[Cite as *Burnett v. Ohio Dept. of Transp.*, 2017-Ohio-1131.]

DAN BURNETT Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION, et al. Defendants	Case No. 2012-01937 Judge Patrick M. McGrath DECISION

{¶1} On July 27, 2016, the magistrate issued a decision recommending judgment for plaintiff in the amount of $21,920.81. Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." On August 10, 2016, plaintiff Dan Burnett (Burnett) filed objections to the magistrate's decision. On August 11, 2016, plaintiff filed a "motion to file a corrected memorandum in support of plaintiff's objections to magistrate Judge VanSchoyck's decision *instanter*." Plaintiff states that the non-final version of his objections were filed and counsel for defendants does not oppose the motion to file the corrected memorandum. As such, plaintiff's motion to file a corrected memorandum in support is GRANTED, and the August 11, 2016 filing replaces the August 10, 2016 filing. On August 23, 2016, defendants, the Office of Risk Management and the Ohio Department of Transportation (defendants), filed their response.

{¶2} As an initial matter, a review of plaintiff's objections and the case docket show that plaintiff failed to support his objections with a transcript of the trial proceedings. When ruling on objections to a magistrate's decision, a "court shall undertake an independent review as to the objected matters to ascertain that the

magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). Additionally, when a party objects to a magistrate's factual findings, "whether or not specifically designated as a finding of fact * * * [it] shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii). "If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions." *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13. Accordingly, the court accepts the magistrate's factual findings and any objections related to factual findings are without merit.

{¶3} In this case, plaintiff was operating a tractor-trailer on U.S. Route 30 in Allen County when a metal skid shoe broke off of the bottom of a snowplow on a truck being operated by an employee of defendant, Ohio Department of Transportation. Plaintiff sustained injuries when the tractor-trailer ran over the object. The parties stipulated on the issue of liability, and the November 18, 2015 trial pertained to damages only. Plaintiff raises the following four objections:

a. Objection 1: This Court should reject the Magistrate's ruling on Defendants' request to strike portions of Dr. Hubbell's testimony and refusal to admit it as evidence.

{¶4} At the conclusion of the damages trial, the magistrate held the trial record open, in part, to allow for Dr. Thomas Hubbell, M.D. to be deposed. In the magistrate's decision, he admitted Dr. Hubbell's deposition, however defendants filed a motion to strike portions of Dr. Hubbell's testimony because Dr. Hubbell was not disclosed as an expert as required by L.C.C.R. 7(E), and the expert opinion he attempted to provide did not satisfy the standard set by the Ohio Supreme Court in *Stinson v. England*, 69 Ohio St.3d 45, 633 N.E.2d 532 (1994), paragraph one of the syllabus. The magistrate concluded that "Dr. Hubbell was not disclosed as an expert as required by

L.C.C.R. 7(E), nor was an expert report produced in accordance with L.C.C.R. 7(E)," and that in a July 2015 response to an interrogatory asking for the name of each person whom plaintiff expected to call as an expert witness, plaintiff responded that "[p]laintiff has not retained an expert witness at this time." Thus, plaintiff breached the disclosure provisions of Civ.R. 26(E)(1)(b) and L.C.C.R. 7(E).

{¶5} Further, the magistrate determined that some of the testimony defendants sought to strike did not amount to admissible expert opinion on causation under the standard set out in *Stinson*, and the magistrate did not find Dr. Hubbell to be persuasive on causation issues relative to plaintiff's psychological issues or his chronic back pain. (Magistrate Decision, p. 13.) As such, the magistrate admitted admissible opinion on causation related to the L4/L5 disc injury at page 45 of the deposition transcript, but granted defendants' motion to strike testimony related to Burnett's chronic back pain and psychological issues.

{¶6} Burnett makes a number of arguments as to why the court should refuse to adopt the findings of the magistrate. First, Burnett argues that contrary to the magistrate's finding "that Dr. Hubbell's opinion regarding causation as it related to Burnett's back pain and the MVA 'had the effect of producing some surprise and prejudicial effect upon Defendants,'" defendants were not surprised by the testimony. Second, Burnett argues that the magistrate was incorrect to find that Dr. Hubbell's opinion on causation did not satisfy the *Stinson* standard. Third, even assuming Dr. Hubbell was not properly designated as an expert witness, his medical records and the information contained therein are independently admissible.

{¶7} Defendants argue that the magistrate was correct in determining that Dr. Hubbell's opinion related to plaintiff's chronic back pain or psychological condition did not comply with *Stinson*, and Dr. Hubbell's office records do not comply with L.C.C.R. 7(E).

{¶8} First, the court turns to the issue regarding L.C.C.R. 7(E) and Civ.R. 26(E)(1)(b). L.C.C.R. 7(E) states, in pertinent part, as follows:

> Each trial attorney shall exchange with all other trial attorneys, in advance of the trial, written reports of medical and expert witnesses expected to testify. The parties shall submit expert reports in accordance with the schedule established by the court.
>
> A party may not call an expert witness to testify unless a written report has been procured from said witness. * * * The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report.
>
> All experts must submit reports. * * * In the event the expert witness is a treating physician, the court shall have the discretion to determine whether the hospital and/or office records of that physician's treatment which have been produced satisfy the requirements of a written report. The court may exclude testimony of the expert if good cause is not demonstrated. (Emphasis added).

{¶9} The court agrees with the magistrate and defendants that Dr. Hubbell was not disclosed as an expert as required by L.C.C.R. 7(E), nor was an expert report produced in accordance with the court's rule. It also appears that plaintiff agrees with this conclusion, stating that Burnett's treating physician "was not labeled by Burnett as an expert witness prior to trial." (Plaintiff's Objections, p. 4.) Furthermore, in response to an interrogatory that asked to name each person whom plaintiff expected to call as an expert witness, plaintiff did not identify any expert. Plaintiff also did not supplement this interrogatory response in violation of Civ.R. 26(E)(1)(b). Finally, while Dr. Hubbell was identified as a witness on plaintiff's pretrial statement, he was only identified as a treating physician and he was not listed as an expert witness.

{¶10} While plaintiff argues that there was e-mail correspondence between plaintiff's counsel and defendants' original counsel indicating that Dr. Hubbell's records

would be used as dispositive evidence of causation, and thus defendants were not surprised by Dr. Hubbell's testimony, the court disagrees. Plaintiff's counsel e-mailed Dr. Hubbell's medical records to defendant more than a year before trial, and had ample opportunity to properly identify Dr. Hubbell as an expert witness and produce a report. Plaintiff did neither, instead asking the court after trial to allow Dr. Hubbell's deposition and medical records to be used as a written report. Accordingly, the court agrees with the magistrate that plaintiff failed to comply with L.C.C.R. 7(E).

{¶11} Moreover, the court disagrees with plaintiff's argument that "no rule prevents the Court from considering these medical records which contain the proper and necessary causation evidence to prove Burnett's physical and psychological issues." (Plaintiff's Objections, p. 7.) While the court is free to consider the medical records as evidence, the magistrate was correct in determining that the attempted expert testimony by Dr. Hubbell related to plaintiff's chronic back pain and psychological issues did not satisfy the requirements of *Stinson*, and thus the court will not consider the medical records as causation evidence to prove plaintiff's chronic back pain and psychological issues.

{¶12} In *Stinson v. England*, 69 Ohio St.3d 45, 633 N.E.2d 532 (1994), the Supreme Court of Ohio established that "the admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." The court agrees with defendants that Dr. Hubbell's medical records pertaining to plaintiff's chronic back pain and psychological issues addressed the conditions that he diagnosed or treated, but do not address the proximate cause of those conditions such that the records satisfy the *Stinson* requirement.

{¶13} A review of the excluded testimony in Dr. Hubbell's deposition shows that Dr. Hubbell did not respond to questioning by plaintiff's counsel in terms of the probabilities required by *Stinson*. There was sufficient evidence in the record that

plaintiff experienced back pain prior to the injury he suffered as a result of the accident. The magistrate was correct in finding that the herniated disc at L4/L5 was proximately caused by the accident and Dr. Hubbell's deposition testimony was admitted for this condition. However, Dr. Hubbell's deposition testimony with regard to plaintiff's chronic back pain and psychological condition was unclear, and did not satisfy the requirements of *Stinson*. (Magistrate Decision, pp. 4, 20).

{¶14} First, Dr. Hubbell testified that plaintiff's depression is a consequence of a longstanding stressful experience which is his pain related to his back injury. However, Dr. Hubbell did not clarify prior to offering this testimony what pain or back injury he was referring to, and in this case plaintiff suffered a herniated disk and associated pain related to the accident, and chronic pain not related to the accident but related to the nature of his employment as a truck driver. Second, as plaintiff's psychological injury did not present itself until approximately 17 months after the accident in this case, the court agrees with the magistrate that plaintiff failed to establish a causal relationship between his chronic back pain and any related psychological issues. As such, plaintiff's first objection is OVERRULED.

b. Objection 2: This Court should reject the Magistrate's determination that Dr. Hubbell's testimony regarding causation as it relates to Burnett's chronic back pain was not persuasive.

{¶15} Plaintiff argues that plaintiff's chronic back pain was not a new or separate injury, and that the magistrate erred in finding that Burnett's back pain proximately caused by the accident was resolved by October 2010. Plaintiff states that the magistrate's findings are directly contradicted by Dr. Hubbell's and Burnett's testimony. In their response, defendants argue that the magistrate is free to find any witness's testimony unpersuasive, as the court can believe all, part, or none of a witness's testimony, even an expert's testimony. *Parsons v. Washington State Comm. College*, 10th Dist. Franklin No. 05-AP-1138, 2006-Ohio-2196, ¶ 21.

{¶16} As an initial note, plaintiff failed to submit a transcript of the damages trial, and thus the court accepts the factual findings of the magistrate as they pertain to the factual testimony of Burnett at trial. Further, it is clear to the court that the magistrate did an extensive analysis and consideration of each witness's testimony and the exhibits provided to the court. Upon review of Dr. Hubbell's testimony and the exhibits presented at trial, the court agrees with the findings of the magistrate.

{¶17} While plaintiff argues that the L4/L5 injury was not a separate injury than plaintiff's chronic back pain, the evidence shows that (1) plaintiff experienced back pain associated with his employment as a truck driver prior to the accident, (2) after the accident, plaintiff had significant pain in his lower back and had to undergo surgery and other medical treatment, and (3) plaintiff returned to work in October 2010 and continued to experience intermittent lower back pain, however this pain was different than the severe and persistent pain caused by the accident. As such, plaintiff's second objection is OVERRULED.

c. Objection 3: This Court should reject the Magistrate's determination that Dr. Hubbell's testimony regarding causation as it relates to Burnett's psychological issues was not persuasive.

{¶18} Plaintiff argues that "the evidence presented at trial and in Dr. Hubbell's testimony confirms that Burnett's condition did not return to normal." (Plaintiff's Objections, p. 14). Similarly to his third objection, plaintiff argues that the testimony of plaintiff at trial and Dr. Hubbell's deposition and medical records show that plaintiff experienced psychological issues that were caused by the accident. Similar to the court's analysis above, plaintiff failed to provide the court with a transcript of evidence at the damages trial as required by Civ.R. 53, and as such the court accepts the magistrate's factual findings. Further, as the trier of fact, the magistrate was entitled to believe all, part, or none of a witness's testimony at trial and give it appropriate weight. There is nothing in the evidence available to the court to lead the court to believe that

plaintiff's psychological issues were proximately caused by the accident. As such, plaintiff's third objection is OVERRULED.

d. Objection 4: The Magistrate's Collateral Source Deduction Was Not Proper.

{¶19} Plaintiff argues that applying his $40,000 Bureau of Workers Compensation (BWC) settlement to the time period February 2010 to October 2010 was an error because the settlement "states that the payment for his injury was equal to $6.20 per month," thus the magistrate should have only reduced the award by $49.60. (Plaintiff's Objections, pp. 16-17). Defendants argue that plaintiff "did not offer any evidence at trial about the structure of his $40,000 settlement nor did he submit the settlement documents as an exhibit." (Response, p. 8). Further, the Joint Stipulation of Average Weekly Wage and Collateral Sources of Recovery provides that the settlement was for $40,000. *Id.* Relatedly, on August 10, 2016, plaintiff filed a request to file a document under seal in support of plaintiff's objections. The document plaintiff requests to be filed under seal is plaintiff's Workers' Compensation Settlement Decision. Plaintiff provides no memorandum in support or explanation why this document should be either filed at this time or filed under seal.

{¶20} While the court has discretion to admit additional evidence in support of objections, plaintiff has not provided any reasons for the court to accept this document. First, plaintiff's motion to file the BWC settlement under seal has no memorandum in support, and while Sup.R. 45(E) allows the court to restrict public access to a case document, the rule does so if the court finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering a number of factors. Here, plaintiff provided no support for his motion. Second, the court agrees with defendants that plaintiff could have produced this document as evidence at trial, and plaintiff has not demonstrated "that the party could

not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d). As such, plaintiff's motion to file Burnett's BWC settlement decision under seal is DENIED and the court finds the magistrate's collateral source deduction was proper. Plaintiff's fourth objection is OVERRULED.

PATRICK M. MCGRATH
Judge

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DAN BURNETT Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION, et al. Defendants	Case No. 2012-01937 Judge Patrick M. McGrath JUDGMENT ENTRY

{¶21} Upon review, the court finds that the magistrate properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered for plaintiff in the amount of $21,920.81. Court costs are assessed against defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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