

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

PATRICK BRANDABUR,	:	APPEAL NO. C-130082
Plaintiff-Appellee,	:	TRIAL NO. A-1200331
vs.	:	<i>JUDGMENT ENTRY.</i>
U.S. BANCORP,	:	
Defendant-Appellant,	:	
and	:	
OHIO BUREAU OF WORKERS' COMPENSATION,	:	
Defendant.	:	

We consider this appeal on the accelerated calendar, and 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.

U.S. Bancorp appeals the trial court's judgment granting its employee, Patrick Brandabur, the right to participate in the workers' compensation fund for the substantial aggravation of spondylosis of his spine as the result of a work-related accident. We conclude that the court's findings were not against the manifest weight of the evidence, so we affirm the judgment.

In 2008, Mr. Brandabur's car was rear-ended by a truck while he was working for U.S. Bancorp. As a result of the car accident, Mr. Brandabur suffered cervical and lumbar strains for which he was allowed to participate in the workers' compensation fund. In 2011, Mr. Brandabur filed a claim with the Industrial Commission for the

additional condition of substantial aggravation of the cervical spondylosis at C5-6 and C6-7. The commission denied his claim, and Mr. Brandabur filed an appeal with the Hamilton County Court of Common Pleas.

At the hearing before the trial court, the parties stipulated that Mr. Brandabur had cervical spondylosis before his accident. Mr. Brandabur, his brother, and his wife testified about Mr. Brandabur's physical limitations following the accident. Mr. Brandabur's chiropractor, Dr. Aaron Troy Schrickel, and U.S. Bancorp's expert witness, Dr. Steven Wunder, testified by deposition. Dr. Schrickel testified that he had treated Mr. Brandabur following the accident. Based on his review of x-rays and magnetic resonance imaging scans ("MRIs") of Mr. Brandabur's neck and his examination and testing of Mr. Brandabur, Dr. Schrickel opined that Mr. Brandabur had suffered the substantial aggravation of his preexisting spondylosis as a result of the 2008 car accident. Conversely, Dr. Wunder concluded that Mr. Brandabur's condition had not been substantially aggravated by the accident. Dr. Wunder based his opinion on his independent medical examination of Mr. Brandabur and his review of the medical records, x-rays and MRIs.

At the conclusion of the trial, the court found that Mr. Brandabur had sustained substantial aggravation of cervical spondylosis, and that he was entitled to participate in the workers' compensation fund for the condition.

All of U.S. Bancorp's assignments of error challenge the weight of the evidence. In the first, the company contends that the trial court's decision granting Mr. Brandabur the right to participate in the fund for the substantial aggravation of cervical spondylosis was against the manifest weight of the evidence. Mr. Brandabur needed to show by a preponderance of the evidence that his preexisting condition of spondylosis was substantially aggravated by the car accident. *See* R.C. 4123.01(C)(4).

“[S]ubstantial aggravation must be documented by objective findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.” R.C. 4123.01(C)(4). U.S. Bancorp contends that the trial court based its decision not upon objective findings, but upon Mr. Brandabur’s subjective complaints about his pain and physical limitations. When announcing its decision, the court stated that it considered the lack of Mr. Brandabur’s pain complaints prior to the accident in contrast to his repeated complaints following the accident to be objective. These complaints are more suitably classified as subjective. But the court also had before it the x-rays, MRIs, medical records and tests performed by Dr. Schrickel. That evidence provided objective findings and results as required by the statute.

Under a manifest-weight-of-the-evidence review, we will not reverse the trial court’s judgment if it is supported by competent, credible evidence. *Pflanz v. Pilkington Lof*, 1st Dist. Hamilton No. C-100574, 2011-Ohio-2670, ¶ 10. Our review of the entire record fails to persuade us that the trial court clearly lost its way and created such a manifest miscarriage of justice that we must reverse its judgment and order a new trial. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-18; *State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 678 N.E.2d 541 (1997). The first assignment of error is overruled.

U.S. Bancorp’s second assignment of error is that the trial court’s finding that Mr. Brandabur’s testimony was credible was against the weight of the evidence. The company argues that Mr. Brandabur’s testimony about his physical limitations and pain was inconsistent because he testified that he continued to do physical activities and ceased going to treatment despite his assertion that he was suffering from the substantial aggravation of cervical spondylosis. “[T]he weight to be given the

evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. We conclude that the court’s determination that the testimony was credible was not against the weight of the evidence. The court was in the best position to determine the witnesses’ credibility. The second assignment of error is overruled.

In the final assignment of error, U.S. Bancorp asserts that the trial court’s reliance on Dr. Schrickel’s testimony instead of Dr. Wunder’s testimony was against the weight of the evidence. The court made clear that it had considered the testimony of both doctors. There is nothing in the record to suggest that we should not defer to the trial court’s determination of the weight to accord the doctors’ testimony. The third assignment of error is overruled.

Therefore, we affirm the trial court’s judgment.

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

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

To the clerk:

Enter upon the journal of the court on November 15, 2013

per order of the court _____
Presiding Judge