

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

CHARLES A. DUNAWAY, JR.,	:	APPEAL NO. C-130291
	:	TRIAL NO. A-1108814
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
	:	
SOUTHWEST OHIO REGIONAL	:	
TRANSIT AUTHORITY,	:	
	:	
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.

Defendant-appellant the Southwest Ohio Regional Transit Authority (“SORTA”) has appealed from the trial court’s entry granting its employee, plaintiff-appellee Charles Dunaway, the right to participate in the workers’ compensation fund for the substantial aggravation of his pre-existing condition of degenerative disc disease at L4-L5 and L5-S1.

Dunaway was employed by SORTA as a spotter. His job involved lining up busses in preparation for different routes. In September of 2010, Dunaway jarred his

back after slipping down several bus steps. He was allowed to participate in the workers' compensation fund for the conditions of lumbar sprain and cervical sprain. He later requested to include the additional conditions of substantial aggravation of pre-existing degenerative disc disease at L4-L5 and L5-S1. Following a hearing, a district hearing officer allowed Dunaway to participate in the workers' compensation fund for these additional conditions. But a staff hearing officer reversed and disallowed Dunaway's participation. After the Industrial Commission refused his appeal, Dunaway appealed to the Hamilton County Court of Common Pleas.

In a bench trial, SORTA offered the deposition testimony of Dr. Steven Wunder, who had conducted an independent medical examination on Dunaway. After outlining Dunaway's extensive history of back pain, Dr. Wunder opined that Dunaway's slip on the bus steps could not have caused a substantial aggravation of his pre-existing degenerative disc disease. Dunaway presented the deposition testimony of his treating physician, Dr. Matthew Murdock. Based on his examination of Dunaway, as well as his review of Dunaway's medical records, Dr. Murdock opined that a simple sprain or strain would not have caused the extreme symptoms experienced by Dunaway, and that Dunaway's fall had substantially aggravated his pre-existing degenerative disc disease. Dunaway testified about the increased pain that he had experienced since the fall. According to Dunaway, his pain can no longer be managed with Aleve, he suffers from incontinence, and he struggles with basic functions such as putting on his shoes. The trial court held that Dunaway was entitled to participate in the workers' compensation fund for these additional conditions.

In two related assignments of error, SORTA argues that the trial court erred in allowing Dunaway to participate in the workers' compensation fund in the absence

of expert medical testimony, and that the trial court's decision was against the manifest weight of the evidence. We consider these assignments together.

To be allowed participation in the workers' compensation fund, Dunaway needed to demonstrate by a preponderance of the evidence that his injury had substantially aggravated his pre-existing degenerative disc disease. R.C. 4123.01(C)(4). He needed to do so with objective diagnostic findings, objective clinical findings, and objective test results. *Id.* SORTA contends that the trial court had rejected the testimony of Dunaway's expert, and consequently that Dunaway had failed to demonstrate substantial aggravation with the requisite expert medical testimony. We disagree. In its findings of facts and conclusions of law, the trial court stated that "the objective findings of Dr. Murdock * * *, and all medical records after the July 2010 baseline, establish that Dunaway's September 20, 2010, workplace injury substantially aggravated his pre-existing degenerative disc disease." Dunaway presented the required medical testimony, and it is clear that the trial court relied on this testimony when making its determination.

Following our review of the record, we cannot find that the trial court lost its way and committed a manifest miscarriage of justice in allowing Dunaway the right to participate in the workers' compensation fund. *Studnicka v. Admr., Ohio Bur. of Workers' Comp.*, 1st Dist. Hamilton No. C-110724, 2012-Ohio-4266, ¶ 5; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23. The trial court was in the best position to judge the credibility of the witnesses, and it was entitled to find the testimony of Dr. Murdock to be more credible than that offered by Dr. Wunder. The trial court was also entitled to consider and rely on the testimony offered by Dunaway when determining that the aggravation of his degenerative disc disease had been substantial or considerable. The trial court's

OHIO FIRST DISTRICT COURT OF APPEALS

decision to allow Dunaway the right to participate in the workers' compensation fund was not against the manifest weight of the evidence.

SORTA's assignments of error are overruled, and the judgment of the trial court is accordingly 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.

HENDON, P.J., HILDEBRANDT and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on December 13, 2013
per order of the court _____.
Presiding Judge