 2008. Included in the motion at ¶14 was a request to exclude any reference to Dr. Burik's opinions in appellee's prior workers' compensation cases. In response to appellee's motion, appellant argued the following:

{¶12} "Plaintiff clearly intends to present evidence that the L5 radiculopathy is an allowed condition. That condition was considered by both the Industrial Commission and the prior jury trial in the same proceedings which considered aggravation of pre-existing spondylolisthesis. Refusal to permit Defendant to introduce evidence of the denial of the condition of aggravation of pre-existing spondylolisthesis presents a skewed picture of this claim to the jury and would infringe upon Defendant's due process rights in defending Plaintiff's claim in this trial." See, Defendant's Brief in Opposition to Plaintiff's Motion in Limine filed October 17, 2008.

{¶13} When the issue was argued prior to trial, appellant's trial counsel argued the following:

{¶14} "Secondly, this goes to the question of Doctor Burik's credibility. When Doctor Burik first issued an opinion that there was an aggravation of the preexisting

spondylolisthesis, he had in front of him radiographic evidence that there was spondylolisthesis, degenerative disk disease, and spinal stenosis.

{¶15} "His first report only said that there was an aggravation of preexisting spondylolisthesis, and it was not until after the Industrial Commission denied that condition that Doctor Burik came back and said, oh, there is an aggravation of the degenerative disk disease and the stenosis.

{¶16} "Why didn't he say that right from the beginning if that's the way he believed? To me this is an absolute credibility question and we should absolutely be entitled to present evidence of the timing of its first report, what he had in front on him, what happened in denying that, and the fact that all of a sudden he tries a new angle.

{¶17} "That is a credibility question and there is nothing in the cases regarding the, quote, de novo proceedings that apply because it is not de novo with respect to those conditions which have already been decided." T. at 39-40.

{¶18} Appellant's trial counsel argued that Dr. Burik's adjustment of his report after the denial of the spondylolisthesis claim was relevant because it went to the doctor's credibility. T. at 43-44. The trial court withheld a ruling pending some research on the issue and proceeded with voir dire. T. at 44.

{¶19} Prior to opening statements, the trial court granted the motion in limine regarding ¶14. T. at 156. The trial court's ruling was based upon a decision from the Eleventh District in *Neuberger v. Mayfield* (1990), Trumbull App. No. 88-T-4123. In the *Neuberger* case, questions were posed to the plaintiff which noted she had lost her prior workers' compensation claims. Objections to the questions were sustained, and the trial court issued a cautionary instruction, instructing "the jury that allegations as to previous

administrative rulings were not to be considered as evidence." While the *Neuberger* court was uncomfortable with the questions posed, it concluded "we do not find that the inappropriate question rose to the crest of prejudicial error."

{¶20} In reviewing the *Neuberger* case, the trial court sub judge determined "I feel that the fact that the Court in that case instructed the jury that allegations as to previous administrative rulings were not to be considered as evidence is indicative of the prejudicial nature of such a question***." T. at 156. Therefore, it appears the trial court decided that although appellant's position on the credibility of Dr. Burik and his changed report may be relevant, the relevancy was outweighed by the prejudicial affect upon the jury. However, the trial court appeared to backtrack on this ruling when it understood the *Neuberger* case was distinguishable as "this is the same claim with a different condition, and you want to bring in the fact that a different condition was disallowed in the past." T. at 162. The trial court instructed appellant's trial counsel that she would "be permitted to introduce evidence of what conditions were allowed and what were disallowed," and was permitted to question Dr. Burik on the fact that his reports changed. T. at 169.

{¶21} Relying on the above ruling, appellant's trial counsel stated the following during opening statement with no objection by appellee:

{¶22} "The first report that Doctor Burik wrote said only that there was an aggravation of the preexisting spondylolisthesis even though he admits at the time he wrote that opinion he had radiographic evidence confirming that there was degenerative disk disease and that there was foraminal stenosis.

{¶23} "It was not until after the aggravation of preexisting spondylolisthesis at L5-S1 was denied that Doctor Burik wrote a second report and gave the opinion that this injury caused an aggravation of the degenerative disk disease and of the foraminal stenosis.

{¶24} "So his first impression, Ladies and Gentlemen, did not have anything to do with the conditions that they are requesting today." T. at 206-207.

{¶25} Witnesses were presented and then it became time to show Dr. Burik's videotaped deposition to the jury. T. at 330. Prior to presenting the deposition, the trial court reviewed the objections therein. The trial court granted appellee's objections to the following testimony (T. at 347-348, 361):

{¶26} "Q. Do you recall when the Industrial Commission issued its decision that the condition of aggravaton of pre-existing spondylolisthesis was disallowed?

{¶27} "A. Yes.

{¶28} "Mr. Tsangeos: Objection

{¶29} "By Ms. Reynolds:

{¶30} "Q. And when was that?

{¶31} "A. I believe somewhere around November 2003. That sound about right?

{¶32} "Q. Okay. Well, there were two orders that came out. And I'm just going to hand you ..., because I believe this is in your file as well but I may have pulled out the wrong one. And I want you to take a look at that document and tell me if you recognize that document.

{¶33} "Mr. Tsangeos: Just show an objection to the prior decisions of the Industrial Commission, as they are prohibited by statute.

{¶34} "A. Yes.

{¶35} "Q. Okay. And can you tell from that document what the date of the hearing is?

{¶36} "A. Date of hearing. April 12th, 2004.

{¶37} "Q. And in that order, it states that, 'It is the finding of the staff hearing officer that the condition of aggravation of pre-existing spondylolisthesis at L5-S1 is specifically denied'; is that correct?

{¶38} "A. That is correct.

{¶39} "Q. Okay.

{¶40} "MR. TSANGEOS: Continuing objection."

{¶41} "****

{¶42} "Q. All right. He also made a statement about his chronic low back pain. What was that statement?

{¶43} "A. 'The patient has chronic low back pain that I assume is related to his rather significant spondylolisthesis. He has some persistent - - he has persistent neck discomfort as well.'

{¶44} "MR. TSANGEOS: Show an - -

{¶45} "BY MS. REYNOLDS:

{¶46} "Q. And then - -

{¶47} "MR. TSANGEOS: Show an objection.

{¶48} "****

{¶49} "Q. Okay. And the Industrial Commission did not agree with that opinion; is that correct?

{¶50} "A. That is correct.

{¶51} "MR. TSANGEOS: Objection. Move to strike." Burik depo. at 45-47, 71-72, and 78, respectively.

{¶52} Prior to this excluded testimony, there was sufficient dialogue between appellant's trial counsel and Dr. Burik to establish that Dr. Burik did in fact issue two different opinions. Burik depo. at 41-45. Appellant proffered the cited testimony and argues the trial court erred in excluding it. T. at 364-365.

{¶53} The admission or exclusion of evidence lies in the trial court's sound discretion. *Rigby v. Lake County* (1991), 58 Ohio St.3d 269. 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* (1983), 5 Ohio St.3d 217.

{¶54} Evid.R. 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 Evid.R. 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."

{¶55} Pursuant to R.C. 4123.512(D), "The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action." "Appeals pursuant to R.C. 4123.512 are de novo, and the trial court must independently assess whether a claimant is entitled to participate in the

Workers' Compensation Fund without regard to the commission's findings." *State ex rel. Dillard Department Stores, Inc. v. Ryan*, 173 Ohio App.3d 339, 2007-Ohio-5556, ¶16. As noted by appellant in its brief at 8, the "injured worker has the burden of proving his/her claim by a preponderance of the evidence and the law is clear that it is prejudicial to mention the ruling of the Industrial Commission with respect to the issue(s) at trial."

{¶56} We find during closing argument, appellant's trial counsel was able to present the issue of Dr. Burik's credibility despite the trial court's ruling:

{¶57} "So then Doctor Burik issues another opinion. He doesn't deny what he said initially. He doesn't contradict that. But now he says it is the degenerative disk disease and the stenosis that have been aggravated.

{¶58} "Now, this is a provider who has been treating Mr. Banner for well over five years, is running up a huge bill for treatment; and Mr. Banner a month ago said his pain was worse than it was the day he first saw Doctor Burik.

{¶59} "You heard testimony by Doctor Kolarik, Board certified orthopedic surgeon, that this chiropractic is not only excessive but it can cause harm to Mr. Banner's back. This is from a provider who tells you he sends his patients out for consult, but you heard him say he basically disagrees with their opinions and conclusion.

{¶60} "This is from a provider who said to you that he obtains consults if his patients aren't improving as they should, treatment is not effective as he would like, that he would like.

{¶61} "But he admitted that he received a letter from Plaintiff's counsel which specifically said 'I feel it may strengthen our case, however, to have an orthopedic consult to confirm whether there is an aggravation of preexisting condition.'

{¶62} "Now, this isn't with regard to treatment. It is not with regard to improving Mr. Banner's condition. It's so we can prove our case." T. at 547-549.

{¶63} We conclude the proffered testimony did not violate the prohibitions of disclosure in workers' compensation cases. We also find the trial court, based upon the perception that the jury would be confused or misled by the testimony about a previous disallowance, did not abuse its discretion in granting the objections to the proffered testimony. Further, although the trial court's opinion changed or was modified, we do not find any undue prejudice to appellant given the unchallenged closing argument of appellant's trial counsel.

{¶64} Assignments of Error I and II are denied.

{¶65} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. concurs,

Hoffman, J. concurs separately.

s/ Sheila G. Farmer

s/ W. Scott Gwin

JUDGES

SGF/sg 1112

Hoffman, J., concurring

{¶66} I generally concur in the majority’s analysis and disposition of Appellant’s assignments of error. I disagree only with the majority’s conclusion “the proffered testimony did not violate the prohibitions of disclosure in workers’ compensation cases.”¹ However, my disagreement does not affect my concurrence in the result reached by the majority.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

¹ Majority Opinion at ¶63.

