IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Karen S. Jordan	:	
	:	
Relator	:	Case No. 07-1901
	:	
v.	:	On Appeal From The
	:	Judgment of the Tenth
Industrial Commission of Ohio, et al.	:	District Court of Appeals
	:	Case No. 06AP-908
Respondents.	:	

REPLY BRIEF OF RELATOR, KAREN S. JORDAN

Stephen D. Plymale (0033013)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
(614) 466-6696 (phone)
(614) 728-9535 (fax)
splymale@ag.state.oh.us
Counsel for Respondent,
Industrial Commission of Ohio

Jonathan H. Goodman (0070978)
Heinzerling, Goodman & Reinhard, LLC
5900 Roche Drive, 4th Floor
Columbus, Ohio 43229
(614) 436-4882 (phone)
(614) 436-6304 (fax)
jon@heingoodlaw.com
Counsel for Relator,
Karen S. Jordan

Christopher C. Russell (0040506)
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215
(614) 227-2000 (phone)
(614) 227-2100 (fax)
Counsel for Respondent,
Buckeye Boxes, Inc.

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Introduction

Relator-Appellant, Karen S. Jordan (Mrs. Jordan), injured her right knee at work in 1984. See Supplement, page 1 (hereinafter, "S., p. x"). The injury was severe and she has required four surgeries, including a total knee replacement in 2004. S., p. 7, 11-12. Her workers' compensation claim has been allowed for numerous conditions affecting her right knee including arthritis, osteomyelitis, reflex sympathetic dystrophy/complex regional pain syndrome. S., p. 1-2. These conditions have resulted in significant impairment and continue to render Mrs. Jordan temporarily and totally disabled more than two decades after she was hurt. S., p. 3; 13-15.

Mrs. Jordan's physicians prescribed several medications to treat the allowed conditions in her claim. S., p. 16-17; 19. The Ohio Bureau of Workers' Compensation (BWC) denied payment for some of these medications and Mrs. Jordan appealed. S., p. 24. Respondent, Industrial Commission of Ohio (the commission), ultimately approved payment for several brand-name medications which were identified by name in its order dated August 18, 2005. S., p. 14-18. At the time that Mrs. Jordan obtained authorization for payment of these brand name medications, R.C. 4123.66 and Ohio Adm.Code 4123-6-21(F) allowed for the payment of brand-name medications if prior approval were sought. The August 18, 2005 commission constituted such prior approval. S., p. 44.

Effective October 1, 2005, the BWC amended Ohio Adm.Code 4123-6-21 such that former Ohio Adm.Code 4123-6-21(F) was removed and Ohio Adm.Code 4123-6-21(I) became effective. Under the new rule, the BWC limits payment for brand-name medications to the cost of the generic equivalents with no exceptions.

Based on its new rule, the BWC refused to pay the full cost of Mrs. Jordan's brand-name medications even though she had previously established the right to full payment under former Ohio Adm.Code 4123-6-21(F). Mrs. Jordan responded immediately with a letter from her pharmacist showing the substantial cost differences between the generic and brand-name medications. S., p. 30. She also obtained a letter from her physician in which he opined that Mrs. Jordan should have brand-name medications only due to her intolerance to generics. S., p. 22. Based on this evidence, Mrs. Jordan filed a motion requesting that full payment for her brand-name medications be reinstated.

The commission ultimately denied Mrs. Jordan's motion by order dated May 31, 2006. In its order, the commission conceded that Mrs. Jordan sought and received prior authorization for full payment of her brand-name drugs under former Ohio Adm.Code 4123-6-21(F). The commission also conceded that it was the October 1, 2005 amendment to Ohio Adm.Code 4123-6-21 that resulted in the BWC's refusal to pay the full cost of her brand-name medications. The commission noted the medical evidence supporting Mrs. Jordan's claim that she cannot tolerate generics and the substantial cost difference between her brand-name medications and the generic medications. S. p. 44-45. Nonetheless, the commission applied Ohio Adm.Code 4123-6-21(I) retrospectively to Mrs. Jordan's claim and refused to pay the full cost of her brand-name medications. The commission's sole reasoning for its decision was that R.C. 4123.66 gives the BWC the authority to pay for medications and Mrs. Jordan should have expected the rules governing such payment to change from time to time. Id.

Mrs. Jordan sought a writ of mandamus in the Tenth District Court of Appeals. The court of appeals denied the writ based on an improper application of the law governing retrospective application of administrative rules. Specifically, the court of appeals failed to apply the proper test under R.C. 1.48, skipping the threshold issue of whether the October 1, 2005 amendment to Ohio Adm.Code 4123-6-21(I) expressly provided for retrospective application and jumping to the constitutional issue of whether the amendment affected substantive or remedial rights under Art. II, § 28 of the Ohio Constitution.

Because the commission and the court of appeals failed to follow R.C. 1.48 and this Court's repeated directives regarding the retrospective application of administrative rules, Mrs. Jordan respectfully requests that their decisions be vacated. This Court should grant the requested writ of mandamus. Ohio Adm.Code 4123-6-21(I) says nothing about retrospective application. Therefore, it cannot be applied retrospectively to Mrs. Jordan's claim so as to deny full payment for her brand-name medications.

Proposition of Law

The Industrial Commission of Ohio abuses its discretion by applying Ohio Adm.Code 4123-6-21 retrospectively.

In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, this Court held, at paragraph one of the syllabus, that:

> The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply. Upon its face, R.C. 1.48 establishes a threshold analysis which must be utilized prior to inquiry under Art. II, § 28 of the Ohio Constitution.

This Court has affirmed this principle repeatedly. See *Warren Cty. Bd. of Commrs. v. Lebanon* (1989), 43 Ohio St.3d 188, 189-190; *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 259; *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, ¶ 12-14. Thus, unless the statute or administrative rule explicitly states that it is to be applied retrospectively, it cannot be so applied. See R.C. 1.48; *Kinser v. Coleman* (1986), 28 Ohio St.3d 259, 262 (if a statute is silent on the issue of retrospective application, it cannot be applied retrospectively). For this reason, it is clear error to address the constitutional issue of substantive versus remedial rights without first conducting the statutory test under R.C. 1.48. See *Van Fossen*, 36 Ohio St.3d at 106. If the law or rule does not expressly state that it is to be applied retrospectively, then it cannot be so applied and the inquiry is over. See *Kilbane*, 91 Ohio St.3d at 259.

In addition, in a line of case law dating back eighty years, this Court has held that payment for medical treatment in a workers' compensation claim is a substantive right that accrues at the time of the injury. See *Indus. Comm. v. Kamrath* (1928), 118 Ohio St. 1, paragraphs two and three of the syllabus, 3-4; *State ex rel. Jeffrey v. Indus. Comm.*

(1955), 164 Ohio St. 356, 367; *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 58; *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 46.

At the time of Mrs. Jordan's injury in 1984, there were two statutes that governed the payment of medicines, R.C. 4123.66 and R.C. 4123.54. The former vested the commission, and later the BWC, with the power to control what the workers' compensation system pays for medication. The latter simply stated that injured workers are entitled to medicines as provided by Chapter 4123 of the Revised Code. While these laws clearly empowered the BWC to control what the system pays for medications, neither statute limited the amount that the system would for brand-name medications.

In 1997, Ohio Adm.Code 4123-6-21 was promulgated. Under that rule, an injured worker could obtain full payment for brand-name medications if she obtained prior authorization. See former Ohio Adm.Code 4123-6-21(F). It was not until the October 1, 2005 amendment of Ohio Adm.Code 4123-6-21 that the BWC refused to pay the full price of brand-name medications under any circumstances if a generic equivalent exists. See Ohio Adm.Code 4123-6-21(I).

Mrs. Jordan's right to payment of medications is a substantive right governed by the law in effect in 1984. See *Kamrath*, 118 Ohio St. at paragraphs two and three of the syllabus, 3-4; Jeffrey, 164 Ohio St. at 367; *Gregory*, 32 Ohio St.2d at 58; *Brown*, 68 Ohio St.3d 45, 46. Moreover, as the commission concedes, Mrs. Jordan sought and obtained prior authorization for full payment of brand-name medications prior to the effective date of Ohio Adm.Code 4123-6-21(I). S., p. 28; 44.

Because Mrs. Jordan established the right to receive full payment for her brand-name medications prior to October 1, 2005, the only way that the commission could

refuse to pay the full amount would be to apply Ohio Adm.Code 4123-6-21(I) retrospectively to her previously established rights. However, in order to do so lawfully, Ohio Adm.Code 4123-6-21(I) would have to pass the R.C. 1.48 retrospective application test set forth in *Van Fossen* and its progeny. In this regard, Ohio Adm.Code 4123-6-21(I) is silent with respect to retrospective application. Thus, it cannot be applied retrospectively and it is improper to reach the constitutional question of whether Ohio Adm.Code 4123-6-21(I) affects substantive or remedial rights. See *Kinser*, 28 Ohio St.3d at 262 (if a statute is silent on the issue of retrospective application, it cannot be applied retrospectively); *Van Fossen*, 36 Ohio St.3d at 106; *Kilbane*, 91 Ohio St.3d at 259.

In its decision, the commission failed to conduct the R.C. 1.48 test. Instead, it simply concluded that R.C. 4123.66 gives the BWC the right to control payment of medications and that Mrs. Jordan should have expected the rules to change from time to time. The commission's analysis is erroneous as a matter of law. This Court has consistently and repeatedly held that a law cannot be applied retrospectively unless it states that it is to be so applied. Ohio Adm.Code 4123-6-21(I) is silent with respect to retrospective application. Therefore, it cannot be applied retrospectively to Mrs. Jordan's claim. See *Van Fossen*, 36 Ohio St.3d at paragraph one of the syllabus.

The court of appeals, like the commission, failed to follow the R.C. 1.48 test in its decision. The court of appeals erroneously framed the issue before it by finding that a law is applied retrospectively if it affects remedial as opposed to substantive rights. However, retrospective application has nothing to do with substantive versus remedial rights. That question is reserved for the secondary constitutional issue that is reached only if the law expressly provides for retroactive application. See R.C. 1.48; *Van Fossen*,

36 Ohio St.3d at 106; *Kilbane*, 91 Ohio St.3d at 259. By contrast, retrospective application occurs when a new law is applied to a previously established right. See *Van Fossen*, 36 Ohio St.3d at 104; Black's Law Dictionary (6th Ed. 1991) 914 (a retrospective law is one that affects rights that accrued before it came into force).

Moreover, the court of appeals inexplicably found that Mrs. Jordan did not establish a right to full payment for her brand-name medications. This finding is clearly incorrect because he commission itself conceded that Mrs. Jordan established this right prior to the October 1, 2005 effective date of Ohio Adm.Code 4123-6-21(I). S., p. 28, 44. Having established that right, the only way that the commission could have altered the amount it paid for Mrs. Jordan's brand-name medications would be to apply a new standard retrospectively. That is precisely what the commission did in this case. However, because Ohio Adm.Code 4123-6-21(I) is silent with respect to retrospective application, the commission abused its discretion by that rule to Mrs. Jordan's previously established right. Accordingly, the court of appeals erred by failing to follow R.C. 1.48 and this Court's decision in *Van Fossen*.

For the foregoing reasons, the decisions below must be reversed and the requested writ of mandamus must be granted. Mrs. Jordan previously established the right to full payment for brand-name medications. The commission conceded this fact. S., p. 17, 44. The commission must be compelled to vacate its erroneous application of Ohio Adm.Code 4123-6-21(I) and reinstate full payment for Mrs. Jordan's brand-name medications.

Response to the Industrial Commission's Brief

In its brief, the commission attempts to circumvent the legal issue before this Court by simply ignoring the law. Indeed, the commission does not even cite R.C. 1.48 in its brief. Further, although the commission mentions *Van Fossen*, it conveniently omits any reference to the syllabus law of that case requiring the application of the R.C. 1.48 test before reaching the constitutional issue of substantive versus remedial rights. Instead, the commission immediately argues that injured workers do not have a substantive right to full payment for medications. Time and time again this Court has held that the issue of substantive versus remedial rights is a secondary question that can be reached if, and only if, the statutory requirement of a clearly expressed retrospective intent is satisfied. See, e.g., *Van Fossen*, 36 Ohio St.3d at paragraph one of the syllabus; *Kilbane*, 91 Ohio St.3d at 259.

Apparently, the commission believes that because R.C. 4123.66 gives the BWC power to control what the system pays for medications, it is free to change the rules whenever and however it pleases. However, there is nothing in R.C. 4123.66 or Ohio Adm.Code 4123-6-21(I) that creates an exception to the requirements of R.C. 1.48, nor does the commission attempt to address this issue in its brief. Instead, the commission asserts that changes in policy are necessary to keep pace with medical science and insurance industry standards. While commission is correct in this regard, the necessity to keep up with changing times does not empower the BWC or the commission to ignore R.C. 1.48 or this Court's jurisprudence with respect to the retrospective application of laws. The BWC could have complied with R.C. 1.48 by simply indicating that it intended the October 1, 2005 amendment to Ohio Adm.Code 4123-6-21 to apply

retrospectively. At that point, the debate would have been about substantive versus remedial rights. However, the amendment failed to expressly provide for retrospective application. Accordingly, the commission's policy arguments are essentially irrelevant. R.C. 1.48 and this Court require a clearly expressed assertion of retrospective application before a law can be applied in that manner. Ohio Adm.Code 4123-6-21(I) fails this test. Thus ends the inquiry.

Next, the commission argues that it applied Ohio Adm.Code 4123-6-21(I) prospectively only. In support of this ludicrous assertion, the commission states that neither it nor the BWC required Mrs. Jordan to reimburse the payments made for the full cost of her brand-name medications prior to October 1, 2005. This argument makes no sense because no law requires reimbursement, even Ohio Adm.Code 4123-6-21(I). Further, reimbursement has nothing to do with retrospective application. As this Court has noted, retrospective application refers to the application of a new law or rule to an existing or previously established right. See *Van Fossen*, 36 Ohio St.3d at 104.

Here, the commission conceded that Mrs. Jordan obtained prior authorization for full payment for brand-name medications prior to October 1, 2005. S., p. 28; 44. In light of this fact, it is unclear how the commission can deny that it applied Ohio Adm.Code 4123-6-21(I) retrospectively. Mrs. Jordan was entitled to full payment for her brand-name medications prior to October 1, 2005, but not after based on the amendment to Ohio Adm.Code 4123-6-21. It is obvious, therefore, that the commission applied a new rule to a previously established right. This scenario is a perfect example of retrospective application. See Black's Law Dictionary (6th Ed. 1991) 914. The commission's contrary assertions are illogical and indefensible.

Finally, the commission engages in a long discussion of extraneous issues such as "Code A" and "Code B" medications with citation to FDA websites. While Mrs. Jordan is impressed with the commission's knowledge of the drug world, none of these issues is relevant to the legal issue before this Court. These issues were not mentioned in the commission's order nor were they mentioned in any prior briefs or arguments before the court of appeals. This attempt to muddy the waters with irrelevant information should be seen for what it is – a ploy designed to distract this Court from the true issue before it. This ploy, coupled with the commission's failure to even cite R.C. 1.48, illustrates the weakness of the commission's position.

R.C. 1.48 and this Court require an express intention for retrospective application before a new law can be applied to an established right. Ohio Adm.Code 4123-6-21(I) says nothing about retrospective application. Therefore, the commission erred by applying the rule retrospectively to Mrs. Jordan's claim. Nothing in the commission's brief addresses this pivotal issue. The commission has abused its discretion and the requested writ of mandamus must be issued.

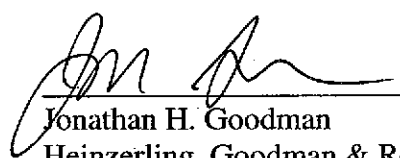
CONCLUSION

The commission abused its discretion by applying Ohio Adm.Code 4123-6-21(I) to Mrs. Jordan's claim in violation of R.C. 1.48. In its decision, the commission found that R.C. 4123.66 empowers the BWC to regulate payment of medications and therefore Mrs. Jordan should have expected the rules to change from time to time. The commission's analysis is incorrect as a matter of law. Nothing exempts R.C. 4123.66 or Ohio Adm.Code 4123-6-21(I) from the requirements of R.C. 1.48 or this Court's jurisprudence regarding the retrospective application of laws.

The court of appeals also erred by failing to follow the R.C. 1.48 test. Moreover, the court of appeals confused the concept of retrospective application with the constitutional issue of substantive versus remedial rights. As this Court has repeatedly held, it is improper to reach the constitutional issue unless the law first complies with R.C. 1.48.

Mrs. Jordan respectfully requests this Court to uphold R.C. 1.48 and Art. II, Section 28 of the Ohio Constitution. Neither the commission nor the court of appeals did so and Mrs. Jordan has been penalized as a result. For this reason, a writ of mandamus must be issued compelling the commission to vacate its improper retroactive application of Ohio Adm.Code 4123-6-21(I) to Mrs. Jordan's claim and to reconsider her request for brand name medications in a manner consistent with Ohio law.

Respectfully submitted,



Jonathan H. Goodman (0070978)
Heinzerling, Goodman & Reinhard, LLC
5900 Roche Drive, 4th Floor
Columbus, Ohio 43229
(614) 436-4882 (phone)
(614) 436-6304 (fax)
jon@heingoodlaw.com
Counsel for Relator,
Karen S. Jordan

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Reply Brief was served upon the following by regular U.S. Mail on this 25th day of February, 2008: Stephen D. Plymale, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215; and Christopher C. Russell, Esq., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215.

Jonathan H. Goodman (0070978)