[Cite as *Heuring v. Meijer, Inc.*, 2010-Ohio-1598.]

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

Martin A. Heuring	Court of Appeals No. L-09-1243
Appellee	Trial Court No. CI0200806248
v.	
Meijer, Inc., et al.	**DECISION AND JUDGMENT**
Appellant	Decided: April 9, 2010

* * * * *

Megan E. Burke, for appellee.

Gregory B. Denny and Mark S. Barnes, for appellant.

*** * * * ***

SINGER, J.

{¶ 1} Appellant, Meijer, Inc., appeals an order from the Lucas County Court of Common Pleas affirming the Industrial Commission of Ohio's decision to allow appellee, Martin Heuring, to participate in the Workers' Compensation Fund, and granting appellee's motion for summary judgment. For the reasons that follow, we affirm the trial court's decision.

{¶ 2} On November 15, 2007, appellee, a clerk at a Meijer's gas station and convenience store, sustained a fall behind the counter inside the station. Appellee avers that he has no independent recollection of the moments immediately before his fall, only that he remembers making a "cash drop". Shortly after the fall, appellee was taken to St. Charles Hospital for treatment. The emergency room report concludes that appellee suffered a syncopal episode (fainting). Appellee was admitted to the hospital for four days for further examination.

{¶ 3} On November 26, 2007, Dr. James D. Brue examined and provided treatment to appellee. Dr. Brue averred that after obtaining a medical history directly from appellee and reviewing appellee's hospital records, that it was his opinion to a reasonable degree of medical certainty that appellee suffered a "non-occupational syncopal episode" and that all injuries sustained on November 15, 2007, are the proximate result of the syncopal episode.

{¶ 4} Sometime after appellee's release from the hospital it was discovered that there was a videotape of the incident as well as a co-worker and a customer who had witnessed appellee's fall. Dr. Brue did not consider the videotape or any statements from the witnesses in reaching his medical opinion.

{¶ 5} Brad Freyer, appellee's co-worker, present at the time of the incident, testified that appellee "was waiting on a customer who asked for smokeless tobacco. [Appellee] went back to get the smokeless tobacco and the next thing, I heard him yell. I turned around and he was falling with his back towards the cabinets. [Appellee] hit his

head on the cabinets and then came to rest on the floor." Freyer also testified that he saw a customer run over to appellee after the fall and inquire to appellee's condition.

{¶ 6} The customer, Todd Yates, testified that appellee had "tried to step over a stool that was in his path," and "[appellee] ended up catching the stool with his foot and fell."

{¶ 7} Appellee was also treated by Dr. Cindy Dunne, a licensed chiropractic physician. Dunne testified that during her treatment she reviewed the video of appellee's fall and that it appeared to her that appellee tripped over a step stool and fell. Based upon her examination, review of prior medical records, and review of the video of the incident, Dunne's opinion, to a reasonable degree of medical probability, is that appellee suffered a "lumbrosacral sprain/strain, thoracic sprain/strain, cervical sprain/strain, and head contusion which were directly and proximately caused by [appellee's] fall" at work on November 15, 2007.

{¶ 8} Appellant sets forth two assignments of error.

{¶ 9} "I. The Court of Common Pleas committed reversible error in granting appellee, Martin A. Heuring's motion for summary judgment because there was contrary evidence, which construed in defendant's favor created a genuine issue of material fact and Ohio law requires appellee to prove his entitlement to worker's compensation benefits at trial.

{¶ 10} "II. The Court of Common Pleas committed reversible error in denying Meijer, Inc.'s motion for summary judgment where appellee Martin A. Heuring sustained an unexplained fall and failed to rule out idiopathic causes of the fall."

{¶ 11} Appellant's assignments of error will be addressed together. This court, in determining whether to affirm or reverse a lower court's grant of summary judgment, applies a de novo standard, making an independent review of the evidence adduced at the original hearing. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment shall only be granted "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * * show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 12} To be compensable under the Ohio Workers' Compensation Fund, an injury, "whether caused by external accidental means or accidental in character and result," must occur in the course of and arising out of employee's employment. R.C. 4123.01(C). The phrase "in the course of" describes injuries that occur while an employee is performing duties required by his employment. *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 120.

{¶ 13} Appellee's injury is easily within the limit imposed by this requirement. There is no dispute that appellee was waiting on a customer at the time of his fall. Attending to the needs of customers is undoubtedly one of the primary duties of a gas station clerk.

{¶ 14} The statute also requires that appellee's injury arise out of his employment. The "arising out of" requirement calls for a totality of the circumstances test. Id. at 122. The test examines the time, place, and circumstances of the employee's injury to determine whether a causal connection between the injury and employment exists. Id. In this case, the first two prongs, time and place, fall in favor of a compensable injury. Appellee fell during his scheduled shift behind the counter inside his place of employment.

{¶ 15} However, appellant argues that the circumstances surrounding appellee's fall preclude appellee's right to participate in the Workers' Compensation Fund. Appellant maintains that the fall resulted from an idiopathic condition (an unexplained syncopal episode) and any resultant injury is therefore not compensable according to *Waller v. Mayfield* (1988), 37 Ohio St.3d 118, 123.

{¶ 16} While appellant's reliance on *Waller* is not incorrect, appellant fails to prove that appellee fell because of a syncopal episode unrelated to appellee's employment. The only witness offering the syncopal episode explanation for appellee's fall is Dr. Brue who did not base his conclusion on the indisputable video evidence or the testimony of witnesses with first-hand knowledge of the incident. The stronger evidence is the opinion of the customer who witnessed the event and Dr. Dunne, who formed her opinion after reviewing the video of the fall. These parties agree, and the video is consistent in showing, that appellee tripped over a step stool while walking towards the

counter. The circumstances revealed in the stronger evidence fall in favor of compensation.

{¶ 17} Moreover, had appellant successfully proven that appellee's fall was caused by some idiopathic condition, appellant would still need to defeat the exception laid out in *Indus. Comm. v. Nelson* (1933), 127 Ohio St. 41. In *Nelson* the Supreme Court of Ohio set forth an exception which allows participation in the Workers' Compensation Fund despite an idiopathic condition "whenever conditions attached to the place of employment or otherwise incident to the employment are factors in" the resultant injury. Id. at 46. In *Nelson*, a welder experienced an epileptic seizure and fell, striking his head on the corner of the spot welding machine where he was working. Id. at 42. In our case, the video showed and appellee's co-worker testified that appellee fell into and hit his head on some cabinets.

{¶ 18} The facts here are analogous to those in *Nelson.* Any doubt is dispelled by the court's explanation that, "We see no reason to make a distinction because of the difference in the kind of machinery, contact with which caused the injury. To be a hazard of employment it is not essential that it be such a condition as to be made the subject of a specific requirement, the violation of which would impose upon the employer a penalty for failure to comply therewith." Id. at 47. In other words, the exception is not limited to contact with inherently dangerous machines, simply contact that, but for the employment, would not have occurred. Compare to *Daub v. Indus. Comm.* (App.1943), 40 Ohio Law Abs. 423 (injury not compensable when employee fell from unrelated heat stroke or

cerebral hemorrhage and struck nothing but the hardwood floor); *Stanfield v. Indus. Comm.* (1946), 146 Ohio St. 583 (injury not compensable when employee's head struck the cement floor after a fall caused by angina pectoris because it was an experience that could have occurred to him in any building or on the street irrespective of employment"). If appellee had not fallen while waiting on a customer behind the counter at work he would not have struck his head against the cabinets. An incident which Dr. Dunne opines resulted in appellee's lumbrosacral sprain/strain, thoracic sprain/strain, cervical sprain/strain, and head contusion.

{¶ 19} The weight of the evidence reveals that appellee tripped over a step stool and fell into and hit his head on cabinets while waiting on a customer at work. Appellant attempts to raise an issue challenging the causation of appellee's injury by offering a medical expert who fails to base his opinion on the best evidence available. Even if appellant's argument was supported by the weight of the evidence, it is defeated by the *Nelson* exception. Appellee's injuries are the result of an accident that occurred in the course of and arising out of appellee's employment and he is entitled to participation in the Workers' Compensation Fund as a matter of law. Appellant's two assignments of error are found not well-taken.

{¶ 20} On consideration whereof, the court finds that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay 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, J. _____

JUDGE

Thomas J. Osowik, P.J. _____

JUDGE

Keila D. Cosme, J. _____
CONCUR.

JUDGE