

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

Lisa L. Smith

Court of Appeals No. L-10-1200

Appellant

Trial Court No. CI0200906324

v.

Lucas County, et al.

DECISION AND JUDGMENT

Appellees

Decided: March 31, 2011

* * * * *

Theodore A. Bowman, for appellant.

Mike DeWine, Attorney General of Ohio, and Joshua W. Lanzinger, Assistant Attorney General; Julia R. Bates, Lucas County Prosecuting Attorney, and Maureen O. Atkins, Assistant Prosecuting Attorney, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Lisa L. Smith, appeals the July 2, 2010 judgment of the Lucas County Court of Common Pleas which granted summary judgment to appellant's former employer, Lucas County, and the Bureau of Workers' Compensation ("BWC"), on her

claim to participate in the Ohio Workers' Compensation Fund for "displacement of cervical disc at C6-7" and "aggravation of pre-existing variant of Chiari malformation." Because we find that no genuine issues of fact remain, we affirm the court's judgment.

{¶ 2} The undisputed facts of this administrative appeal are as follows. On December 21, 2006, appellant while acting within the course and scope of her employment with Lucas County, slipped and fell on a wet floor while entering a building. Appellant sustained injuries to her head, neck, wrist, and elbow. Appellant submitted an injury claim with the BWC. The claim was allowed for the conditions of scalp contusion, neck sprain, sprain thoracic region, sprain lumbar region, sprain of left wrist and left hand, and contusion of right elbow.

{¶ 3} Thereafter, on February 27, 2007, appellant filed a motion to amend her claim to include the additional condition of "displaced cervical disc at C6-7." On April 26, 2007, appellant filed an additional motion to amend to include "aggravation of pre-existing variant of Chiari malformation."

{¶ 4} Following a hearing on August 13, 2007, the District Hearing Officer denied the additional claims finding that there was no correlation between the injury and appellant's bulging disc and that no evidence existed to support a substantial aggravation of appellant's pre-existing Chiari malformation.

{¶ 5} Appellant appealed the decision and, following a hearing held on October 16, 2007, the Staff Hearing Officer concluded that the MRI findings of the bulging disc and Chiari malformation were merely incidental and were not related to the injury. The

hearing officer noted that appellant had a long history of severe migraine headaches and that there was evidence that appellant was having memory problems prior to her injury.

{¶ 6} Appellant filed an appeal with the Industrial Commission of Ohio which, in an order mailed on November 6, 2007, rejected the claims. Appellant then commenced an appeal with the Lucas County Court of Common Pleas. Ruling on appellees' motions for summary judgment, the court found that, as to the cervical spine displacement, there was no evidence to support appellant's claim. As to the claim of aggravation of her Chiari malformation, interpreting the 2006 amendment to R.C. 4123.01(C), the court concluded that because there was no testing or diagnostic procedure to document the condition prior to the accident, appellant failed to provide the statutorily mandated objective findings or results. The court then granted appellees' motions for summary judgment. This appeal followed.

{¶ 7} Appellant now raises the following two assignments of error:

{¶ 8} "I. The trial court erred in finding that a claim for substantial aggravation of a pre-existing condition must be documented by objective medical evidence of the pre-existing condition both before and after the industrial injury.

{¶ 9} "II. The trial court erred in finding that a physician must have treated an injured worker both before and after an industrial injury in order to present objective clinical findings of substantial aggravation of a pre-existing condition."

{¶ 10} Appellant's assignments of error are related and will be jointly addressed. Appellant asserts that the trial court erred by granting appellees' motions for summary

judgment. We review de novo the trial court's ruling on the summary judgment motions. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363.

{¶ 11} In appellant's assignments of error, she contends that the trial court erred when it determined that the objective evidence of the "substantial aggravation" must be presented on a before-and-after basis. Appellant asserts that because the Chiari malformation was not discovered until the post-accident MRI, it could not have been documented. Appellant contends that this interpretation would unfairly preclude recovery for asymptomatic pre-existing conditions.

{¶ 12} Conversely, appellees argue that the evidence presented, the MRI with gated flow study, show only that appellant has current symptoms from the Chiari malformation. Appellees state that no objective evidence was provided to show that the condition worsened after her work injury.

{¶ 13} The statute at issue, R.C. 4123.01(C)(4), provides:

{¶ 14} "(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:

{¶ 15} "* * *

{¶ 16} "(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."

{¶ 17} Both the parties and the lower court correctly state that the above-quoted section, newly added in 2006, has not yet been interpreted by Ohio courts. The revision appears to be a response to the Supreme Court of Ohio's decision in *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St.3d 1. In *Schell*, the court held that an injured worker need only show an aggravation of a pre-existing condition and that the aggravation need not "be of any particular magnitude." *Id.* at 4.

{¶ 18} If appellant had provided sufficient documentation of her symptoms preceding the injury, substantial aggravation could have been established. Such evidence would not necessarily require objective "before" and "after" findings or results. In this case, appellant provided only Dr. Healy's affidavit and chart notes which he specifically stated were based on "the history which she related to me." Appellant failed to provide any information such as records or a statement from her prior treating physician. The subsequent MRI revealed only the existence of the Chiari malformation and provided an explanation for appellant's current symptoms. The testing did not establish that the condition was substantially aggravated by the injury.

{¶ 19} R.C. 4123.54(G) further supports this analysis. The section provides:

{¶ 20} "If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury."

{¶ 21} Based on the foregoing, we find that the trial court did not err in determining that evidence of the condition or symptoms must be documented prior to the injury and presented in support of the claim. To hold otherwise would frustrate the language of the statute. Appellant's assignments of error are not well-taken.

{¶ 22} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

<p>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.</p>
