

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

Kelly J. Sturm

Court of Appeals No. L-12-1129

Appellant

Trial Court No. CI0201101705

v.

City of Toledo, et al.

DECISION AND JUDGMENT

Appellees

Decided: July 19, 2013

* * * * *

John W. Gold and Robert Zelvy, for appellant.

Adam Loukx, City of Toledo Law Director, and Michael A. Kyser,
Assistant Law Director, for appellee, City of Toledo.

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

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} Appellant, Kelly Sturm, appeals the judgment of the Lucas County Court of Common Pleas, which denied his request to participate in the Ohio workers'

compensation fund. Specifically, appellant contends the trial court failed to give an adequate jury instruction regarding the definition of “injury” under R.C. 4123.01(C). We affirm.

A. Facts and Procedural Background

{¶2} Alleging he was injured in the course of his employment, appellant, a Toledo police officer, filed a claim with the Bureau of Workers’ Compensation. On May 25, 2010, the bureau disallowed appellant’s claim. After exhausting all of his administrative remedies, appellant appealed to the trial court pursuant to R.C. 4123.512. In his complaint, appellant alleged the injury he suffered was the result of a substantial aggravation of a pre-existing condition pursuant to R.C. 4123.01(C)(4). The statute states as follows:

(C) “Injury” includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. “Injury” does not include:

* * *

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints

may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

{¶3} The matter proceeded to a jury trial. Testimony from the trial reveals the following facts.

{¶4} On July 11, 2008, appellant was involved in a police chase. The chase began in a vehicle pursuit and ended on foot. As appellant was chasing the suspect, the suspect hopped over a fence. Appellant attempted to follow him over the fence but could not due to a sudden feeling of weakness and heavy pressure on his chest. Six days later, on July 17, 2008, appellant suffered what he believed to be a heart attack, causing him to spend five days in the intensive care unit at Toledo Hospital. After a series of tests, including an electrocardiogram, a cardiograph, a stress test, and a catheterization, it was determined that appellant did indeed suffer a heart attack. His physician, Dr. Nizal Daboul, determined that appellant had a plaque rupture during the chase which caused his heart attack several days later.

{¶5} Appellant also received independent examinations from Dr. Allan Harris, Dr. Barry Deran, and Dr. Robert Kantor. Dr. Harris testified that the plaque rupture occurred while appellant was chasing the subject, and was the result of the degeneration of his chronic coronary artery disease. Dr. Harris testified that while the chase in itself did not

cause the heart attack, it did cause the substantial aggravation of the artery which abruptly caused the artery to close off. He stated that, in his opinion, the artery would not have closed if not for the damage done to it on July 11th. Similarly, Dr. Deran testified that upon learning appellant had the symptoms of weakness and heaviness on the chest, he agreed it was probable that a plaque rupture had occurred. Furthermore, Dr. Deran testified that it was likely the heart attack was caused by the rupture. However, he admitted that there is no objective scientific evidence to support his conclusion. In contrast, Dr. Kantor testified he did not believe that a plaque rupture caused the heart attack because appellant's troponin I levels were not as high as would be expected if a plaque rupture had occurred. In addition, Dr. Kantor testified that there was no objective evidence confirming to a reasonable degree of medical certainty that the plaque rupture caused the heart attack.

{¶6} After the presentation of evidence, the trial court instructed the jury regarding the definition of "injury." The jury instruction stated:

Employers take their employees as they find them and assume the risk of having an employee's pre-existing condition aggravated by some injury which would not hurt or bother a perfectly healthy person.

"Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not

include a condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

{¶7} Following deliberations, the jury found that appellant's pre-existing condition was not substantially aggravated, and thus he was not an eligible candidate for the workers' compensation fund. This appeal ensued.

B. Assignment of Error

{¶8} Appellant assigns as error:

1. The trial court committed reversible error when it issued a jury instruction that mirrored the ambiguous language of R.C. 4123.01(C) without including the Sixth District's interpretation regarding when the diagnostic findings required by the statute may be obtained as set forth in *Smith v. Lucas County*.

II. Analysis

{¶9} “Whether the jury instructions correctly state the law is a question of law which an appellate court reviews de novo.” *State v. Franklin*, 2d Dist. Montgomery No. 24011, 2011-Ohio-6802, ¶ 70.

{¶10} Appellant argues that the trial court erred by failing to include language from *Smith v. Lucas Cty.*, 6th Dist. Lucas No. L-10-1200, 2011-Ohio-1548, to interpret what he believes to be ambiguous language in R.C. 4123.01(C). In that case, Smith was injured in the course of her employment when she slipped and fell on a wet floor entering her workplace. She suffered injuries to her head, neck, wrist, and elbow. She submitted a claim and was allowed relief for the conditions of scalp contusion, neck sprain, sprain thoracic, sprain lumbar region, sprain of left wrist and left hand, and contusion of right elbow. *Id.* at ¶ 2. She later amended her claim to include conditions of a displaced cervical disc and aggravation of preexisting variant of Chiari malformation. These additional claims were denied. *Id.* at ¶ 4. Upon exhausting all of her administrative remedies, Smith appealed to the trial court. At the trial court, summary judgment was granted against Smith. On appeal, we concluded that Smith had failed to present any evidence in the form of records or statements from her prior treating physician that she suffered from a Chiari malformation. Further, the MRI taken after her injury only revealed the existence of the Chiari malformation; it did not establish that the condition was substantially aggravated by the injury. Thus, because Smith presented no evidence

that showed the injury substantially aggravated the condition, we affirmed the trial court's decision. *Id.* at ¶ 18-21.

{¶11} Here, appellant's argument that the jury instruction is deficient fails for three reasons. First, appellant argues that language from *Smith* would assist the jury in interpreting "ambiguous" language from the statute. However, appellant does not state how the statute is ambiguous, and a plain reading of the statute reveals that it simply requires objective, not subjective, evidence to establish a substantial aggravation of a pre-existing condition. Second, *Smith* does not interpret the statute. Rather, *Smith* applies R.C. 4123.01(C) in a summary judgment context where there was *no evidence* submitted to establish a preexisting condition. Furthermore, appellant, despite arguing that language should be included, does not identify any specific language from *Smith* that should have been given in the jury instruction. Lastly, the jury instruction is an accurate statement of the law, copying the statute verbatim. *See State v. Bates*, 6th Dist. Williams No. WM-12-002, 2013-Ohio-1270, ¶ 65, citing 89 Ohio Jurisprudence 3d, Trial, Section 379 (2013) ("Where the law governing a case is expressed in a statute, the better practice is for the court to instruct the jury by use of the actual language used in the statute.") Therefore, we conclude that the trial court did not err in giving a jury instruction that mirrors the statutory language.

{¶12} Accordingly, appellant's assignment of error is not well-taken.

III. Conclusion

{¶13} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.