[Cite as *Holly v. Greater Cleveland Regional Transit Auth.*, 2022-Ohio-3236.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

WALTER HOLLY,	:	
Plaintiff-Appellee,	:	No. 111214
v.	:	
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 15, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-936182

Appearances:

Nager, Romaine & Schneiberg Co., L.P.A., Jennifer L. Lawther, Corey J. Kuzma, and James D. Falvey, *for appellee*.

Sheryl King Benford, General Counsel-Deputy GM and Keith A. Ganther, Deputy General Counsel for Legal Affairs Division, Greater Cleveland Regional Transit Authority; Gallagher Sharp, LLP, Donald G. Drinko, Richard C.O. Rezie, and Gary D. Baker, Jr., *for appellant*.

CORNELIUS J. O'SULLIVAN, JR., J.:

{¶ 1} Defendant-appellant, Greater Cleveland Regional Transit Authority ("GCRTA" or "appellant"), has filed this appeal after a jury returned a verdict in favor of plaintiff-appellee, Walter Holly, finding that he was entitled to workers' compensation for bilateral carpal tunnel syndrome. After a thorough review of the facts and the applicable law, we affirm.

{¶ 2} Appellee began his employment with GCRTA in February 2007 as a full-time rail mechanic. While employed by appellant, appellee alleges he was injured due to repetitive motions of his duties and suffered injuries to both wrists. In February 2020, he filed a claim with the Ohio Bureau of Workers' Compensation ("BWC"), Claim 20-110916. His claim was initially allowed for bilateral carpal tunnel syndrome, but appellant contested his claim. Appellee also filed for additional allowances for compression neuropathy, left upper limb and compression neuropathy, right upper limb. Those additional allowances were denied by BWC. Appellant appealed the allowance for bilateral carpal tunnel syndrome to the Industrial Commission, which refused the appeal, so appellant filed an appeal under R.C. 4123.512 with the Cuyahoga County Common Pleas Court. The matter was referred to mediation, but the parties were unable to mediate the claim, and the dispute was returned to the court docket and proceeded to trial.

{¶ 3} Prior to trial, on August 31, 2021, appellee filed a motion in limine to exclude any testimony from appellant's proposed expert, Dr. Dean Erickson ("Dr. Erickson"). In his motion, appellee argued that appellant failed to disclose its

expert report within the time limits established by Loc.R. 21.1, Part 1, of the Court of Common Pleas of Cuyahoga County, General Division ("former Loc.R. 21.1").[1] The matter proceeded to a jury trial. During the trial, the trial court granted the motion in limine pursuant to Civ.R. 26(B)(7) and excluded Dr. Erickson's testimony.

{¶ 4} At the close of evidence, appellant propounded several jury interrogatories, which asked the jury questions about whether the proximate cause of appellee's injuries was his employment at GCRTA. The trial court declined to submit appellant's interrogatories and instead submitted a general verdict form to the jury. The jury returned a general verdict form finding that appellee was entitled to receive workers' compensation for bilateral carpal tunnel syndrome.

{¶ 5} Appellant moved for a new trial based on the trial court's denial of the interrogatories and exclusion of expert testimony. The trial court denied the motion, and appellant filed a timely notice of appeal.

Assignments of Error

> I. The trial court erred in its refusal to submit jury interrogatories specific to "occupational disease" as requested by defendant-appellant.
>
> II. The trial court erred in excluding the testimony of appellant's expert medical witness, Dr. Dean Erickson.

Law and Analysis

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[1] Loc.R. 21.1 was repealed in 2021. The Local Rules of the Court of Common Pleas of Cuyahoga County dated August 2021 state Loc.R. 21.1 is "Trial Witness" and "Part I: Expert Witness." However, the Local Rules of the Court of Common Pleas of Cuyahoga County dated April 2022 state Loc.R. 21.1 is "Court Mediation" and that the rule was effective June 1, 2021, and renumbered April 11, 2022. Neither publication of the Local Rules lists when former Loc.R. 21.1 "Trial Witness" was repealed. Former Loc.R. 21.1(B) and Civ.R. 26(B)(7) are substantially the same.

Jury Interrogatories

{¶ 6} In the first assignment of error, appellant contends that the trial court erred in refusing to submit jury interrogatories specific to "occupational disease."

{¶ 7} Civ.R. 49 requires a court to present properly submitted and appropriate interrogatories to the jury. *Vanadia v. Hansen Restoration, Inc.*, 8th Dist. Cuyahoga No. 101033, 2014-Ohio-4092, ¶ 12. "This rule puts the onus on the parties to submit proper jury interrogatories to the trial court." *Id.*, citing *Freeman v. Norfolk & W. Ry.*, 69 Ohio St.3d 611, 614, 635 N.E.2d 310 (1994). The court has the discretion to reject interrogatories that are ambiguous, confusing, redundant, or otherwise legally objectionable. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 259, 662 N.E.2d 1 (1996), citing *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 592 N.E.2d 828 (1992).

{¶ 8} This court reviews the trial court's rejection of an interrogatory for an abuse of discretion. *Vanadia* at *id.*, citing *Freeman* at *id.* "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 19. An abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *In re M.D.*, 8th Dist. Cuyahoga Nos. 110957, 110958, and 110959, 2022-Ohio-2672, ¶ 30, citing *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.). When applying the abuse-of-discretion standard, a

reviewing court may not substitute its judgment for that of the trial court. *In re M.D.* at *id.*, citing *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

{¶ 9} In this case, appellant requested the following interrogatories be given to the jury:

> No. 1: Do you find from evidence and by preponderance thereof that the Plaintiff's employment as a mechanic in GCRTA's Rail Department directly and proximately caused him to develop bilateral carpal tunnel syndrome?
>
> No. 2: Do you find from evidence and by preponderance thereof that the Plaintiff's bilateral carpal tunnel syndrome was directly and proximately caused by preexisting medical conditions and comorbidities unrelated to his employment as a mechanic in GCRTA's Rail Dept [sic]?
>
> No. 3: Do you find from evidence and by preponderance thereof that the Plaintiff's employment created a risk of contracting bilateral carpal tunnel syndrome in greater degree and in a different manner than in the public generally?
>
> No. 4: Do you find from evidence and by preponderance thereof that the Plaintiff contracted bilateral carpal tunnel syndrome as a proximate result of exposure to his work environment of his job?
>
> No. 5: Do you find from evidence and by preponderance thereof that the conditions of Plaintiff's employment as a Maintainer/Rail Mechanic at GCRTA resulted in a hazard which distinguishes his employment in character from employment generally?

{¶ 10} In denying appellant's request to submit the five interrogatories to the jury, the trial court stated:

> [I]f the jury signs off on the verdict form saying that he's entitled to participate, they've answered all your interrogatories in the affirmative. If they come back with a verdict that he is not entitled to participate, they've answered one or more of them in the negative. So, in other words, the answers are implicit in the verdict. That's not the

situation in every case. For example, if money damages were at issue here, it would be helpful to have a breakdown of economic loss, non-economic loss, et cetera.

{¶ 11} Appellant argues that the trial court erred in refusing to submit the interrogatories to the jury because the appellant is allowed to "test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." Appellant's brief at p. 11, citing *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.*, 28 Ohio St.3d 333, 337, 504 N.E.2d 415 (1986). The purpose of jury interrogatories in this case, appellant argues, was to "flesh out the elements inherent in the determination of appellee's condition." Appellant's brief at p. 12.

{¶ 12} We agree with the trial court that the answers to the proposed jury interrogatories were implicit in the jury's verdict. The jury interrogatories would not have tested the "correctness" of the general verdict by having the jury assess determinative issues and flesh out the elements of appellee's injury. The parties agreed that appellee suffered from carpal tunnel syndrome. The interrogatories would have served as redundant answers to what the jury had to ultimately decide.

{¶ 13} Thus, the trial court did not abuse its discretion in denying appellant's request for jury interrogatories.

{¶ 14} The first assignment of error is overruled.

Expert Witness Testimony

{¶ 15} In the second assignment of error, appellant contends that the trial court erred in excluding the testimony of its expert witness, Dr. Erickson.

{¶ 16} Civ.R. 26(B)(7)(c) provides that "a party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel." "Unless good cause is shown, all reports and, if applicable, supplemental reports must be supplied no later than thirty (30) days prior to trial. *Id.*

{¶ 17} A trial court's decision to admit or exclude evidence, including expert testimony, will not be disturbed absent an abuse of discretion. *Gridiron v. Cleveland Clinic Found.*, 2019-Ohio-167, 131 N.E.3d 327, ¶ 26 (8th Dist.), citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66, 567 N.E.2d 1291 (1991). Similarly, we review a trial court's ruling on a Loc.R. 21.1 question for an abuse of discretion. *Gridiron* at *id.* citing *Estate of Preston v. Kaiser Permanente*, 8th Dist. Cuyahoga No. 78972, 2001 Ohio App. LEXIS 4988 (Nov. 8, 2001).

{¶ 18} Appellant appealed the BWC award to the trial court on August 19, 2020. The trial court held a case-management conference on October 30, 2020, and referred the case to a workers' compensation mediator. The mediator held a hearing on April 28, 2021, but the case did not settle and was returned to the court docket. Appellant's proposed expert, Dr. Erickson, provided his report to appellant on May 28, 2021. The case was originally set for trial for June 5, 2021, and was continued until September 7, 2021, at the request of the parties. Appellant did not disclose the expert report to appellee until August 13, 2021. Appellee filed a motion in limine to exclude expert testimony on August 31. In preparation for trial, appellee deposed Dr. Erickson on September 1, 2021. Trial commenced as scheduled on

September 7; therefore, the expert report was provided less than 30 days prior to the trial, in contravention to Civ.R. 26.

{¶ 19} Appellant contends that the trial court should not have excluded Dr. Erickson from testifying because appellant could show "good cause" under Civ.R. 26 why it did not timely submit its expert report. The good cause according to appellant was appellee's own delay in submitting to deposition and turning over discovery. Appellant further argues that appellee and counsel cannot argue that they would have been surprised by Dr. Erickson's testimony because Dr. Erickson had authored previous reports regarding appellee's condition.

{¶ 20} In *Gridiron*, the appellant argued that the Cleveland Clinic's defense expert should not have been permitted to testify "because [the] expert report 'did not contain any opinions regarding whether Gridiron suffered a dorsal capsular tear and DRUJ effusion as a direct and proximate result of her alleged * * * injury.'" *Id.* at ¶ 48. The trial court overruled the objection and allowed the expert to testify. In upholding the trial court's decision, this court reasoned:

> Significantly, Dr. Gula's testimony at trial did not materially differ from the subject matter of his expert report. * * * Dr. Gula's testimony did not offer a new theory on the cause of the observed injuries, nor did Dr. Gula change his opinion at trial. Rather, Dr. Gula's expert report and trial testimony consistently offered the same opinion on the issues relating to the extent of Gridiron's left injury and its likely cause. Exclusion of such testimony is not proper merely because it does not comport with the petitioner's theory supporting a workers' compensation claim.

Id. at ¶ 35.

{¶ 21} *Gridiron* is distinguishable. As noted by this court in *Gridiron*, the testifying expert had previously authored a report that outlined his opinion to be used at trial and the trial court found that his opinion did not substantially differ from that in his prior report. In this case, a review of Dr. Erickson's previous evaluations reveal that the doctor did not opine as to causality of appellee's bilateral carpal tunnel syndrome.

{¶ 22} In the Independent Medical Evaluation dated October 5, 2020, Dr. Erickson stated that he independently examined appellee at the request of a "Claims Examiner for RTA" on "the issue of the additional allowance of compression neuropathy right upper limb and compression neuropathy left upper limb with respect to his allowed condition of: Bilateral carpal tunnel syndrome." After reviewing appellee's medical record and a physical examination, Dr. Erickson concluded:

> [A]ccepting the allowed conditions in the claim that the physician's examination findings in the medical record (although I may not agree with their conclusions), I would offer the following opinions to a reasonable degree of medical probability and certainty.
>
> **1) Based upon your review of medical records and physical examination of Mr. Walter Holly, is it your professional medical opinion that this claim should be amended to include the requested conditions of compression neuropathy, right upper limb compression, neuropathy left upper limb?**
>
> The requested additional allowances are essentially a broad nonspecific category that not only encompasses the current allowed condition of bilateral carpal tunnel syndrome but may imply multiple other compressive peripheral neuropathies.

> Although technically it is duplicative of the current allowed condition of bilateral carpal tunnel syndrome, it should NOT be consider [sic] an appropriate additional allowance as a number of other compressive neuropathies could be added to the claim without any objective basis. * * *

(Emphasis sic.)

{¶ 23} In the Independent Medical Evaluation dated February 15, 2021, Dr. Erickson noted that appellee's claim had been allowed for bilateral carpal tunnel syndrome but disallowed for compression neuropathy, left upper limb and compression neuropathy, right upper limb. After a review of medical records, his previous report, and a physical examination, Dr. Erickson opined:

> [A]ccepting the allowed conditions in the claim that the physician's examination findings in the medical record (although I may not agree with their conclusions), I would offer the following opinions to a reasonable degree of medical probability and certainty.
>
> **1. Based on your examination of Walter Holly, is it your professional medical opinion that Mr. Holly's bilateral carpal tunnel release surgeries and postoperative physical therapy were successful?** Mr. Holly's left carpal tunnel release has been very successful. * * * He has had an excellent result.
>
> Unfortunately, Mr. Holly continues to have objective findings supporting subjective symptoms regarding the right carpal tunnel condition status post-surgery. * * *
>
> **2. Is it your opinion that Mr. Holly can return to work as a mechanic full duty at this time?** No. Mr. Holly continues to have objective findings regarding the right carpal tunnel that would preclude his ability to return to work as a mechanic full duty at this time.
>
> **3. Has the allowed bilateral carpal tunnel syndrome reached a level of maximum medical improvement at this time?** Although Mr. Holly's left carpal tunnel syndrome has reached

> maximum medical improvement, he has not reached MMI with respect to the right carpal tunnel * * *.[2]

(Emphasis sic.)

{¶ 24} Dr. Erickson's prior evaluations of appellee dated October 5, 2020, and February 15, 2021, addressed the following issues: whether appellee's claim should be amended to allow additional conditions, whether surgery for carpal tunnel syndrome was successful, if he could return to work, and if he had achieved maximum medical improvement. These prior evaluations did not discuss whether appellee contracted and/or suffered from bilateral carpal tunnel syndrome as a direct result of his work at GCRTA. Dr. Erickson did not touch upon causation until his May 28, 2021 report, distinguishing this case from *Gridiron*, 2019-Ohio-167, 131 N.E.3d 327 (8th Dist.).

{¶ 25} The trial court did not abuse its discretion in granting appellee's motion in limine to exclude Dr. Erickson from testifying. Appellant was in possession of Dr. Erickson's report on May 28, 2021, but did not turn it over until August 13, 2021, less than 30 days before trial. Had appellant needed to supplement Dr. Erickson's report after May 28, 2021, it certainly could have done so, but in accordance with Civ.R. 26, the report was due to appellee no more than 30 days prior to trial. Appellant's argument that it showed good cause why it turned over the report late is without merit. Exclusion of this testimony was within the clear province of the trial court and in accordance with the Rules of Civil Procedure.

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[2] Dr. Erickson's final Independent Medical Evaluation is dated June 8, 2021, after he authored his expert report. Therefore, it is not germane to our analysis herein.

{¶ 26} The second assignment of error is overruled.

{¶ 27} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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CORNELIUS J. O'SULLIVAN, JR., JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and
EMANUELLA D. GROVES, J., CONCUR