

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

THOMAS B. TENHUNDFELD,	:	APPEAL NOS. C-110711
	:	C-120172
Plaintiff-Appellant,	:	TRIAL NO. A-1000550
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
UNION CENTRAL LIFE INS. CO.,	:	
Defendant-Appellee,	:	
and	:	
MARSHA P. RYAN,	:	
ADMINISTRATOR, BUREAU OF	:	
WORKERS' COMPENSATION,	:	
Defendant.	:	

We consider these consolidated appeals on the accelerated calendar. This judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, plaintiff-appellant Thomas B. Tenhundfeld appeals from the trial court's judgment denying him the right to participate in the workers' compensation fund for the following additional conditions affecting his right knee: arthritis, chondromalacia patella, and chondromalacia medial femoral joint.

In 1978, Tenhundfeld sustained a work-related injury arising out of his employment with defendant-appellee Union Central Life Ins. Co. Tenhundfeld's workers'

compensation claim was allowed for “right knee injury; patellar compensation syndrome right knee.” Tenhundfeld underwent two surgeries on his right knee in 1978 and 1981. He sustained a second workplace injury to his right knee in 1988. A second claim was allowed for a torn medial meniscus. Tenhundfeld subsequently underwent six additional surgeries on his right knee and leg.

In August 2009, Tenhundfeld filed a motion requesting that his 1978 claim be amended to include the contested additional conditions. At trial, his treating physician and medical expert, Robert Hill, D.O., testified by deposition. On direct examination, he stated that there was a casual relationship between the 1978 injury and the additional conditions. Dr. Hill testified that Tenhundfeld had a pre-existing, asymptomatic chondromalacia—a breakdown of the cartilage—prior to the injury which only became symptomatic after the injury, requiring the need for medical treatment.

On cross-examination, however, he was presented with notes from a November 1977 office visit. Dr. Hill conceded that Tenhundfeld had demonstrated symptoms in his right knee prior to the injury. He admitted that while it was possible the injury had caused the additional conditions, it was not probable. He was unable to say that it was more likely than not that the additional conditions had been caused by the 1978 injury.

Union Central offered the deposition testimony of David Randolph, M.D. Dr. Randolph conducted an independent medical examination of Tenhundfeld and reviewed his medical history. He testified that there was no evidence that the 1978 injury had led to any of the requested additional conditions.

The trial court entered judgment for Union Central and issued findings of fact and conclusions of law including that Tenhundfeld had not proved the relation of the additional conditions to the injury to the requisite degree of certainty.

In his first assignment of error, Tenhundfeld asserts that since Union Central had paid bills for prior surgeries and treatments on his right knee, that it had “made an implicit determination granting * * * an allowance” for the additional conditions. But the Supreme Court of Ohio has repeatedly rejected the proposition that a medical condition is implicitly allowed when a self-insured employer authorizes and pays for surgery performed to treat the condition. *E.g., State ex rel. Schrichten v. Indus. Comm.*, 90 Ohio St.3d 436, 438, 739 N.E.2d 331 (2000). Medical conditions must be formally recognized, through certification by a self-insured employer, as having been caused by the claimant’s workplace injury. *See State ex rel. Griffith v. Indus. Comm.*, 87 Ohio St.3d 154, 155, 718 N.E.2d 423 (1999). The assignment of error is overruled.

In his second assignment of error, Tenhundfeld argues that the trial court erred in failing to strike Dr. Randolph’s testimony because the doctor had relied upon two medical reports that were not admitted into evidence. *See Evid.R. 703*. We disagree.

“Where an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid.R. 703 has been satisfied.” *State v. Solomon*, 59 Ohio St.3d 124, 570 N.E.2d 1118 (1991), syllabus; *see also State v. Campbell*, 1st Dist. No. C-020822, 2003-Ohio-7149, ¶ 11. *Compare Mahan v. Bethesda Hosp., Inc.*, 84 Ohio App.3d 520, 525, 617 N.E.2d 714 (1st Dist.1992) (where expert based his opinion *exclusively* on the deposition of the plaintiff’s doctor and the deposition was not admitted into evidence at trial, the expert’s opinion was inadmissible).

Thus where, as here, a medical doctor has personally examined a patient, his testimony complies with Evid.R. 703’s requirement that he base his opinion on “facts and data perceived” by him, even if he also bases his opinion, in part, on medical records that were not admitted into evidence. *See Fry v. King*, 192 Ohio App.3d 692, 2011-Ohio-963, 950 N.E.2d 229, ¶ 111 (2nd Dist.); *see also State v. Hoover-Moore*, 10th Dist. No. 03AP-

1186, 2004-Ohio-5541, ¶ 40. It is undisputed that Dr. Randolph personally conducted a medical examination of Tenhundfeld. During his testimony he referenced many of Tenhundfeld's medical histories, including the two contested reports. In response to a question by Tenhundfeld's counsel, Dr. Randolph agreed with counsel's statement that the two reports had "assisted" him in reaching his conclusions. But there was no showing that Dr. Randolph relied wholly on the two reports. The trial court did not abuse its sound discretion in admitting Dr. Randolph's testimony. *See Mahan* at 525. The assignment of error is overruled.

In his third assignment of error, Tenhundfeld asserts that the trial court's decision denying participation in the workers' compensation system for the additional conditions was against the manifest weight of the evidence.

To succeed on his claim, Tenhundfeld had to demonstrate by a preponderance of the evidence that he suffered from the additional conditions and that they had been proximately caused by his 1978 workplace injury. *See* R.C. 4123.01(C); *see also Bell v. Admr., Ohio Bur. of Workers' Comp.*, 1st Dist. No. C-110166, 2012-Ohio-1364, ¶ 22-23. When expert medical testimony is required to establish a causal connection between a workplace injury and a subsequent physical condition, the proof must establish the probability of, and not a mere possibility of, the causal connection. *See* Ohio Adm.Code 4123-3-09(C)(3); *see also Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994), paragraph one of the syllabus.

Our review of the entire record fails to persuade us that the trial court, acting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *See Studnicka v. Admr., Ohio Bur. of Workers' Comp.*, 1st Dist. No. C-110724, 2012-Ohio-4266 ¶ 5; *see also Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23. Tenhundfeld's

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expert witness, Dr. Hill, ultimately testified that it was merely possible that the injury had caused the additional conditions. This testimony did not meet the required standard of proof. The third assignment of error is overruled.

Therefore, the trial court's judgment is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., CUNNINGHAM and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on January 11, 2013

per order of the court _____.
Presiding Judge