

IN THE SUPREME COURT OF OHIO

BUILDERS FIRSTSOURCE OHIO VALLEY, LLC,	:	CASE NO. 2010-0924
	:	
Appellant,	:	
	:	
vs.	:	On Appeal from the
	:	Hamilton County Court of
JOSEPH STARKEY, et al.	:	Appeals, First Appellate
	:	District
	:	
Appellees.	:	

**MERIT BRIEF OF APPELLEE,
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STATEMENT OF FACTS

This is a worker's compensation appeal brought by Appellee, Joseph Starkey (hereinafter "Starkey"). (T.d. 2). Starkey was employed with Appellant, Builders FirstSource Ohio Valley, LLC ("Builders") on September 11, 2003 as a service technician. (T.t.p. 9, l. 1-24). He injured his left hip that day while installing a window. (T.t.p. 11, l. 1-6). He filed a workers' compensation claim as a result. Starkey had no prior left hip complaint or problems before this incident. (T.t.p. 11, l. 11-16). He sought immediate medical attention for his left hip at the Mercy Fairfield Emergency Room. (T.t.p. 12, l. 2-11). His problems with his left hip did not resolve and he sought follow up care with John Gallagher, M.D., an orthopedic surgeon. (T.t.p. 12, l. 20-25). He had conservative care and an MRI of the left hip. (T.t.p. 13, l. 17-25, p. 14, l. 1). This proved unavailing and an arthroscopic surgery was performed on Starkey's left hip by George Shybut, M.D. in 2005. (T.t.p. 14, l. 6-20). The surgery proved unsuccessful and a total left hip replacement was performed by Dr. Gallagher in July 2006. (T.t.p. 15, l. 6-8). Starkey continues to treat with Dr. Gallagher for his left hip and related problems. Builders' counsel did not cross examine Starkey at trial.

Dr. Gallagher testified via stenographic deposition. (T.d. 15). He is a board certified orthopedic surgeon (T.d. 15 p. 5., l. 1-13). Dr. Gallagher testified he had treated Starkey for his left hip problems resulting from his September 11, 2003 workplace injury. (T.d. 15, p. 6, l.

11-25 to p. 8, l. 1-18). He reviewed X-Rays, MRI and an arthrogram of Starkey's left hip. (T.d. p. 9, l. 1-8; p. 9 l. 23-25 to p. 11, l. 1, p. 15, l. 6-23). The MRI and arthrogram showed Starkey had osteoarthritis in his left hip. (T.d. p. 10, l. 4-22). He indicated that Starkey had no history of left hip pain or problems prior to this injury. (T.d. 15 p.. 13, l. 7-12). Conservative care failed and Starkey underwent an arthroscopic surgery as mentioned above, this was unsuccessful and Starkey required a left hip replacement. (T.d. 15, l. 23-25, p. 18, l. 1-6). A total hip replacement was done at that time due to his left hip osteoarthritis. (T.d. 15 p. 18, l. 7-21). Dr. Gallagher reviewed Builders' expert medical report of Thomas Bender, M.D. Dr. Gallagher agreed with Dr. Bender's conclusion that the additional condition of degenerative osteoarthritis of Starkey's left hip was pre-existing and aggravated as a direct and proximate result of his September 11, 2003 injury. (T.d. 15 p. 24, l. 1-24). Dr. Gallagher opined Starkey's pre-existing degenerative osteoarthritis of his left hip was aggravated as a direct and proximate result of his workplace injury on September 11, 2003 and provided his basis for that opinion. (T.d. p. 25 l. 21-25 to p. 27 l. 1-4). Builders presented no medical testimony or evidence at the trial court level.

A bench trial was held September 30, 2008. (T.d. 19, 22).

Judgment was entered for Builders on December 3, 2008, finding Starkey was not entitled to continue to participate for the additional condition.

(T.d. 23). On December 17, 2008, Starkey filed his appeal to the First

District Court of Appeals. (T.d. 24). The First District Court of Appeals reversed the decision of the trial court and found Starkey entitled to participate for the additional condition of degenerative osteoarthritis of the left hip on April 9, 2010. Builders filed a discretionary appeal May 24, 2010 and it was granted by this Court August 25, 2010.

ARGUMENT

This Court has agreed to examine two propositions of law in this case:

Proposition of Law No.1: A workers' compensation claim for a certain condition by way of direct causation does not necessarily include a claim for aggravation of that condition for the purposes of either R.C. §4123.512 or *res judicata*.

Proposition of Law No. 2: A claimant in a R.C. §4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken.

Starkey requests that the decision of the Court of Appeals for the First Appellate District be affirmed, as a method of causation does not give rise to a new or separate injury. Further, the principles and framework of the Ohio Workers' Compensation system and the nature of an appeal under R.C. §4123.512 support the decision of the First District Court of Appeals. Finally, the Court of Appeals decision injects a finality and regularity into the litigation process under R.C. §4123.512 and serves to avoid repetitive and costly litigation.

I. AN INJURY UNDER R.C. §4123.01 IS A DOCUMENTED PHYSICAL HARM. A “METHOD OF CAUSATION” IS THE CAUSAL CONNECTION BETWEEN THE PHYSICAL HARM AND THE INJURIOUS EVENT.

Injury is defined in R.C. §4123.01 as “any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.” R.C. §4123.01(C).

This Court has long held that in order for an injury to be compensable under the workers' compensation system, there must be a physical component suffered by the claimant. In *Malone v. Indus. Comm.* (1942), 140 Ohio St.292, 23 Ohio Op. 496, 43 N.E.2d 266, overruled on other grounds, *Village v. General Motors Corporation* (1984), 15 Ohio St.3d 129, 15 OBR 279, 472 N.E.2d 1079, this court held that an injury “comprehends a *physical* or traumatic damage or harm.” (Emphasis added.) *Malone* at paragraph one of the syllabus. Thus, an “injury” under §4123.01(C) requires a physical harm or medical condition documented by the evidence.

In addition to a documented physical harm, an injured worker must establish a *causal connection* between the physical harm and the industrial injury, in order for it to be compensable. There are several recognized “methods of causation” under Ohio law, including direct causation, aggravation of a pre-existing condition, repetitive trauma or

flow through. *Fox v. Indus. Comm.* (1955), 162 Ohio St. 569, 125 N.E.2d 1; *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St.3d 1, 548 N.E.2d 920; *Lewis v. Trimble* (1997), 79 Ohio St.3d 231, 680 N.E.2d 1207; *Village v. General Motors Corporation* (1984), 15 Ohio St.3d 129, 472 N.E.2d 1079.

In this case, Starkey's physical harm at issue is degenerative osteoarthritis of the left hip. At the Industrial Commission, Starkey's motion to amend his claim for this condition was supported by a BWC physician, Dr. Kim Stearns. (T.d. 17). Dr. Stearns opined Starkey's degenerative osteoarthritis existed and was causally related to the industrial injury by way of *flow through*. (T.d. 17). The Industrial Commission adopted Dr. Stearns' report and allowed the condition of degenerative osteoarthritis of the left hip, relying upon the opinion of Dr. Stearns. (T.d. 17).

At trial, Starkey's treating physician, Dr. John Gallagher, testified to a different "method of causation". Dr. Gallagher testified the degenerative osteoarthritis of the right hip *pre-existed* his industrial injury and was *aggravated* by the injury. Builders' independent medical expert, Dr. Thomas Bender, also issued a medical report opining that the degenerative osteoarthritis *pre-existed* and was *aggravated*. Thus, at trial, the same physical harm was at issue (degenerative osteoarthritis of the left hip), however, the "method of causation" differed – flow through vs. aggravation.

II. A METHOD OF CAUSATION IS NOT A NEW AND DISTINCT INJURY AS DEFINED IN R.C. §4123.01 PURSUANT TO ROBINSON V. AT&T NETWORK SYSTEMS, 2003-OHIO-1513.

As set forth above, an injury is a documented physical condition or harm. A method of causation is the link between the condition and injurious event. While both are necessary for compensability, a different method of causation” is not tantamount to proving a new injury. *Robinson v. AT&T Network Systems* (March 27, 2003), 2003-Ohio-1513.

In *Robinson*, the claimant filed a motion to allow degenerative disc disease in his claim by way of direct causation. The claimant lost at the Industrial Commission and failed to file an appeal pursuant to R.C. §4123.512. The claimant then filed a motion with the Industrial Commission to allow the degenerative disc disease, arguing a different method of causation – aggravation of a pre-existing condition.

The Tenth District Court of Appeals found the claim for aggravation barred by the doctrine of *res judicata*. It stated:

“In the case *sub judice*, there is no dispute that the separately asserted claims share the same parties, the same event of June 29, 1993, and the same injury DDD affecting the L4-5, L5-S1 area of Robinson's back. The only distinguishing factor between the two claims is whether the accident directly caused, or served to aggravate, Robinson's DDD, i.e., whether it is "post traumatic" or "aggravation" of a pre-existing condition. However, advancing a new theory of causation is not tantamount to trying to prove a new injury.

Bright v. E & C Lyons (Sept. 30, 1993), Geauga App. No. 93-G-1753.

As such, it is apparent that the core of Robinson's claims is whether he should be permitted to participate in the workers' compensation fund for the specific injury of DDD as that injury relates to his employment. Robinson had the opportunity to thoroughly litigate that claim while pursuing his first motion by appealing the commission's decision to the common pleas court. There, he could have argued his entitlement to participation in the workers' compensation fund by presenting alternative theories of causation: (1) the accident directly caused DDD at L4-5, L5-S1, or (2) the accident aggravated his pre-existing DDD at L4-5, L5-S1. Unfortunately, no appeal was taken.

In sum, the commission's prior order denying Robinson's first motion represents a valid, final judgment of a court of competent jurisdiction. Thus, the issue of Robinson's ability to participate in the workers' compensation fund in connection with his DDD injury, regardless of its cause, has been fully argued and adjudicated. Robinson's current motion presents a claim that for all intents and purposes, is identical to that of the first. Consequently, the motion is barred by *res judicata* and AT&T is entitled to summary judgment as a matter of law."

Pursuant to the logic in *Robinson*, there is a clear delineation between the "method of causation" and the "core" of the claim, which is the right to participate in the workers' compensation fund for a physical condition or harm. In this case, applying the principles in *Robinson*, the "core" of Starkey's claim is whether he should be permitted to participate in the workers' compensation fund for the condition of degenerative osteoarthritis of the right hip. The "method of causation" – whether it be direct cause, flow through or aggravation – does not change or alter the core issue, which is allowance for this condition. Thus, a different "method of causation" is not tantamount to proving a new injury.

III. BECAUSE A DIFFERENT “METHOD OF CAUSATION” DOES NOT EQUATE TO A NEW INJURY, THE SAME MEDICAL CONDITION CAN BE ADDRESSED AT TRIAL UNDER A DIFFERENT THEORY OF CAUSATION.

An appeal from the Industrial Commission to a trial court under R.C. §4123.512 regarding a claimant's right to participate in the workers' compensation scheme is a *de novo* determination of matters of law and fact. *Oswald v. Connor* (1985), 16 Ohio St.3d 38, 42, 476 N.E. 2d 658. The appeal is *de novo* on the issue of coverage, and permits introduction of evidence that was not before the Commission. *Booher v. Honda of America, Inc.* (1996), 113 Ohio App.3d 798, 682 N.E.2d 657.

Courts have held that a claimant is not required to advance a specific theory of causation at the administrative level if they wish to utilize it in the trial court as R.C. §4123.512 allows for the contemplation of new evidence so long as it relates to the same medical condition. *Torres v. Gen. Motors Corp.* (Nov 21, 1991), 8th Dist. No. 59122; *McManus v. Eaton Corp.* (May 16, 1998), 5th Dist. No. CA-7346; *Maitland v. St. Anthony Hosp.* (Oct. 3, 1985), 10th Dist. No. 85 AP-301. The Seventh District Court of Appeals in *Plaster v. Elbeco*, (October 22, 2007) 2007 Ohio 5623 and the Eleventh District in *Bright v. E & C Lyons* (Sept. 20, 1993), 11th Dist. No. 93-G-1753 both adopted this approach as well.

In *Bright*, the injured worker filed a claim to participate in the workers' compensation fund. The Bureau denied her claim, the Industrial Commission affirmed that decision, and Bright appealed to

Common Pleas Court and won by advancing a new theory of causation, aggravation of a pre-existing condition. The Bureau of Workers' Compensation argued in its appeal that the trial court erred by allowing Bright to amend her pleadings to assert a new theory of recovery.

In reaching its decision, the court discussed Civ. R. 15(B) and noted that the Bureau was not subjected to an ambush at trial because Bright's experts had given deposition testimony concerning aggravation approximately nine months prior to trial. The court went on to state, "[a]dditionally, several pronouncements indicate that in a case where a new theory of recovery is first presented at the trial level, the evidence is admissible since the claimant * * * is not attempting to prove a new injury, but rather, merely advances a new theory of causation." *Plaster* at 10. This case is factually on all fours with Starkey's position.

Builders argues the decision of this Court in *Ward v. Kroger Co.* (2005), 106 Ohio St.3d 35, 830 N.E.2d 1155 and some of its progeny are controlling. However, the plain language of the *Ward* decision, its fact pattern, and its underlying purpose indicate otherwise.

In *Ward*, this Court noted at page 39:

Specifically, we do not address the issue whether a claim for a certain condition by way of direct causation must necessarily include a claim for aggravation of that condition for purposes of either R.C. 4123.512 or *res judicata*.

This Court had the opportunity to address Starkey's situation, but did not in *Ward* as it presented a different scenario. Clearly, this Court's decision in *Ward* does not address our specific factual situation.

The underpinnings of the *Ward* decision are not implicated in this case either. This Court was concerned counsel was being ambushed or surprised at the trial level and that the administrative process was being usurped. This Court stated that "order is lost, fairness is jeopardized, and the statutory framework is destroyed when the administrative process is merely used as a conduit to get the first claim to the trial court in order to raise other conditions for the first time in the trial court after bypassing the administrative process. Simply put, R.C. §4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level." *Id.*

While these are legitimate reasons, they do not apply in this case. The condition at issue is not new as it was in *Ward*. It is and was degenerative osteoarthritis of the left hip. Nothing changed from the administrative proceedings. Medical testimony and evidence were presented years ago on this issue by all sides and again at trial. Starkey was examined by Builders' expert in advance of trial. Their expert, in fact, produced a report that opined the additional condition should be allowed by way of an aggravation theory. Starkey's expert witness was disclosed, his records provided and his deposition took place several

weeks prior to trial. Builders had a chance to inquire with Dr. Gallagher, about the aggravation of the condition. They had time to produce testimony or other evidence refuting Dr. Gallagher's position. None of this was done. There was no ambush and the condition was fully argued and worked up both administratively and prior to trial of this matter. The underpinnings supporting the *Ward* court's rationale do not apply to this instance.

Starkey is aware of decisions in Second and Sixth Districts that stand contra to his position and that were cited by the trial court. However, Starkey asserts the underpinning of these decisions is *Ward*, a case that never explicitly decided the very issue these courts were grappling with, but that they went onto decide using its rationale anyway. The application of *Ward* to this situation is incorrect for the reasons stated above.

Secondarily, as stated in *Davidson* that "to presume that the commission will consider the evidence in light of both types of conditions, regardless of the type of claim made, is too broad an interpretation of the commission's role." *Davidson v. Ohio Bur. of Workers' Comp.* (February 23, 2007), 2007 Ohio 792 at ¶28. However it is clear the Industrial Commission's role is just that. These courts' concerns should be alleviated as evidenced by the hearing officer memorandum appended to Starkey's trial brief. (T.d. 18). The Staff Officer decided the matter with

this background and the ability to hear alternative theories of causation at the administrative level. This is precisely what happened in this case.

Administratively, the Industrial Commission Hearing Officer's manual at section S-11 (T.d. 18) allows claimants, like Starkey, to present alternative theories of causation at the administrative level. In addition, R.C. §4123.95 states the workers' compensation statutes are to be liberally construed in favor of claimants, like Starkey. This backdrop shows the decision of the First District Court of Appeals is in fact correct and in keeping with the principles underlying the workers' compensation system in Ohio.

IV. THE DECISION OF THE COURT OF APPEALS PROMOTES ECONOMY AT BOTH THE ADMINISTRATIVE AND JUDICIAL LEVELS.

Builder's position does not serve judicial economy. It serves no useful purpose to allow a claimant, after being unsuccessful at trial using a direct causation theory, to apply for and re-litigate the allowance of the same condition using a different method of causation. That is the practical effect of Builders' position. If the rationale of the First District is upheld, there would be but one opportunity under R.C. §4123.512, to prove the condition at issue employing any method of causation that the evidence supports. The process will be uniform and judicial economy will be served.

As stated by this Court, the remedial purpose of the system would be frustrated if a failure to observe every technicality would defeat an otherwise just claim. *Roma v. Indus. Comm.* (1918), 97 Ohio St.247.

While it may be somewhat "through the looking glass" for the claimant to take this position, claimants should be limited to one opportunity to prove a condition in an appeal under R.C. §4123.512. Employers should be able to rest assured that there is some finality after the successful defense of an R.C. §4123.512 appeal. To allow a claimant to re-litigate the allowance of a specific condition using a different method of causation is certainly not what this Court envisioned in *Ward*.

CONCLUSION

For the foregoing reasons, Starkey requests that the decision of the First District Court of Appeals be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record, by regular U.S. mail, on this 6th day of December, 2010 specifically:

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