

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

Lynette D. Lake

Court of Appeals No. L-12-1330

Appellant

Trial Court No. CI0201105232

v.

Anne Grady Corporation, et al.

DECISION AND JUDGMENT

Appellee

Decided: October 25, 2013

* * * * *

Jeffrey J. Perkins and John R. Polofka, for appellant.

Robert J. Gilmer, Jr. and Carrie L. Sponseller, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} In this workers' compensation case, appellant, Lynette Lake, appeals the judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of appellee, Anne Grady Corporation ("Anne Grady"). For the following reasons, we affirm.

A. Factual and Procedural Background

{¶2} On February 12, 2010, while in the course of her employment with Anne Grady, Lake fractured her left kneecap when she slipped and fell on a patch of ice. Subsequently, she filed an application with the Bureau of Workers' Compensation, which was allowed for her claim of "fractured patella, closed left." On January 5, 2011, Lake sought additional allowance for "substantial aggravation of pre-existing osteoarthritis left knee." The claim was allowed at the administrative level, then by the district hearing officer, and then by the staff hearing officer. Finally, the Industrial Commission of Ohio refused Anne Grady's further appeal. Having exhausted its administrative remedies, Anne Grady appealed the allowance to the Lucas County Court of Common Pleas pursuant to R.C. 4123.512.

{¶3} At the trial court, Anne Grady moved for summary judgment, arguing that Lake could not prove her claim for substantial aggravation of a pre-existing injury under R.C. 4123.01(C)(4). That section provides:

"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. R.C. 4123.01(C)(4).

{¶4} In support of its motion, Anne Grady submitted an affidavit from Dr. Thomas Leiser concluding, “[t]o a reasonable degree of medical probability, Ms. Lake’s current left knee complaints and symptoms are directly attributable to her naturally occurring, pre-existing degenerative left knee osteoarthritis, which was not substantially aggravated by the February 12, 2010 work injury.” Leiser stated,

There are no objective diagnostic findings, objective clinical findings or objective test results showing that Ms. Lake’s pre-existing left knee osteoarthritis was substantially aggravated by the February 12, 2010 work injury. Notably, there is no objective evidence of any kind that shows any changes in the level or extent of Ms. Lake’s left knee osteoarthritis from before the February 12, 2010 work injury as compared to the level or extent of her left knee osteoarthritis after the February 12, 2010 work injury.

{¶5} In support of her response to Anne Grady's motion for summary judgment, Lake attached the affidavit of her treating physician, Dr. Gregory Georgiadis.

Georgiadis' affidavit stated, in pertinent part:

3. Based on my examination of Ms. Lake, the history taken, and my review of medical records, it is my opinion to a reasonable degree of medical certainty that Ms. Lake did sustain the condition of 'substantial aggravation of pre-existing osteoarthritis of the left knee' as a direct and proximate result of the work injury she suffered on February 12, 2010.

4. It is my opinion that Ms. Lake had severe osteoarthritis of her left knee that pre-existed her February 2010 work injury. By history, and review of medical records, that arthritis was asymptomatic and not causing Ms. Lake any problems or limitations before the injury. She had no restrictions of daily activities until this injury caused the osteoarthritis of the left knee to be aggravated and made symptomatic.

5. To a reasonable degree of medical certainty, Ms. Lake has ongoing problems that are directly attributable to this February 2010 work injury. She is in need of further treatment and will probably need further surgery including a total knee replacement because of this work injury. Her left knee problems were not caused primarily by the natural deterioration of her knee joint; rather her problems were caused primarily by this injury

which substantially aggravated the pre-existing and symptom free osteoarthritis of the left knee.

6. The substantial aggravation of the pre-existing osteoarthritis of the left knee is documented by repeated x-rays, Ms. Lake's clinical findings, and her subjective complaints.

{¶6} In its reply, Anne Grady challenged the sufficiency of Georgiadis' affidavit in two ways. First, it argued that the affidavit is insufficient under Civ.R. 56(E) and Evid.R. 705 because it fails to disclose the underlying facts and data which support its conclusion. Alternatively, Anne Grady argued that the affidavit fails to identify any specific objective diagnostic findings, objective clinical findings, or objective test results as required by R.C. 4123.01(C)(4). Thus, under either theory, Anne Grady concluded that summary judgment in its favor was appropriate because Lake has failed to demonstrate a genuine issue of material fact.

{¶7} In its judgment on the motion, the trial court agreed with Anne Grady that Georgiadis' affidavit failed to comport with the rules of evidence, and thus found it inadmissible. Finding that the record was devoid of any other evidence to support Lake's claim, the trial court granted summary judgment in Anne Grady's favor. This timely appeal followed.

B. Assignments of Error

{¶8} Lake assigns three errors for our review:

1. In this employer court appeal from the additional allowance of aggravation of arthritis, the affidavit of the treating orthopedic surgeon, that the injured workers [sic] pre-existing arthritis in her left knee was substantially aggravated by her work injury, and documented by repeated x-rays, clinical findings and subjective complaints, is sufficient to demonstrate a question of fact and the trial court erred in determining that the affidavit was inadmissible.

2. In this employer court appeal from the additional allowance of aggravation of arthritis, the trial court erred in finding no genuine issue of material fact existed on the basis of an affidavit of a non-treating physician who did not examine the injured worker until several months after the injury, when the affidavit of the treating orthopedic surgeon who surgically treated the injured worker within two weeks of the injury states that over the course of his more than two years of treatment of the injured worker, there is objective evidence of substantial aggravation of pre-existing arthritis of the left knee as a direct and proximate result of the work injury.

3. In this employer court appeal from the additional allowance of aggravation of arthritis, the trial court erred as a matter of law in holding that the affidavit of treating orthopedic surgeon Dr. Georgiadis did not satisfy the requirements of R.C. § 4123.01.

II. Analysis

{¶9} Lake’s assignments of error are interrelated and will be addressed together.

{¶10} We review an award of summary judgment de novo, applying the same standards as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶11} Where a party seeks summary judgment on the ground that the nonmoving party cannot prove its case, it is the moving party that “bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party’s claims.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). “[T]he moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party’s claims.” *Id.* “If the moving party fails to satisfy its initial burden, the motion for summary judgment must be

denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial.” *Id.*

{¶12} Here, Anne Grady has satisfied its initial burden through the affidavit of Dr. Leiser. In that affidavit, Leiser stated that he examined Lake and her medical records, including post-injury x-rays taken February 16, 2010, and concluded that “[t]here are no objective diagnostic findings, objective clinical findings or objective test results showing that Ms. Lake’s pre-existing left knee osteoarthritis was substantially aggravated by the February 12, 2010 work injury.”

{¶13} The burden then shifted to Lake to establish, through evidentiary quality material, specific facts showing that there is a genuine issue for trial. In an attempt to do so, Lake submitted the affidavit of Dr. Georgiadis in which he opines to a reasonable degree of medical certainty that Lake’s fall substantially aggravated the pre-existing osteoarthritis of her left knee. However, the trial court found this affidavit to be inadmissible in that it did not meet the standards of Civ.R. 56(E). On appeal, Lake first argues that the trial court erred in making this determination. We need not address this first argument, though, because, even assuming that the affidavit is admissible, it is still insufficient to demonstrate a genuine issue for trial under R.C. 4123.01(C)(4).

{¶14} Lake disagrees, and contends that Georgiadis’ affidavit is sufficient in that it conflicts with Leiser’s affidavit on the decisive issue: whether Lake’s fall substantially

aggravated her pre-existing osteoarthritis. Lake argues that the trial court's decision to award summary judgment is based on an erroneous reliance on *Smith v. Lucas Cty.*, 6th Dist. Lucas No. L-10-1200, 2011-Ohio-1548.

{¶15} In *Smith*, the appellant suffered a workplace injury when she slipped and fell on a wet floor. Her initial claims for injuries from that fall were allowed. Five months after her accident, the appellant sought to amend her claim to include “aggravation of preexisting variant of Chiari malformation.” Prior to her injury, the appellant had been experiencing migraines, but she had never been diagnosed as having a Chiari malformation. Ultimately, the Industrial Commission of Ohio rejected the amended claim for substantial aggravation, as did the court of common pleas. In affirming the denial of that claim, we reasoned,

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 [the post-injury treating physician'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. *Id.* at ¶ 18.

We concluded, “[T]he 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.” *Id.* at ¶ 21.

{¶16} Lake argues that the trial court relied on *Smith* for the proposition that a worker cannot claim substantial aggravation of a pre-existing condition if the worker did not receive an objective diagnosis of the pre-existing condition before the work injury. However, she maintains that *Smith* does not stand for this proposition, but rather was decided on the basis that the appellant did not provide *any* information such as records or a statement from her prior treating physician, and that the objective findings of her pre-existing condition acquired after her injury did not support an aggravation theory. Lake submits that requiring objective evidence of a condition both before and after an injury would be a novel burden in worker’s compensation law, and would go far beyond the intent of the *Smith* decision.

{¶17} Recently, the Eighth District has addressed this issue in a remarkably similar factual situation. In *Gardi v. Lakewood School Dist. Bd. of Edn.*, 8th Dist. Cuyahoga No. 99414, 2013-Ohio-3436, Gardi was injured when he slipped and fell on black ice while working for the Lakewood City School District. His initial claim for left knee contusion was allowed by the Industrial Commission of Ohio. Subsequently, Gardi

moved to amend his claim to include an additional allowance for substantial aggravation of pre-existing osteoarthritis of the left knee. That claim was denied, and Gardi appealed to the court of common pleas. At the trial court, Lakewood moved for summary judgment, arguing that Gardi had failed to present pre-injury medical evidence documenting his osteoarthritis, and, thus, he could not demonstrate substantial aggravation of a pre-existing condition. Relying on *Smith*, the trial court granted Lakewood's motion.

{¶18} On appeal, the Eighth District reversed. In its analysis, the court concluded that the clear and unambiguous language of R.C. 4123.01(C)(4) “requires that a substantial aggravation of a pre-existing injury must be documented by objective diagnostic findings, objective clinical findings, or objective test results.” *Id.* at ¶ 12. The court continued,

There is no language anywhere in the statute that requires the pre-existing condition to be medically documented prior to the workplace injury that allegedly aggravated the condition. Accordingly, any requirement that a claimant must present pre-injury documentation of the pre-existing condition before the claimant may recover under R.C. 4123.01(C)(4) for substantial aggravation of the condition adds a requirement that is not in the statute. *Id.*

{¶19} Further, like Lake, the Eighth District stated that *Smith* does not stand for the proposition that objective medical evidence of a pre-existing condition must be documented prior to the injury and presented in support of an R.C. 4123.01(C)(4) substantial aggravation claim. *Gardi* at ¶ 20. Rather, the court found that *Smith* “merely stands for the proposition that to recover under R.C. 4123.01(C)(4), there must be some objective evidence of substantial aggravation of a pre-existing condition.” *Gardi* at ¶ 23. In reaching this conclusion, the Eighth District noted that we specifically stated that “[s]uch evidence would not necessarily require objective ‘before’ and ‘after’ findings or results.” *Id.*, quoting *Smith*, 6th Dist. Lucas No. L-10-1200, 2011-Ohio-1548 at ¶ 18.

{¶20} We agree with Lake and the Eighth District that *Smith* does not hold that an injured worker is required to produce pre-injury *objective* medical evidence documenting a pre-existing condition to support a substantial aggravation claim. We also clarify that while pre-injury evidence of a pre-existing condition—whether objective or subjective—is helpful, it is not necessary so long as the worker can demonstrate through “objective diagnostic findings, objective clinical findings, or objective test results” that the pre-existing condition was substantially aggravated by the injury. R.C. 4123.01(C)(4).

{¶21} However, as recognized by Lake, to determine that a condition has been substantially aggravated, there must be a pre-injury reference point from which to compare the post-injury condition. In cases where the pre-injury condition is asymptomatic, providing an initial reference point becomes difficult, especially where the

pre-existing condition has never been diagnosed. This does not mean, however, that proving substantial aggravation of a pre-existing condition is impossible in these situations. In fact, Ohio courts have found that sufficient evidence existed to support a substantial aggravation claim under R.C. 4123.01(C)(4) where the condition had not been diagnosed pre-injury.

{¶22} In *Bohl v. Cassens Transport Co.*, 3d Dist. Seneca No. 13-11-36, 2012-Ohio-2248, Bohl was injured when a chain he was using to secure a motor vehicle to his semi-trailer slipped from the ratchet. Bohl's initial claim for cervical strain was allowed. He then sought an additional allowance for substantial aggravation of pre-existing degenerative arthritis of the cervical spine. Eventually, the matter proceeded to a jury trial.

{¶23} At the trial, Bohl's treating physician, Dr. Heis, testified that when he examined Bohl after the accident, Bohl had "some decreased rotation of his neck, [his] ability to move his neck back and forth was decreased." *Id.* at ¶ 23. Heis ordered medication and physical therapy, and performed "trigger point injections" of cortisone. A few months later, Heis referred Bohl to another doctor to receive cervical nerve root blocks. Several months after that, Heis requested that Bohl's workers' compensation claim be amended to include substantial aggravation of cervical degenerative disc disease. *Id.* at ¶ 24. Heis concluded that Bohl had this pre-existing condition after viewing Bohl's MRI and x-rays, and noting that the bone spurs on the neck and spine

took years to develop and were there before the workplace injury. Heis also concluded “upon his physical examination of Bohl, Bohl’s MRI and medical records, and his own clinical observations * * * that Bohl sustained a substantial aggravation of cervical disc disease as a result of his workplace injury.” *Id.* Heis testified that he reached this opinion because Bohl did not heal after several months of treatment. Heis further testified that his diagnosis is consistent with other types of neck injuries where the neck of a patient with degenerative arthritis is snapped back and forth. *Id.*

{¶24} In addition to his testimony, Heis’s medical reports were entered into evidence. In his March 15, 2010 report, Heis noted, “[r]ange of motion of the cervical spine reveals rotation possible to 75° to the right, and only 40° to the left, with full flexion and 30° of cervical extension.” *Id.* at ¶ 32. Several months later, following treatment with medication, physical therapy, and cervical nerve root blocks, Heis reported, “exam today reveals rotation of the neck to the right and left at 45°, with 20° of extension and only 30° of flexion noted today.” *Id.*

{¶25} Following Bohl’s presentation of evidence, Cassens Transport Company moved for a directed verdict, arguing that Heis made no reference to objective findings to support his conclusion that Bohl suffered a substantial aggravation of degenerative arthritis of the cervical spine. The trial court overruled the motion. On appeal, the Third District affirmed, reasoning that although Heis’s testimony failed to reference “objective diagnostic findings, objective clinical findings, or objective test results,” his testimony

must be taken in conjunction with his medical reports, which did provide objective clinical findings that Bohl's range of motion had decreased months after the initial injury despite medical treatment. *Id.* The Third District concluded that based on the medical reports, Heis's testimony, and Bohl's testimony, a rational trier of fact could have found that Bohl suffered a substantial aggravation of pre-existing degenerative arthritis of the cervical spine. *Id.*

{¶26} Likewise, in *Brate v. Rolls-Royce Energy Sys., Inc.*, 5th Dist. Knox No. 12CA000001, 2012-Ohio-4577, the Fifth District reversed the trial court's award of summary judgment, concluding that a genuine issue of material fact existed as to whether Brate suffered a substantial aggravation of pre-existing osteoarthritis of the right knee. In that case, Brate twisted and injured his right knee while he was working for Rolls-Royce Energy Systems, Inc. ("Rolls-Royce"). Brate was granted workers' compensation benefits for right knee sprain and internal derangement. Brate subsequently sought allowance for substantial aggravation of pre-existing osteoarthritis of the right knee. The Industrial Commission denied his request.

{¶27} In Brate's appeal to the trial court, Rolls-Royce moved for summary judgment, claiming that no genuine issue of material fact existed regarding medical causation. The trial court granted Rolls-Royce's motion, and Brate appealed.

{¶28} In reversing the trial court's decision, the Fifth District relied on the testimony of Brate's treating physician, Dr. Cush. Cush testified that during his surgery

to repair Brate's torn meniscus, he observed "preexisting osteoarthritic changes." *Id.* at ¶ 26. Specifically, he observed "Grade 2, moderate Grade 2 chondral changes, as well as a rare Type 3 chondral changes." *Id.* He described the chondral changes as cracks and fissures "in the cartilage, and loose bodies are floating fragments inside the joint." *Id.* He further testified that because the arthritic changes were of the advanced pathology, they existed prior to the accident and were made worse by the trauma to the knee. *Id.* In making this conclusion, Cush relied on the following evidence:

Objective is my clinical exam demonstrating valgus instability, stress testing demonstrating an MCL injury, arthroscopic evaluation with the intra photographs demonstrating the medial meniscus tear. Subjective in that my patient, who seems like an outstanding citizen, says that my knee hurts and it did not hurt before, and he did have continued medial joint line pain, despite arthroscopic portions being resected, joint pain and a torn meniscus, take out that torn portion, that pain should go away. *Id.* at ¶ 27.

{¶29} Based on this evidence, and the testimony of Brate's primary care physician, Dr. Elder, which largely supported Cush's conclusions, the Fifth District held that genuine issues of material fact existed to overcome Rolls-Royce's motion for summary judgment. *Id.* at ¶ 38.

{¶30} Here, in contrast to *Bohl* and *Brate*, Georgiadis' affidavit provides no objective diagnostic findings, objective clinical findings, or objective test results.

Although the affidavit states that the substantial aggravation is documented by “repeated x-rays, Ms. Lake’s clinical findings, and her subjective complaints,” it does not state which x-rays or clinical findings were relied upon, and no x-rays, clinical findings, or other medical records were attached to it. Merely stating that objective evidence exists is not in and of itself objective evidence. Furthermore, the affidavit fails to state how these anonymous x-rays and clinical findings support the conclusion that the condition has been substantially aggravated. Therefore, having provided no objective diagnostic findings, objective clinical findings, or objective test results to support her conclusion that the fall substantially aggravated the pre-existing osteoarthritis of her left knee, Lake has failed to satisfy her burden to demonstrate that a genuine issue remains for trial, and summary judgment in favor of Anne Grady is appropriate.

{¶31} Accordingly, Lake’s assignments of error are not well-taken.

III. Conclusion

{¶32} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to Lake pursuant to App.R. 24.

Judgment affirmed.

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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>.