[Cite as *Bahr v. Progressive Cas. Ins. Co.*, 2009-Ohio-6641.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92620

LISA BAHR

PLAINTIFF-APPELLEE

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-628861

BEFORE: Sweeney, J., Rocco, P.J., and Boyle, J.
RELEASED: December 17, 2009
JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy L. Zix
Brian E. Ambrosia
Taft, Stettinius & Hollister, L.L.P.
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302

**ATTORNEY FOR APPELLEE
LISA BAHR**

Jeffery S. Watson
328 Harbor Street
Suite 16
Conneaut, Ohio 44030

**ATTORNEY FOR BUREAU OF
WORKERS' COMPENSATION**

Sandra L. Nimrick
Assistant Attorney General
State Office Building, 11th Floor
615 Superior Avenue
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Progressive Casualty Insurance Company, ("Progressive") appeals from the decision of the trial court that granted plaintiff-appellee, Lisa Bahr ("Bahr"), the right to participate in the workers' compensation fund for knee injuries. For the reasons that follow, we affirm.

{¶ 2} Bahr, who was employed by Progressive, filed a first report of injury ("FROI") seeking workers' compensation benefits for an alleged workplace injury sustained on September 15, 2004. Progressive denied her claim. Bahr appealed to the Industrial Commission, where her claim was ultimately allowed by the Staff Hearing Officer. After the Industrial Commission declined to hear Progressive's appeal, it pursued a further appeal of the allowance in the Court of Common Pleas.

{¶ 3} The matter proceeded to a bench trial. In pretrial discussion, the trial court instructed that it would issue findings of fact and conclusions of law.

{¶ 4} At trial, Bahr testified as follows: On September 15, 2004, she was employed as a Senior Customer Service Representative. That day, she drove to work and walked to her second floor desk. Prior to that day, Bahr had not seen a doctor for about 23 years. She had seen a doctor when she was 13 years old for growing pains in her right knee.

{¶ 5} The afternoon of September 15, 2004, Bahr was required to give a presentation at a team meeting. Following the meeting, she was required to participate in a "team building exercise," which Progressive referred to as "team

Olympics." The activities included a water balloon toss and egg-on-spoon games, where the employees would walk around a cone and return. In a third game, the employees would "spin around a bat to make [themselves] dizzy, to run a ways down and come back." Bahr participated in all three physical activities for over an hour. Her manager, George Garcia ("Garcia"), then suggested that she and the other employees target him with the leftover water balloons, which they did. She threw a balloon at Garcia, turned to walk away and felt pain in her right knee. The pain caused her to sit down at a table and she could not put full weight on her right leg. The injury occurred on a grassy, slope area on Progressive property as she was going downhill.[1] She was unable to participate in the final team building exercise. She reiterated that she "felt the pain in [her] knee when [she] turned to leave the water balloon activity."

{¶ 6} When asked, "what were you doing when you hurt your knee?" Bahr responded, "I was throwing the water balloon." Later, she affirmed that she experienced the pain as she walked away from that event. She twisted her knee as she turned away. The last thing she was doing before the pain started was throwing a water balloon. Bahr repeatedly testified that she did not indicate this when reporting her injury because it was not asked of her. She explained that when she was asked how or when she injured her knee, she had told the inquirer

[1] Bahr acknowledged that the written reports did not specify that the injury occurred on the grassy slope but her testimony was more specific on this point.

— whether it was the HR representative, the nurse, or a doctor — that she had injured her knee at work.

{¶ 7} Bahr returned to her desk with assistance. Her knee continued to hurt and was significantly swollen.[2] The next day at work, Garcia instructed her to contact human resources. The HR representative asked her questions and filled out an incident report.[3] Bahr later completed a hospital report in her own handwriting on September 16, 2004.[4] She informed hospital personnel that she thought she sprained her knee at work. They did not ask her how it had happened. An ultrasound and x-rays were taken of her leg and Bahr was given a knee brace and crutches and referred to Dr. Helper.

{¶ 8} Dr. Helper examined Bahr in October 2004 and sent her for an MRI. She told Dr. Helper that she had twisted her knee at work and that it hurt since that time. He did not ask her what she had been doing when it occurred.

{¶ 9} On November 6, 2004, Bahr filled out another incident report.[5]

{¶ 10} Dr. Fumich also examined Bahr's knee injury. Bahr informed Dr. Fumich that she injured her knee while engaged in a team building exercise at work, specifically, throwing a water balloon. Dr. Fumich performed two surgeries

---

[2]The last time Bahr had suffered a swollen knee was 18 to 20 years prior when she was playing softball.

[3]Defendant's Exhibit A.

[4]Defendant's Exhibit B.

[5]Defendant's Exhibit E.

on Bahr's knee to repair a torn ACL. Thereafter, Bahr underwent physical therapy.

{¶ 11} Progressive sent Bahr to see Dr. Gordon Zellers. Bahr delivered her MRI and x-rays to Dr. Zellers who, according to Bahr, partially reviewed them. Zellers also had Bahr do "knee bends, standing on tippy toes, sitting down, [and] crossing legs * * *." Zellers asked her when she felt the pain and she told him when she twisted around and walked away on the grass. She also told Zellers about the growing pains she experienced in her right knee at age 13. According to Bahr, she has a "floating kneecap" due to being double jointed.

{¶ 12} On cross-examination, Bahr denied that her knee "gave out" on her for many years. She, however, acknowledged that Dr. Helper's medical records did indicate that.[6]

{¶ 13} Bahr then presented the testimony of Dr. Fumich by way of videotaped deposition.[7]

{¶ 14} Plaintiff's Exhibits 2, 3, 4, and 5 were admitted without objection, and plaintiff's Exhibit 1 was withdrawn. Defendant's Exhibits A, B, C, E, and H were admitted without objection. Defendant's Exhibits D, F, and G were admitted over plaintiff's objection.

---

[6]Defendant's Exhibit C.

[7]Both pretrial discussion and comments in the record reflect that the parties agreed that the trial court would reserve its rulings on objections made during the deposition testimony, which would also include the issue raised by Progressive in its motion in limine to strike.

{¶ 15} Bahr rested her case, and Progressive moved for a directed verdict, arguing in part, that Dr. Fumich did not render a "proper causal opinion" or a "specific causal opinion." The court reserved ruling pursuant to Civ.R. 41(B)(2). The court then requested Progressive to submit legal authority in support of its position that medical opinion testimony is required to establish that the injury arose out of Bahr's employment.

{¶ 16} Progressive conceded that Bahr's knee injury occurred within the scope of employment. After this exchange, Progressive presented the testimony of Dr. Gordon Zellers and Dr. Stephen Helper through videotaped deposition. At the conclusion, Progressive renewed its motion for a directed verdict.[8] The trial court subsequently issued its findings of fact and conclusions of law together with an opinion and order, which thoroughly detailed the bases of its decision.

{¶ 17} The trial court concluded that Bahr's injuries were sustained in the course of, and arising out of, her employment with Progressive on September 15, 2004, entitling her to participate in the workers' compensation fund.

{¶ 18} Progressive now appeals raising four assignments of error for our review.

Standard of Review

{¶ 19} "Workers' compensation statutes must be liberally construed in favor of the employee. R.C. 4123.95. However, an appellate court, upon review of

[8]Which, in the absence of a jury, the court considered under Civ.R. 41(B).

the judgment of a trial court following a bench trial, should be guided by a presumption that the fact finder's findings are correct. In addition, an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge. Thus, the appellate court will not reverse the trial court's judgment unless it is against the manifest weight of the evidence. The weight of the evidence and the credibility of witnesses is primarily a function for the trier of the fact. In reviewing a bench trial, an appellate court will uphold the trial court's evaluations unless it appears the record is insufficient to support a reasonable person in concluding as the trial judge did." *Harris v. Custom Graphics, Inc.*, Cuyahoga App. No. 84326, 2005-Ohio-285, ¶8, internal citations omitted.

{¶ 20} "In the event the evidence is susceptible to more than one interpretation, the reviewing court must construe it consistently with the trial court's judgment. In reviewing a bench trial, an appellate court will uphold the trial court's decision unless it appears the record cannot support a reasonable person in concluding as the trial judge did." *Bales v. Miami Univ.*, Butler App. No. 2006-11-295, 2007-Ohio-6032, citing *Harris v. Custom Graphics, Inc*., Cuyahoga App. No. 84326, 2005-Ohio-285, ¶8.

{¶ 21} Progressive's assignments of error require the application of this standard of review.

{¶ 22} "I. The trial court erred by applying the [*Lord v. Daugherty* (1981), 66 Ohio St.2d 441] factors in determining whether plaintiff's injury arose out of her employment with Progressive.

{¶ 23} "II. The trial court's determination that plaintiff's third degree ACL tear and first degree MCL tear 'arose of out [sic] her employment' with Progressive is not supported by the manifest weight of the evidence."

{¶ 24} Without dispute, in order to be compensable under the Workers' Compensation Act an injury must be received in the course of employment and arise out of the employment. *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 276, citing R.C. 4123.01(C); R.C. 4123.54; *Fassig v. State, ex rel. Turner* (1917), 95 Ohio St. 232.

{¶ 25} The Ohio Supreme Court has set forth certain criteria to aid in the determination of whether an injury arose out of employment. Id. at 278, citing *Lord v. Daugherty* (1981), 66 Ohio St.2d 441. "In *Lord*, [the Ohio Supreme Court] announced three distinct factors to aid in determining whether a sufficient causal relationship existed, based upon the totality of the facts and circumstances." Id.

{¶ 26} The Court, in *Lord,* instructed:

{¶ 27} "Whether there is a sufficient 'causal connection' between an employee's injury and his employment to justify the right to participate in the worker's compensation fund depends on the totality of the facts and circumstances surrounding the accident, including: (1) the proximity of the

scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident." *Lord,* at paragraph one of the syllabus.

{¶ 28} Progressive does not dispute that the *Lord* factors were satisfied but argues that the trial court should not have applied them.

{¶ 29} Progressive maintains that the trial court erred by utilizing the *Lord* factors in determining that Bahr's injury arose out of her employment. Progressive relies upon case law where it contends the courts did not apply them. See *Stanfield v. Indus. Comm.* (1946), 146 Ohio St. 583; *Eggers v. Indus. Comm.* (1952), 157 Ohio St. 70; *Foster v. Cleveland Clinic Foundation*, Cuyahoga App. Nos. 84156 and 84169, 2004-Ohio-6863; *Duvall v. J&J Refuse*, Stark App. No. 2004 CA 00008, 2005-Ohio-223*; Dailey v. Autozone, Inc.* (Sept. 29, 2000), Trumbull App. No. 99-T-0146; and *Evans v. Mihm* (Sept. 4, 1992), Trumbull App. No. 92-T-4644.[9] Every case is distinguishable.

{¶ 30} In *Foster*, this Court found the *Lord* factors are not necessarily dispositive of an employee's right to participate in the workers' compensation fund for *assault*-related injuries that just happen to occur at the workplace. *Foster* involved a domestic dispute that culminated in the employee's death at her

[9]Both *Stanfield* and *Eggers* predated the Ohio Supreme Court's decision in *Lord* and the Trumbull County Appellate Court in *Dailey* did not analyze, distinguish, or mention *Lord*.

workplace where her spouse shot and killed her. Because the injury only came to fruition at work, but was completely unrelated to the employment, it was not compensable. To reach this conclusion, this Court, in *Foster,* followed the authority of Ohio courts that had "consistently focused on two factors" in assessing the compensability of injuries resulting from workplace assaults or fights: (1) if the origin of the assault was work-related; and (2) if the claimant was not the instigator. The test utilized in *Foster* is clearly not applicable to the instant matter.

{¶ 31} Bahr sustained her injury at work while participating in employment-related activities. She did not bring the cause of her injuries to the workplace nor did she instigate the events that lead up to the injury.

{¶ 32} The other line of cases Progressive relies upon relate to "idiopathic" injuries, meaning an injury that arose from circumstances particular to an individual employee, rather than out of a risk related to the employment. *Dailey; Duvall; Eggers; Evans;* and *Stanfield.*

{¶ 33} In *Dailey*, the employee was working the cash register and, while walking to hand a receipt to his manager, he felt a sharp pain in his back. The court found significant the fact that Dailey "was not lifting, pushing, or pulling anything at the time of his injury"; he was either walking or turning slightly with paper in hand. *Dailey*, supra. "This was a normal movement." Id. In this case, Bahr was not simply walking around the office in non-physically demanding

activities. Bahr was in the midst of physically exerting herself in employment-related physical activities at the time she sustained her injuries.

{¶ 34} In *Evans*, the employee suffered a heart attack at work. The question before the court in *Evans* was "if a worker has an admittedly *non* work-related injury (i.e., a heart attack), and the care which is given to the worker and provided by his employer is alleged to be a causal factor in the worker's death, is the care '* * * received in the course of, and arising out of, the injured employee's employment'?" *Evans*, supra. The court concluded that the *Lord* test applies "to determine whether the *employee's* conduct was in the course of employment when the 'accident' occurred." Id., emphasis in original. Because the court in *Evans* was examining the *employer's* conduct (the provision of medical care) it concluded that the *Lord* test did not apply. Significantly, the employee did not allege in *Evans* that his employment caused his heart attack. The court also noted that the heart attack was a natural deterioration of an organ that simply "manifested" at the worksite and was not "occasioned in the course of" employment. Id. In this case, Bahr did allege that her knee injury arose out of her employment — her participation in the physical team building exercises.

{¶ 35} In *Stanfield*, the employee died after falling and hitting his head on the cement floor on his way to the restroom. The facts established, however, that the employee's fall was precipitated by a pre-existing heart condition. The court concluded that "[t]he fall resulted from the seizure alone and not from any circumstance of his employment." *Stanfield,* 146 Ohio St. at 586; accord *Eggers*,

157 Ohio St. at 76 (finding "[t]here [was] no evidence * * * on which a jury could find that Eggers' head struck the 'housing' or anything else when he fell. In the absence of such evidence it must be assumed that his head was cut when it hit the floor"); see, also, *Duvall*, supra (employee had a two-week history of left knee pain and was scheduled for a doctor visit prior to his workplace fall.)

{¶ 36} Bahr did not suffer a pre-existing torn ACL; nor was there any evidence she suffered from any recent knee problems for that matter. In fact, she was able to participate in numerous physical work-related activities without difficulty for the better part of the day in question. Bahr's injury resulted while she was participating in physically demanding activities that were directly related to her employment. Once the injury occurred, she could no longer engage in the physical tasks. She alerted her supervisor and required assistance for the remainder of the day. Bahr then spent that evening in pain on the couch and ultimately was directed by her supervisor to report the injury the following day. The law does not provide that her injury becomes non-compensable for the mere fact that she noticed it while walking between the physically demanding tasks of her employment that day. Her injuries were not "idiopathic."

{¶ 37} This Court has applied the *Lord* factors in factually analogous circumstances to determine whether an injury arose out of employment. See *Rosado v. Cuyahoga Metro. Hous. Auth., Inc.,* Cuyahoga App. No. 87922, 2007-Ohio-1164, ¶21-31. In *Rosado*, the employee was on his way to clock out for lunch when he tripped, causing his foot to slip under a tow motor that crushed

it. He was unable to work for ten months. Despite that Rosado was walking to lunch when his injury occurred, this Court applied the *Lord* factors.

{¶ 38} Further, the trial court correctly applied the totality of the circumstances in assessing a causal connection between the employment and injury. *Fisher*, supra; *Griffin v. Hydra-Matic Division, General Motors Corp.* (1988), 39 Ohio St.3d 79 (holding "that an injury sustained by an employee upon the premises of her employer is compensable pursuant to R.C. Chapter 4123 irrespective of presence or absence of a special hazard thereon, which is distinctive in nature or quantitatively greater than the hazards encountered by the public at large.") Nonetheless, the physical exertion required of Bahr's employment that day subjected her to the risk and hazard of the knee injury she ultimately suffered.

{¶ 39} The trial court found, "[w]hile so engaged in these activities and more specifically after throwing a water-filled balloon at her supervisor, Ms. Bahr twisted her right knee painfully while walking away from the place on the grassy slope where she threw the water balloon. The pain began within taking one or two steps after throwing the balloon at her supervisor. She began walking with a limp and made her way to a table to sit down and rest. She did not participate further in the exercises and advised her supervisor (George Garcia) of her pain."

{¶ 40} The trial court's findings further included that the MRI indicated "1) a medial collateral ligament sprain; 2) an anterior cruciate ligament (ACL) tear; 3) marrow edema in the medial and lateral plateaus of the tibia; and 4) joint

effusion." Bahr sought treatment, and underwent surgery, for these injuries. The trial court found "the twisted knee, right knee sprain, torn ACL and MCL arose out of plaintiff's employment in Progressive activities on September 15, 2004 * * *."

{¶ 41} The trial court's findings are supported by competent, credible evidence in the record such that we cannot substitute our judgment for that rendered by the trial court.

{¶ 42} For all these reasons, the trial court properly applied the *Lord* factors to this case and its conclusion was not against the manifest weight of the evidence.

{¶ 43} Assignments of Error I and II are overruled.

{¶ 44} "III. The trial court erred in finding that plaintiff did not need to present expert medical testimony that her third degree ACL tear and first degree MCL tear were the direct and proximate result of a specific hazard or risk unique to her employment.

{¶ 45} "IV. The trial court erred by relying on Dr. Fumich's testimony because he failed to provide an opinion as to whether plaintiff's third degree ACL tear and first degree MCI tear were the direct and proximate result of a specific hazard or risk unique to her employment."

{¶ 46} "In order to establish a right to workmen's compensation for harm or disability claimed to have resulted from an accidental injury, it is necessary for the claimant to show by a preponderance of the evidence, medical *or otherwise*, * * *

that his injury arose out of an in the course of employment, but also that a direct or proximate causal relationship existed between his injury and his harm or disability." *White Motor Corp. v. Moore* (1976), 48 Ohio St.2d 156, paragraph one of the syllabus, emphasis added.

{¶ 47} "As a general rule of law involving complex medical problems, medical evidence is necessary to establish a direct or proximate causal relationship between an industrial accident and the resulting injury." Id. at 159; see, also, *Stacey v. The Carnegie-Illinois Steel Corp*. (1951), 156 Ohio St. 205. But, "[w]here the issue of causal connection between an injury and the specific subsequent physical disability involves questions which are matters of common knowledge, medical testimony is not necessary in order to submit the case to the jury." Id. at paragraph two of the syllabus. Thus, it is not always necessary to provide testimony from a medical expert in order to establish a causal connection between an injury and an employment-related accident. See *Perry v. LTV Steel Co.* (1992), 84 Ohio App.3d 670, 674.

{¶ 48} "[T]he relevant distinction regarding the character of the injury is whether it is readily observable or understandable or the injury is 'internal and elusive in nature, unaccompanied by any observable external evidence.'" *Chilson v. Conrad*, Portage App. No. 2005-P-0044, 2006-Ohio-3423, ¶20, quoting *Davis v. Morton Thiokol, Inc*. (Nov. 1, 1991), 11th Dist. No. 90- L-15-083, other citations omitted. Lay testimony is sufficient where the causal relationship is a matter within common knowledge.

{¶ 49} Bahr sought to participate in the workers' compensation fund after suffering knee injuries. The record includes evidence that Bahr participated in many physical activities that day until feeling a pain in her knee. This pain rendered her unable to continue her participation. She immediately began limping and required assistance to move about thereafter. She endured constant pain throughout the evening and into the next day. Upon arriving at work the following day, she was sent to human resources to report her injuries. Bahr described her injuries and how they transpired. There is also testimony from her surgeon as to the impetus of her injuries.

{¶ 50} In *Chilson*, the court found that lay testimony as to observable facts such as pain and swelling was sufficient to establish a causal connection between a work accident and the injured worker's knee strain.

{¶ 51} Similarly here, the trial court concluded that medical testimony was not necessary to establish a causal connection between the work-related activities and Bahr's injuries. The court reasoned that "it is obvious that the strenuous activities of the game-playing events of the day by a 36-year-old, 5' 7", 215 lb. woman, could produce a stress beyond that of ordinary walking around the office. * * * [T]he evidence and circumstances herein involved a readily observable injury (severe knee pain and swelling) which any layman could and immediately did recognize at the scene, as did her supervisor."

{¶ 52} The trial court's sound reasoning is supported by the record. Additionally, there was medical testimony that established a connection between the work activities as being the cause of Bahr's injuries.

{¶ 53} In this case, Dr. Fumich opined that the injury to Bahr's anterior cruciate ligament occurred on September 15, 2004 "with some activity at this event." The event being the team building exercises at Progressive. For these reasons, Assignments of Error III and IV are overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR