

ORIGINAL

In the
Supreme Court of Ohio

MARK A. BENNETT,	:	Case No. 2011-0902
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Lucas County Court of Appeals,
v.	:	Sixth Appellate District
	:	
ADMINISTRATOR,	:	Court of Appeals
OHIO BUREAU OF WORKERS'	:	Case No. L-10-1185
COMPENSATION,	:	
	:	
Defendant-Appellee,	:	
	:	
and	:	
	:	
GOODREMONT'S INC.,	:	
	:	
Defendant-Appellee.	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION**

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INTRODUCTION

This case involves a run-of-the-mill workers' compensation claim filed by the Appellant, Mark A. Bennett. The issue is whether a claimant has a duty to present medical evidence of his injury on appeal under R.C. 4123.512, even if administratively the case was decided on other grounds. Because proof of an injury is one of the essential (and well-established) elements of a workers' compensation claim, the question answers itself. The Court need not take jurisdiction.

The Ohio Industrial Commission denied Bennett's workers' compensation claim because it found that he had not been injured in the course of his employment, but instead fell under the so-called "coming and going" rule. The Commission did not reach the issue of Bennett's actual injuries because it had decided the case on the "in the course of" issue.

Bennett appealed under R.C. 4123.512 and the Sixth District Court of Appeals eventually found that Bennett did not fall under the "coming and going" rule. The Sixth District remanded to the trial court for additional proceedings. During those proceedings, Bennett presented no medical evidence of his injury at trial. Accordingly, the trial court granted a directed verdict in favor of the Appellee, Administrator of the Ohio Bureau of Workers' Compensation ("BWC"), finding that Bennett failed to present any evidence at trial that he had sustained a compensable injury.

Bennett appealed the directed verdict to the Sixth District, raising the meritless argument that he now urges this Court to consider. According to Bennett, the trial court erred by deciding the issue of actual injury, because the Commission had not made a finding on that issue. The Sixth District soundly rejected this claim, relying on basic and well-established principles of workers compensation law. All workers' compensation appeals filed under R.C. 4123.512 are *de novo* proceedings, and all claimants are required to re-establish, by a preponderance of the

evidence, that they (1) sustained an injury, and (2) sustained that injury while in the course of and arising out of their employment.

There is no reason for this Court to reconsider these well-established principles now. In fact, Bennett offers only the flimsiest reason the court should do so. He invokes two cases—which turn on whether a claimant can, during a R.C. 4123.512 appeal, amend his complaint to allege a new medical injury or assert new theories for injuries included in the original complaint. But these cases have nothing to say about the scope of a common pleas court’s review under R.C. 4123.512. Under R.C. 4123.512, common pleas courts hold trials and decide workers’ compensation claims *de novo*; they cannot remand to the Commission for further determinations.

In short, this case presents no new or important issue of law for the court to consider, and the trial court properly granted a directed verdict in favor of the BWC. Therefore, the Court should decline jurisdiction.

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Sixth District’s decision did not involve a new or unusual issue. Instead, the lower court properly applied well-established principles of workers’ compensation law. Specifically, it is well-established law that a workers’ compensation claimant, when appealing a case under R.C. 4123.512, has the obligation to prove both elements of his case. That is, he must prove that he was injured and that the injury occurred in the course of and arising out of his employment. R.C. 4123.01(C).

Also well-established is that a R.C. 4123.512 action is *de novo*, and that the claimant must prove anew at trial that he sustained an injury and that it was in the course and scope of employment. *Marcum v. Barry* (10th Dist. 1991), 76 Ohio App. 3d 536, 539. Because the

appeal is *de novo*, the trial court makes the determination without consideration of or deference to the Commission's decision. *Id.*, citing *Jones v. Keller* (12th Dist. 1966), 9 Ohio App. 2d 210.

Bennett's case was properly decided by application of these two well-established legal principles. He was obligated on appeal to prove that he had sustained an injury in the course of and arising out of his employment. Although he eventually was able to prevail on the "in the course of" prong of his case, he never established an injury, or a causal connection between his accident and subsequent medical condition. While perhaps unusual procedurally, the trial court decision denying the claim was inevitable given the law.

Contrary to Bennett's suggestion, this case does not fall into the line of cases including *Ward v. Kroger* (2005), 106 Ohio St. 3d 35, and *Builders FirstSource Ohio Valley, L.L.C. v. Starkey*, No. 2010-0924. *Ward* held that a claimant cannot amend his Complaint on appeal to add new medical conditions not first addressed by the Industrial Commission:

The Claimant in an 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.

Ward, 106 Ohio St. 3d 35, at syllabus. *Starkey*, which is now pending before this Court, followed-up on *Ward*, by asking whether a claimant may modify his theory of causation of the injury on appeal under R.C. 4123.512.

This case does not involve the questions at issue in *Ward* or *Starkey*. Bennett brought a claim for "concussion w/o coma." The claim was denied administratively based on the "in the course of" question. Bennett appealed on that question and eventually won. However, his original administrative claim was still for "concussion w/o coma," and Bennett is still obligated to allege and prove that injury at trial, and that the condition arose out of his accident, before his claim can be allowed.

Bennett did not change the condition for which he applied on appeal, as in *Ward*. Nor did he change the theory of causation for that condition, as in *Starkey*. Rather, on appeal he failed to allege or prove *any* specific medical condition at all.

As two well-established principles of workers' compensation law are dispositive of the case, it presents no issue of public or great general interest. To the contrary, this case is a garden variety workers' compensation matter, where the claimant failed to prove all of the essential elements of his case. Accordingly, this Court should decline jurisdiction.

STATEMENT OF THE FACTS

Bennett worked as a copier salesman for Goodremont's, Inc. On the morning of February 28, 2006, another car struck Bennett's vehicle from behind while Bennett was on his way to Goodremont's main office.

Bennett filed a workers' compensation claim with the BWC. The document he filed to initiate his workers' compensation claim, commonly called a FROI-1,¹ did not allege any specific medical condition as a result of the automobile accident. Rather, the FROI-1 simply stated "Head, neck, mid and lower back." However, the BWC initially denied the claim under the ICD-9 code: 850.00 Concussion w/o coma.²

On appeal, the Industrial Commission of Ohio denied Bennett's claim in its entirety based on the "coming and going rule." In effect, the Commission held that the automobile accident did not occur in the course of Bennett's employment.

Bennett filed an appeal in Lucas County Common Pleas Court under R.C. 4123.512. Because the Complaint did not allege any specific injuries or medical conditions, the BWC submitted the following discovery request:

¹ First Report of Injury

² International Classification of Diseases, 9th Revision

Interrogatory No. 7: State with specificity the injuries and/or medical conditions that are alleged as being compensable and are the subject of this appeal.

Bennett's response was:

Answer: I received neck and back injuries resulting in surgery. I am presently totally disabled.

(Defendant Administrator, Bureau of Workers' Compensation's First Set of Interrogatories to Plaintiff). Bennett failed to re-assert the concussion or assert any other specific medical condition sustained as a result of his accident.

The trial court initially affirmed the Commission's finding that Bennett's claim was barred under the "coming and going" rule, but the Sixth District Court of Appeals reversed and remanded to the trial court for additional proceedings. *Bennett v. Goodremont's, Inc.* (6th Dist.), No. L-08-1193, 2009-Ohio-2920, ¶ 29.

At trial, Bennett still did not specify the injuries he sustained. In fact, his testimony regarding the injuries was limited to a single question:

Did you receive injuries from that accident?

Yes.

(Transcript of the Proceedings, pgs. 28-29). Bennett did not present any other testimony or evidence regarding his alleged injuries.

At the close of Bennett's case in chief, the BWC moved for a directed verdict. The trial court allowed the parties to file post-trial briefs, then granted the BWC's motion. The Sixth District Court of Appeals affirmed. *Bennett v. Goodremont's, Inc.* (6th Dist.), No. L-10-1185, 2011-Ohio-1264.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW AND ARGUMENT

Response to Bennett's Proposition of Law No. 1:

A workers' compensation claimant appealing under R.C. 4123.512 has the burden to prove his case—including the specific industrial injuries alleged administratively—by a preponderance of the evidence, regardless of the basis for the Industrial Commission's denial of the claim.

Bennett confuses the restrictions of *Ward v. Kroger* (2005), 106 Ohio St. 3d 35, with his obligation to prove his case. Under *Ward*, a claimant cannot amend his complaint in court to include medical conditions that were not first adjudicated by the Industrial Commission:

The Claimant in an 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.

Ward, 106 Ohio St. 3d 35 at syllabus. Thus, all medical *conditions* must first be heard by the Industrial Commission before a claimant can bring them before the trial court in an appeal filed under R.C. 4123.512.

In Bennett's case, the BWC initially denied his claim under the ICD-9 code: 850.00, Concussion w/o coma. Therefore, this was the medical condition under consideration administratively. The fact that the claim was denied because the BWC and Commission found Bennett's alleged injury did not occur in the course of his employment, rather than because of some lack in the medical evidence is irrelevant to Bennett's burden of proof in a R.C. 4123.512 appeal. Regardless of the basis for the Commission's decision, Bennett had a responsibility to prove his injury on appeal, and that his alleged medical condition was a result of his accident, once the "in the course of" issue was resolved.

Bennett erroneously interprets *Ward* to mean that the trial court cannot decide any issues, including the medical condition for which a claimant is applying, that the Commission does not

specifically resolve. This is a mischaracterization of well-established law, and a misguided attempt to distort *Ward*.

Bennett's assertion that the trial court may only hear those issues that were specifically addressed by the Industrial Commission is in direct conflict with the *de novo* nature of workers' compensation appeals. R.C. 4123.512 contemplates that a trial court will make a new determination, without consideration of the evidence before the Commission:

R.C. 4123.51[2] contemplates not only a full and complete *de novo* determination of both facts and law but also contemplates that such determination shall be predicated not upon the evidence adduced before the Industrial Commission but, instead, upon evidence adduced before the common pleas court as in any civil action, which may involve a jury trial if demanded.

Marcum, 76 Ohio App. 3d at 539. Indeed, the *de novo* nature of such an appeal means that the trial court makes the determination without consideration of or deference to the Commission's decision:

The proceedings are *de novo* both in the sense of receipt of evidence and determination. The common pleas court, or the jury if it be the factual determiner, makes the determination *de novo* without consideration of, and without deference to, the decision of the Industrial Commission. R.C. 4123.51[2] contemplates a full *de novo* hearing and determination.

Marcum, 76 Ohio App. 3d at 539, citing *Jones*, 9 Ohio App. 2d 210. Thus, all the evidence and arguments heard in a R.C. 4123.512 appeal must be newly made.

Given the *de novo* nature of such an appeal, the claimant has the burden to provide evidence of *both* elements of a workers' compensation claim: (1) that he sustained an injury; and (2) that he sustained that injury while in the course of and arising out of his employment. R.C. 4123.01(C). Once the second issue was decided here, Bennett still had an obligation to prove the first.

However, on remand from the court of appeals, Bennett provided no evidence in support of the medical condition that had originally been the subject of his complaint: ICD-9 code: 850.00,

Concussion w/o coma. Indeed, he did not even allege it in his Complaint. Bennett alleged only that “[a]s a result of the collision, Mr. Bennett suffered bodily injuries, required and requires medical treatment, has had a loss of income, and has been disabled.” (Petition, ¶4)

Bennett failed to specify any injury he sustained as a result of his motor vehicle accident. But even if he had done so, he was required to present competent medical evidence to establish a causal relationship between his accident and the resulting injury. Needless to say, Bennett provided no such evidence. Indeed, Bennett did not offer a single medical record during his case in chief. The testimony about the nature of Bennett’s injuries amounted to a single question and answer:

Did you receive injuries from that accident?

Yes.

(Transcript of the Proceedings, pgs. 28-29). This is insufficient evidence of a compensable injury.

Even if the trial court had admitted Bennett’s interrogatory answer as a specific medical allegation (“I received neck and back injuries resulting in surgery. I am presently totally disabled.” Plaintiff’s Answer to Defendant-Appelle’s, Administrator, Bureau of Workers’ Compensation, First Set of Interrogatories, No.7), neck and back injuries that result in surgery and total disability are not medical conditions that are matters of common knowledge. See *White Motor Corp. v. Moore* (1976), 48 Ohio St. 2d 156, 159 (“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.”) Accordingly, under *White Motor Corp.*, Bennett was required to submit competent medical evidence establishing a causal connection between the motor vehicle accident and his neck and back injuries, yet he failed to do so. In fact, he provided no medical evidence at all. At the close of Bennett’s case in

chief, the trial court and counsel for the BWC remained unsure what specific medical conditions were being alleged. Accordingly, the trial court properly granted a directed verdict in favor of the BWC.

As stated in *Ward*, a claimed right of participation in the in the workers' compensation fund is not a generic request:

A claimed right of participation in the in the fund is not a generic request. There is no such thing as a workers' compensation claim for "an injury." A workers' compensation claim is simply the recognition of the employee's right to participate in the fund for a *specific injury or medical condition*, which is defined narrowly, and it is *only for that condition*, as set forth in the claim, that compensation and benefits provided under the act may be payable.

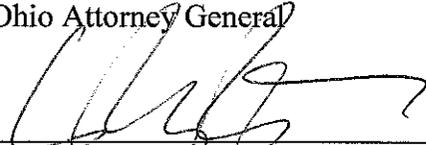
Ward, 106 Ohio St. 3d at 37-38. (emphasis added). Under *Ward*, Bennett was required to allege a specific medical condition that he sustained as a result of his accident, and prove that the medical condition was a direct result of his accident through competent medical evidence. He did not do so, and the trial court properly granted a directed verdict in favor of the BWC.

CONCLUSION

For the above reasons, this Court should decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellee Administrator, Ohio Bureau of Workers' Compensation was served by U.S. mail this 24th day of June, 2011, upon the following counsel:

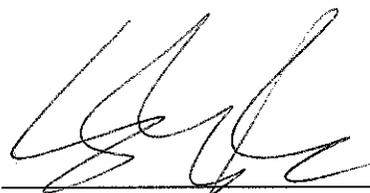
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