[Cite as *Budzevski v. OhioHealth Corp.*,, 2012-Ohio-5038.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Milan Budzevski,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-112 (C.P.C. No. 07 CVD 03 3402)
OhioHealth Corporation,	:	
Defendant-Appellant,	:	(REGULAR CALENDAR)
Administrator, Bureau of Workers' Compensation,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 30, 2012

Arthur C. Graves, for appellee.

Habash & Reasoner LLC, Stephen J. Habash, and *Dennis H. Behm*; *Keith Hartzell*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, OhioHealth Corporation, appeals the judgment of the Franklin County Court of Common Pleas allowing plaintiff-appellee, Milan Budzevski, to participate in the workers' compensation fund for the additional allowances of lumbar spinal stenosis with neurogenic claudication and chronic pain syndrome. For the following reasons, we reverse the trial court's judgment.

I. BACKGROUND

{¶ 2} On December 26, 2000, appellee sustained an industrial injury in the course of and arising out of his employment with appellant. The Industrial Commission of Ohio ("commission") allowed appellee's claims for lumbosacral strain, right shoulder rotator cuff tear, herniated nucleous pulposus L4-5, aggravation of pre-existing degenerative disc disease, central disc protrusion at L3-4 and L4-5, major depression without psychotic features, and generalized anxiety disorder.

{¶ 3} On April 14, 2005, appellee filed a motion seeking additional allowance for the conditions of lumbar spinal stenosis with neurogenic claudication, myofascial syndrome, chronic pain syndrome, and sacroiliitis. After the commission denied his motion, appellee filed a complaint, pursuant to R.C. 4123.512, in the court of common pleas alleging he was entitled to participate in the workers' compensation fund for the additional conditions.

{¶ 4} On October 30, 2007, appellant conducted a discovery deposition of Dr. Ralph Newman, appellee's treating physician. Appellant thereafter filed a motion for summary judgment supported by Dr. Newman's deposition testimony. Appellee responded with an affidavit of Dr. Newman. On June 8, 2009, the trial court granted appellant's motion as to the condition of myofascial pain syndrome, but found that genuine issues of material fact remained as to the three remaining conditions.

{¶ 5} The matter proceeded to a bench trial on June 10, 2009, at which appellee and his brother, Pande Budzevski, testified on behalf of appellee. In addition to the live testimony, appellee submitted the March 24, 2009 videotaped trial testimony (in the form of a perpetuation deposition) of his treating physician and newly identified expert, Dr. Newman, along with several exhibits. At the conclusion of appellee's case, appellant argued in support of its motion for directed verdict which had been filed with the court the same day. The court took the matter under advisement, having not yet viewed Dr. Newman's videotaped trial testimony nor having read the transcript of that testimony.

{¶ 6} Appellant thereafter submitted the videotaped trial testimony (in the form of a perpetuation deposition) of Gregory Bosley of BRI Investigations, who had conducted videotaped surveillance of appellee on June 17 and 18, 2005. Appellant also submitted the videotaped trial testimony (in the form of perpetuation depositions) of its experts,

Drs. Richard Briggs and John Cunningham, along with several exhibits. At the close of its case, appellant again moved for a directed verdict; the court again indicated it would take the matter under advisement.

{¶ 7} In a decision and entry issued September 8, 2010, the trial court granted appellant's motion for directed verdict as to the condition of sacroiliitis, but denied the motion as to the conditions of aggravation of lumbar spinal stenosis with neurogenic claudication and chronic pain syndrome. On September 14, 2011, the court issued a decision allowing appellee's claims for the additional conditions of aggravation of lumbar spinal stenosis with neurogenic claudication and chronic pain syndrome. The court journalized its decision in a judgment entry filed January 20, 2012.

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellant timely appeals, advancing two assignments of error for review:

> I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO REQUIRE BUDZEVSKI'S ONLY MEDICAL EXPERT TO ESTABLISH CAUSATION TO A PROBABILITY CONTRARY TO *RANDALL V. MIHM* (1992), 84 Ohio App.3d 402.
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> II. THE TRIAL COURT'S DECISION TO ALLOW BUDZEVSKI'S CLAIM FOR THE ADDITIONAL CONDITIONS OF AGGRAVATION OF LUMBAR SPINAL STENOSIS WITH NEUROGENIC CLAUDICATION AND CHRONIC PAIN SYNDROME WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. DISCUSSION

{¶ 9} Before considering appellant's assignments of error, we must address its motion to strike those portions of appellee's brief that reference Dr. Newman's October 30, 2007 discovery deposition. Appellant's motion is unopposed.

{¶ 10} In his brief, appellee references Dr. Newman's discovery deposition, noting that said deposition had been filed in the case as an attachment to appellant's summary judgment motion. As appellant points out, however, the "mere filing of a deposition of a witness with the clerk of courts" is insufficient to "make such deposition a part of the transcript of proceedings." *Conway v. Ford Motor Co.*, 48 Ohio App.2d 233, 237 (1976).

{¶ 11} Although R.C. 4123.512(D) permits any party to read a physician's deposition transcript into the record, our review of the record reveals that appellee failed to submit, read or discuss Dr. Newman's discovery deposition at the June 10, 2009 trial. It is well-settled that "[a]ppellate review is limited to the record as it existed at the time the trial court rendered its judgment." *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 13. " ' "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." ' " *Id.*, quoting *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, quoting *State v. Ismail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. Because Dr. Newman's discovery deposition was not made a part of the June 10, 2009 trial proceedings, appellee may not utilize it to advance arguments on appeal. Accordingly, we grant appellant's motion to strike those portions of appellee's brief referencing Dr. Newman's October 30, 2007 discovery deposition.

{¶ 12} We turn now to the merits of appellant's arguments. In its first assignment of error, appellant contends that the testimony of appellee's expert, Dr. Newman, was insufficient as a matter of law to establish proximate causation. Specifically, appellant contends that Dr. Newman failed to relate the conditions of aggravation of lumbar spinal stenosis with neurogenic claudication and chronic pain syndrome to his workplace injury to a reasonable degree of medical probability. Appellant further maintains that allowance of chronic pain syndrome constitutes an improper "double recovery," as Dr. Newman testified that it was "part and parcel" of the previously allowed conditions.

{¶ 13} Before addressing the merits of this assignment of error, we first must identify our standard of review. In an R.C. 4123.52 appeal from a commission order granting or denying the right to participate in the workers' compensation fund, the trial court conducts a de novo review. *Krull v. Ryan*, 1st Dist. No. C-100019, 2010-Ohio-4422, ¶ 9, citing *Benton v. Hamilton Cty. Educational Serv. Ctr.*, 123 Ohio St.3d 347, 2009-Ohio-4969, ¶ 14. On further appeal, this court employs a manifest weight of the evidence standard of review. *Krull* at ¶ 9, citing *Rutherford v. Adecco USA, Inc.*, 1st Dist. No. C-080642, 2009-Ohio-2046, ¶ 11. Under this standard, this court may not reverse the trial court's judgment if it is supported by competent, credible evidence. *Id.*, citing *Rutherford* at ¶ 11. " 'However, to the extent that the judgment involves a question of law, we review

the question of law independently and without any deference.' " *Tepe v. Tepe,* 4th Dist. No. 11CA13, 2012-Ohio-1482, ¶ 9, quoting *Cooper v. Smith,* 155 Ohio App.3d 218, 2003-Ohio-6083, ¶ 10 (4th Dist.).

{¶ 14} In order to succeed on his right to participate claim, appellee was required to demonstrate by a preponderance of the evidence that he suffered from the claimed conditions and that those conditions were proximately caused by his December 2000 workplace injury. *Bell v. Bur. of Workers' Comp.,* 1st Dist. No. C-110166, 2012-Ohio-1364, ¶ 23, citing R.C. 4123.01(C) and *Fox v. Indus. Comm. of Ohio,* 162 Ohio St. 569 (1995).

{¶ 15} "Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion." *Darnell v. Eastman,* 23 Ohio St.2d 13 (1970), syllabus. "When expert medical testimony is required in a case to establish a causal connection between the industrial injury and a subsequent physical condition, the proof must establish a probability and not a mere possibility of such causal connection." *Randall v. Mihm,* 84 Ohio App.3d 402, 406 (2d Dist.1992). "At a minimum, the trier of fact must be provided with evidence that an employee's employment-related activity 'more likely than not' caused the employee's injury." *Cyrus v. Yellow Transp., Inc.,* 169 Ohio App.3d 761, 2006-Ohio-6778, ¶ 8 (10th Dist.), quoting *Shumaker v. Oliver B. Cannon & Sons, Inc.,* 28 Ohio St.3d 367, 369 (1986). "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Stinson v. England,* 69 Ohio St.3d 451 (1994), paragraph one of the syllabus. "Although no 'magic words' are required, the expert's testimony, when viewed in its entirety, must equate to an expression of probability." *Davis v. Ryan,* 10th Dist. No. 11AP-198, 2012-Ohio-324, ¶ 14, quoting *Rhodes v. Firestone Tire & Rubber Co.,* 10th Dist. No. 08AP-314, 2008-Ohio-4898, ¶ 11. "Opinions expressed with a lesser degree of certainty must be excluded as speculative." *Shumaker* at 369.

{¶ 16} As noted above, in an effort to establish his right to participate for the additional conditions, appellee presented the videotaped trial testimony of his treating physician and expert witness, Dr. Newman. On direct examination, Dr. Newman opined,

"to a reasonable degree of medical certainty and probability," that "based upon the histories [he] obtained, the results of [his] examinations, [and] review of the surgical report of 10-21-04," appellee sustained the additional conditions of lumbar spinal stenosis with neurogenic claudication and chronic pain syndrome as a direct and proximate result of his December 26, 2000 workplace injury, "by way of either direct causation or aggravation of pre-existing conditions." (Dr. Newman Mar. 24, 2009 trial depo. 22-23.) Dr. Newman further opined that the condition of lumbar spinal stenosis pre-existed appellee's December 2000 workplace injury, and that such injury aggravated that condition. In addition, Dr. Newman opined that appellee suffered from chronic pain syndrome "directly and [proximately] caused" by the December 26, 2000 workplace injury. (Dr. Newman Mar. 24, 2009 trial depo. 24.) When asked to explain the basis for his opinions, Dr. Newman averred, "[t]he MRIs clearly demonstrate that [appellee] was suffering from spinal stenosis, I think it was referred to as congenital, which would predate the date of injury. * * * [T]he chronic pain syndrome * * * arose * * * from the date of injury because prior to that, he did not have any symptomology referable to chronic pain syndrome." (Dr. Newman Mar. 24, 2009 trial depo. 25.)

{¶ 17} However, on cross-examination, Dr. Newman acknowledged that his treatment notes, billing records, and workers' compensation documentation during the period he treated appellee did not include a diagnosis that appellee suffered from either lumbar spinal stenosis with neurogenic claudication or chronic pain syndrome. He further acknowledged that the symptoms underlying his opinion that appellee suffered from chronic pain syndrome, i.e., continuous lumbar pain, were solely attributable to the previously allowed conditions. He accordingly opined that chronic pain syndrome was not a separate condition; rather, it was "part and parcel" of allowed conditions and a "duplicate medical condition." (Dr. Newman Mar. 24, 2009 trial depo. 64-65.)

{¶ 18} Later on cross-examination, Dr. Newman viewed the surveillance video taken of appellee on June 17 and 18, 2005 and acknowledged it was taken during the time he treated appellee. The surveillance video depicts appellee performing various physical activities including stacking and carrying multiple wooden stakes, chopping and pounding wooden stakes into the ground, erecting a deer enclosure, carrying a propane tank, and driving a car.

{¶ 19} Dr. Newman averred that the opinions he had previously rendered regarding the additional conditions were based upon the symptomology related by appellee, most notably continuous lumbar pain and limited range of motion. Dr. Newman acknowledged that, on the surveillance video, appellee "did not appear to be" suffering from that symptomology, as he did not grimace in pain, did not grab his lower back, did not have any difficulty lifting and carrying the wooden stakes or propane tank, and did not have any difficulty bending or stooping. (Dr. Newman Mar. 24, 2009 trial depo. 73.) Dr. Newman acknowledged that appellee's activities as depicted in the video were "inconsistent" with appellee's subjective complaints of continuous lumbar pain and limited range of motion. (Dr. Newman Mar. 24, 2009 trial depo. 74-76.)

{¶ 20} Appellant's counsel then asked Dr. Newman, "In light of the fact that you did not diagnose neurogenic claudication associated with lumbosacral spinal stenosis in any of the documents that we've talked about here, and in light of the fact that all of the symptoms that you talked about are explained by the other diagnoses that are noted on Appendix G and Appendix F and Appendix H and Appendix I [treatment notes, billing records, and workers' compensation documentation], and in light of the inconsistencies that you see on the DVD of him relating his symptoms to you, which as I understand it is the basis for your diagnosis, would you agree with me that based solely on the symptomology and the inaccuracy of his condition that he did not have neurogenic claudication with spinal stenosis associated with his work-related injury of December 26th of 2000?" Dr. Newman answered "I'm not sure." (Dr. Newman Mar. 24, 2009 trial depo. 78-79.)

{¶ 21} Appellant's counsel then asked Dr. Newman, "And when you say you're not sure * * * you do not have an opinion then within a reasonable degree of medical probability as to that condition being related to his December 26th, 2000 incident?" Dr. Newman responded, "The reason I'm confused is is he had surgery * * * in 2004 for a condition of the lumbar spine. I saw the video you showed me, that's approximately 7 months, 8 months after that. * * * Yet he did go through a surgical procedure for a correction of low back symptoms. And although I saw a video which was inconsistent with ongoing chronic pain, nevertheless, there was justification at some point in time for him to have lumbar surgery, not a trivial surgery. And so when you ask me about * * *

lumbar stenosis with neurogenic claudication, obviously, there was very little low back symptomology in that video; however, there must have been some justification for the surgery of 2004. I cannot explain the discrepancy." (Dr. Newman Mar. 24, 2009 trial depo. 79-80.) Counsel for appellee did not attempt to rehabilitate Dr. Newman's testimony through redirect examination.

{¶ 22} In *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649 (1994), the Supreme Court of Ohio discussed the inherent deficiency of equivocal or contradictory opinions. The court stated that "equivocal medical opinions are not evidence." *Id.* at 657. "Such opinions are of no probative value." *Id.* The court further stated that "equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement." *Id.* Equivocal statements "reveal that the doctor is not sure what he means and, therefore, they are inherently unreliable." *Id.*

{¶ 23} With regard to the claimed condition of lumbar spinal stenosis with neurogenic claudication, Dr. Newman testified, after reviewing the surveillance video, that he was no longer certain that such condition was related to appellee's industrial injury. He further testified that he could not explain the discrepancy between appellee's related symptomology and his physical actions as depicted on the surveillance video. Pursuant to *Eberhardt,* Newman's statements constituted equivocal medical opinions unworthy of any probative value. Thus, Dr. Newman's testimony did not establish within a degree of probability that appellee's industrial injury proximately caused the condition of aggravation of lumbar spinal stenosis with claudication. Dr. Newman's testimony thus was insufficient as a matter of law to prove proximate causation. It also left unrebutted testimony from appellant's experts, Drs. Briggs and Cunningham, both of whom testified to a reasonable degree of medical probability that the condition of lumbar spinal stenosis with claudication was congenital, pre-dated appellee's workplace injury, was exacerbated by the natural aging process, and was not aggravated by his workplace injury.

{¶ 24} With respect to chronic pain syndrome, Dr. Newman opined on cross-examination that such condition was based solely upon symptoms attributable to previously allowed conditions and thus constituted a duplicate medical condition. Accordingly, Dr. Newman's testimony was insufficient as a matter of law to establish that

appellee's December 2000 industrial injury proximately caused the condition of chronic pain syndrome.

{¶ 25} Because appellee failed to establish that he suffered from aggravation of lumbar spinal stenosis and chronic pain syndrome as a proximate result of his December 2000 workplace injury, he may not participate in the workers' compensation fund for those conditions. We therefore sustain appellant's first assignment of error.

{¶ 26} In its second assignment of error, appellant contends the trial court's decision allowing the claimed conditions was against the manifest weight of the evidence. Our resolution of appellant's first assignment of error renders the second assignment of error moot. App.R. 12(A)(1)(c).

{¶ 27} Having sustained appellant's first assignment of error, rendering appellant's second assignment of error moot, we hereby reverse the judgment of the Franklin County Court of Common Pleas which allowed appellee to participate in the workers' compensation fund for the conditions of aggravated lumbar spinal stenosis with claudication and chronic pain syndrome.

Motion to strike granted;
judgment reversed.

BROWN, P.J., and CONNOR, J., concur.
