[Cite as *Isom v. Dayton Power & Light Co.*, 2010-Ohio-4756.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

MARGARET ISOM	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23911
vs.	:	T.C. CASE NO. 09CV1283
DAYTON POWER & LIGHT COMPANY, et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 1st day of October, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from a judgment of the common pleas court finding that an employee who was injured in an accident

on the employer's premises is entitled to participate in the Workers' Compensation fund.

{¶ 2} Plaintiff, Margaret Isom, was born with a dislocated hip, and Isom's hip has been unstable her entire life. Isom has undergone multiple hip surgeries and has a prosthetic hip joint on her right side. Isom regularly walks with the assistance of a crutch or walker.

{¶ 3} Isom had two jobs in December of 2004. She was employed by Defendant, The Dayton Power & Light Company ("DP&L"). She was also employed by Time Warner Entertainment Company ("Time Warner"). Both jobs involved customer relations work.

{¶ 4} On December 22, 2004, Isom worked her job at DP&L from 8:00 a.m. to 3:00 p.m. After that, she worked her job at Time Warner from 4:00 p.m. to 1:30 a.m. A blizzard took place in the Dayton area that day.

{¶ 5} Isom made her way to her car in the DP&L parking lot at the end of her work shift on December 22, using her crutch. When Isom attempted to step over a pile of snow, she fell forward against her car. Though she was able to push herself up, Isom fell forward a second time, into approximately two and one half feet of snow.

{¶ 6} Isom was able to drive herself home to pick up dry socks and shoes. She then drove to her work location at Time Warner,

where, after exiting her car, Isom slipped on a patch of ice and fell to the ground. Isom nevertheless picked herself up and reported to work at Time Warner.

{¶ 7} On January 12, 2005, Isom consulted her orthopedic surgeon, Dr. Dennis Brown, for symptoms that had developed in her hip. Dr. Brown diagnosed a dislocation of the prosthetic device in Isom's right hip. A further surgery to repair the injury was performed.

{¶ 8} Isom filed workers' compensation claims against DP&L and Time Warner for "dislocation of right total hip replacement, and mechanical loosening of the prosthetic joint" arising from her employment. Both claims were denied by the Industrial Commission.

{¶ 9} Isom filed an appeal of both denials to the common pleas court pursuant to R.C. 4123.512. DP&L and Time Warner both filed Civ.R. 56 motions for summary judgment. The trial court denied both motions, and the case proceeded to a jury trial. The jury found that Isom is not entitled to participate in the workers' compensation fund on her claim against Time Warner, and that Isom is entitled to participate in the fund on her claim against DP&L. An appeal to this court was filed by DP&L.

ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING

DEFENDANT/APPELLANT THE DAYTON POWER & LIGHT COMPANY'S ('DP&L') MOTION FOR SUMMARY JUDGMENT AND SUBMITTING THIS CASE TO A JURY, WHEN PLAINTIFF/APPELLEE MARGARET ISOM ('MS. ISOM') FAILED TO ESTABLISH A CAUSAL RELATIONSHIP BETWEEN THE INCIDENT AT DP&L AND THE ALLEGED CONDITIONS OF 'DISLOCATION OF RIGHT TOTAL HIP REPLACEMENT; AND MECHANICAL LOOSENING OF THE PROSTHETIC JOINT.'"

{¶ 11} Before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the non-moving party. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. A genuine issue of material fact exists whenever the relevant factual allegations in the pleadings, affidavits, depositions, or interrogatories are in conflict. *Aglinsky v. Cleveland Builders Supply Co.* (1990), 68 Ohio App.3d 810.

{¶ 12} An employee who suffers an accidental injury in the course of and arising out of the injured employee's employment is entitled to participate in the workers' compensation fund. R.C. 4123.01(C), 4123.54(A). The term "injury" comprehends a physical or traumatic damage or harm accidental in character and

that results from external or accidental means, in the sense of being the result of a sudden mishap occurring by chance, and not in the usual course of events. *Dripps v. Industrial Commission* (1956), 165 Ohio St. 407. Therefore, the accidental event must be a proximate cause of the injury; that is, a cause that directly produces the injury and without which the injury would not have occurred.

{¶ 13} In considering the issue of proximate cause in the workers' compensation context, the definition and principles governing the determination of proximate cause in the field of torts are applicable. *Oswald v. Connor* (1985), 16 Ohio St.3d 38. Proof of proximate cause between an injury and an on-the-job event requires supporting medical evidence. *Id.* That testimony must demonstrate causation to a reasonable degree of medical certainty. *Stacey v. Carnegie-Illinois Steel Corp.* (1951), 156 Ohio St. 205.

{¶ 14} Dr. Brown, Isom's orthopedic surgeon, both in his discovery and testimonial depositions opined that, to a reasonable degree of medical certainty, the trauma to Isom's hip produced by her three falls on December 22, 2004 combined to cause the injury for which Isom's claim was made. However, with respect to the three falls that occurred, the first two at DP&L and the third at Time Warner, Dr. Brown could not say that any one had

independently caused the dislocation of the prosthetic device that he diagnosed.

{¶ 15} DP&L moved for summary judgment, arguing that Isom lacked evidence to prove that her injury arose out of and in the course of her employment by DP&L, because Dr. Brown could not state which of the accidents that Isom experienced on DP&L's property were the proximate cause of her injury. The trial court denied that motion. The court found that Dr. Isom's opinion, to a reasonable degree of medical certainty, that the three falls had combined to proximately cause Isom's hip dislocation preserved a genuine issue of material fact. Following presentation of the evidence at trial, the court instructed the jury on "dual causation," stating:

{¶ 16} "Proximate cause is a happening or event which in the natural and continuous sequence produces an injury and without which the result would not have occurred. An injury was proximately caused if it was produced in the natural and con - continuous sequence by something that occurred as part of the activities, conditions and risks of the workplace. That event is a proximate cause of an injury.

{¶ 17} "When workplace activities, conditions and risks combine with other causes, (sic) causes to directly and proximately produce injury, each is a proximate cause. It is

not necessary that each cause occur at the same time or place." (T. 530-531).

{¶ 18} DP&L argues that the trial court erred when it denied DP&L's motion for summary judgment and when it instructed the jury on dual causation, because in neither instance was Isom's evidence sufficient to demonstrate that Isom's falls on DP&L's property were the proximate cause of the injury for which her claim was made. We do not agree.

{¶ 19} "It is a well-established principle of tort law that an injury may have more than one proximate cause. See Prosser and Keeton, Law of Torts (5 Ed.1984) 266-268, Section 41; 2 Restatement of the Law 2d, Torts (1965) 432, Section 433; 1B Larson, Law of Workers' Compensation (1991) 7-612 to 7-941, Section 41.64; 1 Ohio Jury Instructions (1988) 183, Section 11.10 ('There may be more than one proximate cause.'). Ohio case law also supports this fundamental tenet of tort law: 'In Ohio, when two factors combine to produce damage or illness, each is a proximate cause.' *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.3d 66, 67, 548 N.E.2d 304, 305." *Murphy v. Carrollton Manufacturing Company*, 61 Ohio St.3d 585, 587-588.

{¶ 20} "The term 'dual causation' is used to describe any occupational disease causation problem in which a personal element, such as smoking, combines with an employment element,

such as inhalation of asbestos or textile fibers, noxious fumes, acrid smoke, or irritating dust, to produce lung cancer, emphysema, bronchitis and the like." Larson's Workers' Compensation Law, §52-06[4][a]. Some jurisdictions, though not Ohio, have enacted apportionment statutes in an effort to exclude the "personal element" from a finding of causation. Even then, "[t]he crucial distinction . . . is between apportioning disability and apportioning cause. The former is possible in the minority of states having apportionment statutes; the latter is never possible." *Id.* at §52.06[4][d].

{¶ 21} In tort law, "[c]oncurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single, indivisible injury." *Gave v. Halloran* (1948), 150 Ohio St.476, paragraph one of the syllabus. "The basic principles of proximate causation are applicable to dual causation of occupational diseases. Thus, when two factors combine to produce damage or illness, each is a proximate cause." *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.3d 66, syllabus.

{¶ 22} The trial court did not err when it instructed the jury on dual causation. Neither did the court err when it denied DP&L's motion for summary judgment, applying the dual causation rule. Dr. Brown's testimony was sufficient to permit a finding that

Isom's two falls at DP&L combined with Isom's subsequent fall at Time Warner to produce the dislocation of her prosthetic device that Isom's injury involved. The falls at DP&L were therefore a proximate cause of Isom's injury. *Norris v. Babcock & Wilcox Co.* DP&L's contention that Isom's falls at DP&L must be shown to constitute an independent proximate cause is inconsistent with the established rule regarding concurrent negligences and seeks an apportionment of causes, as opposed to resulting disabilities, that Larson rejects.

{¶ 23} Finally, DP&L argues that Dr. Brown's testimonial deposition, which was presented to the jury, should not be believed because it conflicts with his discovery deposition on the issue of dual causation. We see no essential conflict in Dr. Brown's responses to the questions he was asked. In any event, DP&L did not ask to strike Dr. Brown's testimonial deposition because of an alleged conflict, and so sorting out any differences in relation to his credibility was a determination for the jury to make. Further, the jury's verdict in favor of Isom renders moot or harmless any error the trial court may have committed in denying DP&L's motion for summary judgment on a finding that genuine issues of material fact remained for determination regarding the issue of proximate cause. *Continental Insurance Company v. Whittington* (1994), 71 Ohio St.3d 150.

{¶ 24} The assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J., concur.

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