

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.  
DILLARD DEPARTMENT STORES,  
INC.,

Appellant,

vs.

MARSHA P. RYAN, ADMINISTRATOR,  
OHIO BUREAU OF WORKERS'  
COMPENSATION, and PAMELA S.  
SCOTT,

Appellees.

Case No. 07-2225

On Appeal from the Franklin County  
Court of Appeals  
Tenth Appellate District

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**MERIT BRIEF OF APPELLANT DILLARD DEPARTMENT STORES, INC.**

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MICHAEL J. BERTSCH (0016619) (COUNSEL OF RECORD)

KATHLEEN E. GEE (0074966)

**MOSCARINO & TREU LLP**

The Hanna Building

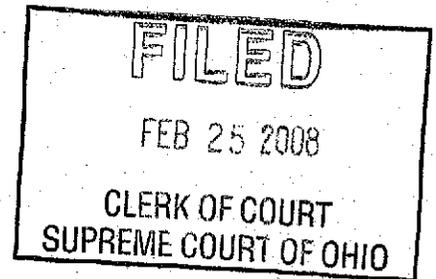
Cleveland, Ohio 44115

Phone: (216) 621-1000

Fax: (216) 622-1556

Email: [mbertsch@mosctreu.com](mailto:mbertsch@mosctreu.com)

[kgee@mosctreu.com](mailto:kgee@mosctreu.com)



COUNSEL FOR APPELLANT  
DILLARD DEPARTMENT STORES, INC.

PAUL W. NEWENDORP (0000779)

**BROWN AND MARGOLIUS, L.P.A.**

55 Public Square, Suite 1100

Cleveland, Ohio 44113

Phone: (216) 621-2034

Fax: (216) 621-1908

COUNSEL FOR APPELLEE  
PAMELA S. SCOTT

STEPHEN D. PLYMALE (0033013)

Assistant Attorney General

Workers' Compensation Section

150 East Gay Street, 22<sup>nd</sup> Floor

Columbus, Ohio 43215-3130

Phone: (614) 466-6696

Fax: (614) 752-2538

Email: [splymale@ag.state.oh.us](mailto:splymale@ag.state.oh.us)

COUNSEL FOR APPELLEE  
ADMINISTRATOR  
OHIO BUREAU OF WORKERS'  
COMPENSATION

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## STATEMENT OF FACTS

Appellants [Marsha P. Ryan], Administrator and the Bureau of Workers' Compensation (collectively "BWC") abused their discretion in denying Dillard Department Stores, Inc.'s ("Dillard's") request for surplus fund reimbursement under R.C. §4123.512(H) and *State ex rel. Sysco Food Services of Cleveland, Inc. v. Industrial Commission of Ohio*, 89 Ohio St.3d 612, 2000-Ohio-1. The request followed and was based on Claimant Pamela S. Scott's voluntary dismissal with prejudice of a second Complaint filed in Dillard's R.C. §4123.512 court appeal from her additionally allowed L4-5 disc bulge. Dillard's and the Claimant had contemporaneously reached a settlement of her entire workers' compensation claim, the express terms of which provided she would forfeit her right to participation for the additional condition. The agreement was approved by operation of law following its submission under R.C. §4123.65. A more detailed summary follows.

Claimant Pamela S. Scott sustained an industrial injury on June 21, 1999 while in Dillard's employ. Her workers' compensation claim was recognized for lumbosacral sprain and strain.

On February 22, 2000, Claimant moved for the further allowance of her claim for "L4-5 Disc Bulge." A District Hearing Officer of the Industrial Commission of Ohio ("ICO") granted the additional allowance by Record of Proceedings dated June 16, 2000. Dillard's Appeal of that Order was denied by a Staff Hearing Officer of the ICO on August 8, 2000. The ICO refused its further appeal on September 7, 2000, making the Staff Hearing Officer's Order final.

On November 2, 2000, Dillard's timely filed a Notice of Appeal of the August 8, 2000 SHO Order in the Trumbull County Court of Common Pleas under R.C. §4123.512. Claimant filed a Complaint in Appeal on or about December 4, 2000. She later filed a Notice of Filing Voluntary Dismissal Without Prejudice Pursuant to Civ.R. 41(A)(1)(a) on or about October 22, 2001.

Claimant filed a second Complaint in Appeal on October 17, 2002, reinitiating the litigation commenced by Dillard's November 2, 2000 Notice of Appeal. Just before trial on the issue of L4-5 disc bulge, Dillard's and Claimant reached a proposed settlement of the entire workers' compensation claim. A Joint Application for Approval of Settlement Agreement, with proposed settlement terms was filed with BWC by Dillard's and Claimant on January 23, 2004. (Appx. 69; Supp. 1.) A copy was filed with the ICO on January 26, 2004. (Appx. 73; Supp. 5.)

On or about February 18, 2004, Claimant filed Plaintiff's Notice of Voluntary Dismissal With Prejudice Pursuant to Civ.R. 41(A)(1)(a), in effect, terminating litigation on the issue of additional allowance and forfeiting her right to continue participating in the Ohio Workers' Compensation Fund for L4-5 disc bulge. (Appx. 77; Supp. 9.)

Throughout this time, BWC failed to object to or comment on the terms of the proposed settlement while the agreement was on file. The ICO issued no Order either approving or denying the settlement application, thus operating as an approval of the settlement under R.C. §4123.65(D).

On June 11, 2004, Dillard's third party administrator, Helmsman Management Services, Inc., applied for reimbursement from the surplus fund for compensation and

medical benefits paid as a result of the additionally allowed L4-5 disc bulge, which had since been disallowed by operation of law.

On or about August 4, 2004, after ignoring the litigation for more than three years other than filing the obligatory Answer, BWC filed a Motion for Relief from Judgment and Substitution of Parties with the Trumbull County Common Pleas Court. (Appx. 79; Supp. 11.) In that Motion, BWC requested the court appeal be reopened citing to *Youghiogheny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70 and *State ex rel. Sysco Food Service of Cleveland Inc. v. Industrial Commission of Ohio*, 89 Ohio St.3d 612, 2000-Ohio-1. In the Brief, BWC argued:

\* \* \* While on its face, a voluntary dismissal may seem inconsequential, the result would be prejudicial to Defendant-Administrator. The Ohio Supreme Court, in 2000, ruled in *The State ex Rel Sysco Food Service of Cleveland Inc. v. Industrial Commission of Ohio, et al* (2000), 89 Ohio St.3d 612, 734 N.E. 2d 361, 2000 Lexis 2073, that a self-insured employer is to be reimbursed from the state surplus fund for compensation paid to an employee when the claim is originally allowed by the Industrial Commission, and then subsequently is denied by a trial court. If Plaintiff-Claimant dismisses her claim \* \* \*, then Defendant-Employer could receive a default judgment for want of prosecution – or in this case, the plaintiff dismissed her case with prejudice. Thus Plaintiff-Claimant's claim would be deemed denied by a trial court, and Defendant-Employer *will be entitled* to reimbursement from the state surplus fund for compensation paid on Plaintiff-Claimant's previously allowed claim. [Appx. 79; Supp. 11, emphasis added.]

BWC, less than three weeks later in a different forum, did an "about face" and denied Dillard's request for surplus fund reimbursement on August 23, 2004, claiming the ICO Order allowing the claim for L4-5 disc bulge was not overturned. (Appx. 53; Supp. 23.) Dillard's appealed the decision to the Self-Insured Review Panel (SIRP) on September 21, 2004.

After a January 26, 2005 conference before the BWC's SIRP, a November 17, 2005 Order denied Dillard's intra-agency Appeal. (Appx. 50; Supp. 24.) The SIRP erroneously found that Claimant's second voluntary dismissal did not operate as a judicial determination disallowing the L4-5 disc bulge.

Dillard's appealed the decision of the SIRP to the Administrator on February 7, 2006. BWC's Designee, on April 20, 2006, by final Order, upheld the denial of Dillard's surplus fund reimbursement request, finding that the settlement "ended the dispute between" Dillard's and Claimant, that the employer did not prevail, and that there was no determination that compensation and benefit payments should not have been made for the disputed condition. (Appx. 48; Supp. 27.)

On July 13, 2006, Dillard's filed its Petition and Complaint in Mandamus with the 10<sup>th</sup> District Court of Appeals. At issue was whether as a result of Claimant's voluntary dismissal of the action, Dillard's was entitled to be reimbursed from the State's surplus fund for the amounts that it had paid Claimant for the L4-L5 disc bulge condition.

On January 22, 2007, the Appellate Court Magistrate rejected Appellant's request for writ ordering reimbursement. (Appx. 34.) On February 15, 2007, Appellant filed its Objections to the Magistrate's decision. On October 18, 2007, a divided Appellate Court issued its majority opinion overruling Appellant's Objections and adopting the Magistrate's decision. (Appx. 4.) On November 30, 2007, Appellant filed its Notice of Appeal of the Tenth Appellate District Court's Order to the Ohio Supreme Court. (Appx. 1.)

Appellant on September 21, 2007, also moved the Trumbull County Common Pleas Court for Judgment. The court issued a January 2, 2008 Judgment Entry,

wherein it denied Appellee's Motion for Relief from Judgment and Appellant's Motion for Judgment. (Appx. 54.)

Appellant appealed the Trumbull County Judgment Entry to the 11<sup>th</sup> District Court of Appeals on January 31, 2008, where the case remains pending.

### ARGUMENT

#### Proposition of Law No. 1:

#### **A Workers' Compensation Claimant's Second Rule 41(A) Noticed Dismissal in an Employer Appeal Operates as Adjudication on the Merits and Entitles the Employer to Surplus Fund Reimbursement.**

The primary issue presented by this appeal is whether a final judicial action occurred when the claimant voluntarily dismissed her Complaint a second time such that payments should not have been made to her for the ICO-allowed additional condition of L4-5 disc bulge.

According to R.C. §4123.512(H),

If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant *should not have been made*, the amount thereof *shall be charged* to the surplus fund under division (B) of section 4123.34 of the Revised Code. (Emphasis added.)

Further, according to O.A.C. 4121-3-18(A)(17),

If the claim is subsequently denied, payments *shall be charged* to the statutory surplus fund. \* \* \* If the employer is a self-insurer such amount *will be paid* to the self-insurer from the surplus fund. (Emphasis added.)

This Court has held that, where there has been an ultimate finding that the employer has been improperly required to pay all (or any part) of a sum in compensation, then the employer is entitled to reimbursement. *State ex rel. Eaton Corp. v. Lancaster* (1988), 40 Ohio St.3d 404.

In *Youghioghny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, the Supreme Court held R.C.§4123.512 provides that, if an award of compensation is proved to be incorrect upon appeal, the benefits improperly disbursed to a claimant will be charged against the state surplus fund and the employer recovers any amount of improperly paid benefits. In reliance on that precedent, the right to surplus fund reimbursement was granted to a self-insured employer where, after an appeal to the Court of Common Pleas, an entire claim was disallowed. *State ex rel. Sysco Food Services of Cleveland, Inc. v. Industrial Commission of Ohio*, 89 Ohio St.3d 612, 2000-Ohio-1.

BWC has continued to resist its obligations despite this Court's unequivocal declaration that surplus fund reimbursement is available to self-insured employers who obtain reversal of a prior compensation and/or benefits award in court or administratively. See, e.g., *State ex rel. Kokosing Construction Company, Inc. v. Ohio Bureau of Workers' Compensation*, 102 Ohio St.3d 429, 2004-Ohio-3664; *State ex rel. Diversey Corp. v. Bureau of Workers' Compensation*, Franklin App. No. 03AP-343, 2004-Ohio-1626; *State ex rel. Interstate Brands Corporation v. Conrad*, Franklin App. No. 03AP-1035, 2004-Ohio-4645. In *Kokosing*, this Court rejected BWC's contention that *Sysco*, supra, only applied to claims overturned as a result of an employer's appeal of the claim's initial allowance:

\* \* \* The bureau – without any legal citation – contends that *Sysco* applies only to what it calls "straight-line appeals," i.e., an employer's appeal of the initial workers' compensation claim allowance. \* \* \* This argument is unpersuasive.

\* \* \* The bureau has offered no compelling legal, practical or financial reason for treating *Kokosing* any

differently from Sysco or for confining surplus fund reimbursement to "straight-line appeals."

*Kokosing*, at ¶¶ 28-29.

In this case, just as in *Kokosing*, BWC's April 20, 2006 Order denied surplus fund reimbursement without any citation to legal authority or other compelling reason. Its baseless denial was contrary to law, arbitrary, unreasonable and unconscionable, was issued absent any record evidence to support its conclusions and constituted an abuse of discretion. In other words, it violated a clear legal duty to reimburse Dillard's for expenses it incurred from the overturned allowance of Claimant's L4-5 disc bulge.

BWC has maintained in successive intra-agency denials that Claimant's voluntary dismissal of her refiled Complaint, with prejudice, in the Trumbull County Court of Common Pleas was not an administrative or judicial determination on the merits of Dillard's court appeal. (Appx. 48; Supp. 27.) BWC disingenuously suggests that the reimbursement rights turn on which party prevailed at the last hearing on the matter of additional allowance of L4-5 disc bulge before settlement of the claim. BWC self-servingly construes the last hearing on this issue to be the August 8, 2000 final administrative Order that led to Dillard's court appeal and reasons that, since Claimant prevailed at that hearing, Dillard's is not entitled to reimbursement pursuant to R.C. §4123.512(H) and *Sysco*, supra. (Appx. 48; Supp. 27.)

BWC's action misreads and misconstrues the language of R.C. §4123.512(H) as well as the clear import and effect of the Claimant's voluntary dismissal of her second Complaint.

Under R.C. §4123.512, Claimant always bears the burden of proof under the *de novo* appellate standard, regardless of which party initiated the appeal. *Kaiser v.*

*Ameritemps, Inc.*, 84 Ohio State 3d, 411, 413, 1999-Ohio 360. This requires Claimant in virtually all cases to bear the expense of offering expert testimony at trial along with sufficient evidence to satisfy the trier of fact in order to prevail. This process involves a wholly independent review even though Claimant may have met her burden before the ICO. *Youghiogheny & Ohio Coal Co. v. Mayfield* (1984) 11 Ohio St.3d, 70, 71; *Rice v. Stouffer Foods Corp.* (Nov. 6, 1997), Cuyahoga App. No. 72515.

This Court examined voluntary dismissals in the specific context of R.C. §4123.512 appeals in the seminal 1999 *Kaiser* decision. "A workers' compensation claimant may employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the Court of Common Pleas brought by an employer under R.C. §4123.512." *Kaiser*, supra, at Syllabus. The Claimant's voluntary dismissal of the Complaint, however, does not affect the employer's Notice of Appeal, which remains pending until the Complaint is refiled. *Id.*, at 415. "If an employee does not refile its Complaint within a year's time, he can no longer prove his entitlement to participate in the workers' compensation system." *Id.*

Following on that pronouncement, this Court especially considered the consequences of a failure to refile a voluntarily dismissed Complaint within one year in 2006, holding:

In an employer-initiated workers' compensation appeal pursuant to R.C. §4123.512, after the employee-claimant files the petition as is required by R.C. §4123.512, and voluntarily dismisses it as allowed by Civ.R. 41(A), if the employee-claimant fails to refile within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal. \* \* \*

*Fowee v. Wesley Hall, Inc.* 108 Ohio St.3d 533, 2000-Ohio-1712.

*Fowee and Rice* plainly establish that a Plaintiff-employee's default – whether by failure to refile, failure to prosecute, or a second voluntary dismissal – operates as a *de facto* judicial determination that benefits were improperly paid. In the case at bar, Scott did refile her Complaint within the saving statute. The case proceeded anew, then she voluntarily dismissed the refiled Complaint with prejudice. Under Civ.R. 41(A), a Plaintiff's second voluntary dismissal of a case operates as an adjudication on the merits:

Unless otherwise stated in the notice of dismissal \* \* \*, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits of any claim that plaintiff has once dismissed in any court.* Civ.R. 41(A)(1) (emphasis added).

This rule unequivocally provides that a second noticed dismissal under Rule 41(A), such as occurred in this case, is an adjudication on the merits. See also, *Mays v. Kroger Company* (Butler Cty. 1998), 129 Ohio App.3d 159. Were this not so, a plaintiff could extinguish an employer's right to reimbursement simply by filing a second Rule 41(A) dismissal at any time.

Claimant Scott could no longer prove her entitlement to participate in the Ohio Workers' Compensation fund for the alleged condition of L4-5 disc bulge after the second dismissal. This was her sole burden in the Dillard's initiated appeal. Since the voluntary dismissal with prejudice operated as an adjudication on the merits in the Dillard's court appeal, the challenged L4-5 disc bulge was specifically disallowed in the workers' compensation claim. The second voluntary dismissal of the Complaint, accordingly, constituted a determination and the final judicial action that the Claimant was not entitled to participate for the allowed condition. The administrative allowance

was overturned by that act alone entitling Dillard's to surplus fund reimbursement under R.C. §4123.512. The BWC has already conceded before the Court of Appeals that had Claimant simply abandoned her claim by filing a second Rule 41(A) dismissal – without a settlement – an ensuing application for surplus fund reimbursement from employer would have been honored. The fact that here a settlement occurred proximal to the dismissal does not in any way change the effect of the Ohio Civil Rule's treatment of the second voluntary dismissal.

BWC abused its discretion, violated Dillard's clear legal right to reimbursement for expenses related to the now disallowed L4-5 disc bulge, entitling the employer to a Writ of Mandamus from a denial decision that was unreasonable, arbitrary, unconscionable, and contrary to law.

**Proposition of Law No. 2:**

**As Claimant's Second Rule 41(A) Dismissal Occurred in the Context of an ICO Approved Self-Insured Settlement of Her Entire Claim, Surplus Fund Reimbursement is Warranted and Appropriate.**

The allowance of thirty days for administrative review of proposed self-insured settlements embodied in R.C. §4123.65, ensures the interests of the Ohio Workers' Compensation system are protected. *Gibson v. Meadow Gold Dairy* (2000), 88 Ohio St.3d, 201, 203. Here, Dillard's complied with the statutory requirements and the final settlement agreement was approved by the Industrial Commission under R.C. §4123.65. The terms of the January 2004 settlement agreement were **executory in nature**. By its terms, the Trumbull County Common Pleas Court appeal was to be dismissed with prejudice with the resulting disallowance of the L4-5 disc bulge. Because the BWC, through its Assistant Attorney General, objected to the proposed

entry, Judge Kontos was unwilling to sign it. This left the Plaintiff-Claimant with one option only to fulfill her end of the bargain made with Dillard's: a voluntary dismissal with prejudice.

On November 1, 2000, Dillard's had appealed a limited issue to the Trumbull County Common Pleas Court – the additional allowance of L4-5 disc bulge *only*. In January 2004, days before trial, the litigants agreed to settle not merely that limited issue, but Claimant's *entire underlying injury claim*:

Claimant acknowledges that ***this settlement agreement applies to the entirety of Claim No. 99-511602***, as well as to any and all other claims which she may have against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims; (Appx. 69; Supp. 1, emphasis added.)

One important term of the proposed settlement was Claimant's agreement that the L4-5 disc bulge on appeal would be disallowed, setting the stage for Dillard's to obtain a Sysco reimbursement. Claimant thereby was spared the time, expense and difficulty of proving a questionable claim based on a chiropractor's diagnosis made years before during a single visit. Dillard's, on the other hand, agreed to pay the Claimant to extinguish potential future exposure for compensation and medical expenses of a disabled claimant with a serious low back injury that had prevented her from working for years.

Neither BWC nor the Court of Appeals majority cited to any provision of the Ohio Workers' Compensation Act, the administrative rules, or the agency's own policies and procedures that prohibited Claimant and the self-insured employer from negotiating settlement terms that would permit surplus fund reimbursement.

Absent any express proscription, why should these parties be limited from negotiating the Claimant's right to participate in the Ohio Workers' Compensation Fund?

A Claimant should be and is permitted in self-insured court appeals to proceed to trial or not. The workers' compensation laws contain no prohibition on or qualification of the Claimant's ability to settle on such terms as she and the self-insured employer agree, subject to the Industrial Commission's approval power if exercised.<sup>1</sup>

As stated by the Eighth District Court of Appeals in *Estate of Orecny v. Ford Motor Co.* (1996), 109 Ohio App.3d 464, "[t]he amended version of [R.C. §4123.65] gives much more latitude to self-insured employers to negotiate settlements with their employees."<sup>2</sup> Had the original proposed judgment entry been signed by the judge, reimbursement would have been in order despite the claim settlement:

Requests have been granted when the employer is able to document a final \* \* \* **judicial declaration** where it is determined that compensation and benefit payments should not have been made. (Appx. 79; 11, emphasis added.)

Dillard's was required to name BWC as a party to the court appeal. BWC did nothing more than file an Answer in the case. The Administrator conducted no discovery, attended no depositions, retained no expert witness, and attended no Pretrial Conferences until after the voluntary dismissal.<sup>3</sup> BWC then waited **four months** after the dismissal to file the Motion for Relief from Judgment! (Appx. 79; Supp. 11.) In addition, the proposed settlement agreement was submitted to BWC at least 20 days before the Industrial Commission's approval period lapsed. Yet, nothing was done to voice an objection to the

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<sup>1</sup> R.C. §4123.65(C) makes clear that the Administrator plays no role in the negotiation of or approval of settlement terms between self-insured employers and their employees.

<sup>2</sup> This is a principle obviously subscribed to by the Industrial Commission of Ohio, which allowed the 30-day cooling off period to lapse without comment in this case and did not make any finding that the settlement terms were unfair or a gross miscarriage of justice under R.C. §4123.65(D).

<sup>3</sup> For all practical purposes, there were only two parties to that litigation: Dillard's and Claimant.

terms of settlement. Only when surplus fund reimbursement became an issue did BWC desire to play any active role in the court appeal.

In summary, the workers' compensation settlement agreement included a provision that provided for the Claimant's Complaint to be dismissed with prejudice and a finding she was not entitled to participate for the condition(s) on appeal. Rather than dismissing the case pursuant to that entry, Claimant filed a Notice of Voluntary Dismissal with prejudice when the Court indicated it could not sign the proposed entry.

The settlement agreement, with all of its express negotiated terms, was filed with the Respondent and the Industrial Commission as required by statute. Both had it for twenty days or more. Neither agency objected to its terms and the Industrial Commission allowed it to become effective by operation of law when it failed to approve or deny the agreement.

Claimant dismissed her Complaint with prejudice. Dillard's paid the settlement. BWC then moved to vacate the dismissal arguing that it gave the employer Sysco reimbursement rights. At the same time, BWC denied Dillard's applications for reimbursement of monies to which the self-insured employer is entitled because of the Complaint's dismissal with prejudice.

No authority, other than the majority Court of Appeals opinion, exists to support BWC's Orders denying surplus fund reimbursement. As shown above, BWC clearly abused its discretion in denying Dillard's requested reimbursement. A writ of mandamus directing reimbursement should be granted by this Court.

## CONCLUSION

Appellant Dillard's is entitled to mandamus relief because:

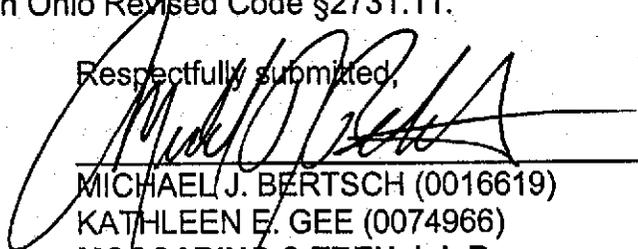
- BWC abused its discretion by ignoring the legal effect of Claimant's second notice dismissal under Civ.R. 41(A)(1) as an adjudication on the merits of Relator's R.C. §4123.512 appeal.
- BWC abused its discretion by ruling that a settlement of the entire claim alters the legal effect of a second notice dismissal without any legal authority and directly contradicting his stated position advanced in a court filing to vacate the dismissal.
- BWC's April 20, 2006 Order was unreasonable, arbitrary and unconscionable, and amounted to an abuse of discretion, in that it maintains Claimant's dismissal with prejudice does not entitle Dillard's to surplus fund reimbursement when, three weeks prior to the Self-Insured Department's initial determination, BWC argued before the Trumbull County Court of Common Pleas that Claimant's dismissal should be vacated because it *does* call for surplus fund reimbursement to Dillard's.

For all of the foregoing reasons, Appellant Dillard Department Stores, Inc. seeks reversal of the court of Appeals October 18, 2007 decision and:

- a) Requests that a writ of mandamus be issued, ordering Appellees, Marsha P. Ryan, Administrator, and Ohio Bureau of Workers' Compensation, to vacate, set aside and hold for naught the April 20, 2006 Order denying Appellant's request for surplus fund reimbursement and ordering Appellees to authorize surplus fund reimbursement to Appellant based on the disallowance of the previously recognized L4-5 disc bulge;

- b) Additionally, that Appellant be awarded its costs incurred herein and reasonable attorneys' fees, in accordance with Ohio Revised Code §2731.11.

Respectfully submitted,



---

MICHAEL J. BERTSCH (0016619)

KATHLEEN E. GEE (0074966)

**MOSCARINO & TREU, L.L.P.**

The Hanna Building

Cleveland, Ohio 44115

Phone: (216) 621-1000

Fax: (216) 622-1556

Email: [mbertsch@mosctreu.com](mailto:mbertsch@mosctreu.com)

[kgee@mosctreu.com](mailto:kgee@mosctreu.com)

Counsel for Appellant

Dillard Department Stores, Inc.

**PROOF OF SERVICE**

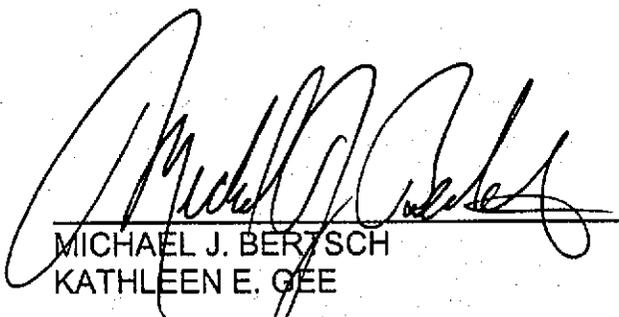
I hereby certify that on this 25th day of February, 2008 a copy of Appellant Dillard Department Stores, Inc.'s Merit Brief was sent by ordinary U.S. Mail, first-class postage prepaid, to:

Stephen D. Plymale, Esq.  
Assistant Attorney General  
Workers' Compensation Section  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215-3130

***Counsel for Appellee  
Marsha P. Ryan,  
Administrator Ohio Bureau of  
Workers' Compensation***

Paul W. Newendorp, Esq.  
Brown and Margolius, L.P.A.  
55 Public Square, Suite 1100  
Cleveland, Ohio 44113

***Counsel for Appellee  
Pamela S. Scott***



MICHAEL J. BERTSCH  
KATHLEEN E. GEE

Counsel for Appellant  
Dillard Department Stores, Inc.

25190/04271

# APPENDIX

IN THE SUPREME COURT OF OHIO

07-2225

STATE OF OHIO ex rel.  
DILLARD DEPARTMENT STORES, INC.

Appellant,

vs.

WILLIAM E. MABE, ADMINISTRATOR,  
OHIO BUREAU OF WORKERS'  
COMPENSATION, and PAMELA S.  
SCOTT,

Appellees.

On Appeal from the Franklin County  
Court of Appeals  
Tenth Appellate District

Court of Appeals Case No.  
06APD-07-0726

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NOTICE OF APPEAL OF  
APPELLANT DILLARD'S DEPARTMENT STORES, INC.

---

MICHAEL J. BERTSCH (0016619) (COUNSEL OF RECORD)

KATHLEEN E. GEE (0074966)

MOSCARINO & TREU LLP

The Hanna Building

Cleveland, Ohio 44115

Phone: (216) 621-1000

Fax: (216) 622-1556

Email: mbertsch@mosctreu.com

kgee@mosctreu.com

Counsel for APPELLANT

DILLARD DEPARTMENT STORES, INC.

PAUL W. NEWENDORP (0000779)

BROWN AND MARGOLIUS, L.P.A.

55 Public Square, Suite 1100

Cleveland, Ohio 44113

Phone: (216) 621-2034

Fax: (216) 621-1908

COUNSEL FOR APPELLEE

PAMELA S. SCOTT

STEPHEN D. PLYMALE (0033013)

Assistant Attorney General

Workers' Compensation Section

150 East Gay Street, 22<sup>nd</sup> Floor

Columbus, Ohio 43215-3130

Phone: (614) 466-6696

Fax: (614) 752-2538

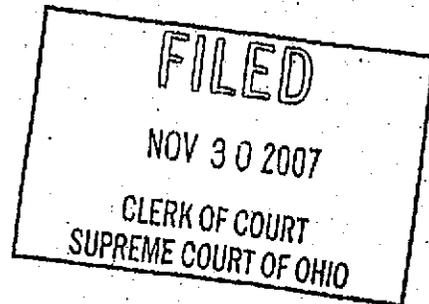
Email: splymale@ag.state.oh.us

COUNSEL FOR APPELLEE

ADMINISTRATOR

OHIO BUREAU OF WORKERS'

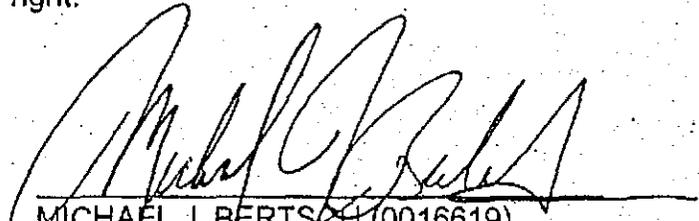
COMPENSATION



Notice of Appeal of Dillard Department Stores, Inc.

Appellant Dillard Department Stores, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 06APD-07-0726 on October 18, 2007, a copy of which is attached hereto.

This case originated in the Franklin County Court of Appeals, Tenth Appellate District, and, therefore, is an appeal of right.



MICHAEL J. BERTSCH (0016619)

KATHLEEN E. GEE (0074966)

**MOSCARINO & TREU, L.L.P.**

The Hanna Building

Cleveland, Ohio 44115

Phone: (216) 621-1000

Fax: (216) 622-1556

Email: [mbertsch@mosctreu.com](mailto:mbertsch@mosctreu.com)

[kgee@mosctreu.com](mailto:kgee@mosctreu.com)

Counsel for Appellant

Dillard Department Stores, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served by regular U.S. mail, postage prepaid, this 29<sup>th</sup> day of November, 2007, on the following:

Stephen D. Plymale, Esq.  
Assistant Attorney General  
Workers' Compensation Section  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215-3130

*Counsel for Appellee  
William E. Mabe,  
Administrator Ohio Bureau of  
Workers' Compensation*

Paul W. Newendorp, Esq.  
Brown and Margolius, L.P.A.  
55 Public Square, Suite 1100  
Cleveland, Ohio 44113

*Counsel for Appellee  
Pamela S. Scott*

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MICHAEL J. BERTSCH  
KATHLEEN E. GEE

Counsel for Appellant  
Dillard Department Stores, Inc.

25190/04271

FILED  
COURT OF APPEALS  
FRANKLIN CO OHIO

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel.  
Dillard Department Stores, Inc.,

Relator,

v.

[Marsha P. Ryan], Administrator,  
Ohio Bureau of Workers' Compensation  
et al.,

Respondents.

No. 06AP-726

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on October 18, 2007

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*Moscarino & Treu, L.L.P., Michael J. Bertsch, Edward S. Jerse and Kathleen E. Gee, for relator.*

*Marc Dann, Attorney General, and Stephen D. Plymale, for respondent Administrator, Ohio Bureau of Workers' Compensation.*

---

IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Dillard Department Stores, Inc. ("Dillard"), filed this action in mandamus seeking a writ to compel the Ohio Bureau of Workers' Compensation ("BWC") to vacate

its order which denied Dillard reimbursement from the surplus fund of money Dillard paid to settle a workers' compensation claim involving Pamela S. Scott.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated to the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision which contains detailed findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶3} Dillard has filed objections to the magistrate's decision. Counsel for the BWC has filed a memorandum in response. The case is now before the court for review.

{¶4} Ms. Scott was injured in 1999 while working for Dillard, a self-insured employer. Dillard certified her claim for "lumbosacral strain/sprain." When Ms. Scott sought recognition of the additional condition of "L4-5 disc bulge," Dillard resisted. A district hearing officer ("DHO") entered an order granting the additional condition. After an appeal, a staff hearing officer ("SHO") also entered an order granting the additional condition. Dillard's further appeal to the Industrial Commission of Ohio ("commission") was refused.

{¶5} Dillard next filed an appeal to the Trumbull County Court of Common Pleas under R.C. 4123.512. Counsel for Ms. Scott dismissed that appeal and refiled the appeal within the allotted time. Before the appeal could be heard, Ms. Scott and Dillard reached a settlement under the terms of which Dillard paid Ms. Scott \$15,000 to resolve all workers' compensation claims flowing from her 1999 injuries. Since the settlement included all the 1999 injuries, the appeal to the Trumbull County Court of Common Pleas was dismissed.

{¶6} Dillard, through its third-party administrator, then applied for reimbursement of compensation and medical benefits it had paid for the L4-5 disc bulge. Dillard argued that despite the fact it had lost before a DHO, an SHO and the commission, on the issue of recognition of the L4-5 disc bulge, Dillard had been a prevailing party because the Trumbull County Court of Common Pleas had not rendered a judgment on behalf of Ms. Scott.

{¶7} The BWC, the Self-Insured Review Panel, and the administrator of the BWC all rejected the application for reimbursement. Hence, this action in mandamus was initiated. The magistrate who handled this case has carefully and accurately addressed the pertinent facts and applicable law. Stating the central issue succinctly, a self-insured employer who pays a significant sum of money to settle a workers' compensation claim is not a prevailing party such that the employer can obtain reimbursement from the surplus fund for the money used to settle the claim. This is especially true where the employer has lost at all levels of the commission.

{¶8} Dillard, in essence, bought the dismissal of the appeal to common pleas court as a part of the settlement. Dillard did not prevail in any intelligible sense of the word "prevail." Since Dillard did not prevail, it cannot and should not be paid from the surplus fund. For this reason, we reject Dillard's assertion that application of *State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.*, 89 Ohio St.3d 612, 2001-Ohio-1, entitles Dillard to reimbursement. In *Sysco*, the Supreme Court of Ohio held that, in derogation of the specific language of R.C. 4123.512(H), a self-insured employer is entitled to reimbursement from the surplus fund when "in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on

behalf of a claimant should not have been made." *Id.* at 615, citing R.C. 4123.512(H). Sysco carves out a judicial exception on constitutional grounds to the legislature's comprehensive workers' compensation scheme for Ohio—an exception that we believe should not be lightly extended to cover the facts in the case before us.

{¶9} Our ruling is not governed by the practical consequence of accepting Dillard's point of view. However, we cannot blind ourselves to the chaos which would result were we to adopt Dillard's position. Self-insured employers would be encouraged to pursue administrative appeals with no semblance of merit, followed by an appeal to common pleas court. Before the trial in common pleas court, the self-insured employer would be able to settle the claim and then turn to the surplus fund for reimbursement of the settlement costs, plus attorney fees, arguing that they had prevailed. The BWC, which had no input to the settlement, would be expected to pay the self-insured employer back from the surplus fund. Needless to say, the surplus fund would not long survive and employers who had actually been defrauded would have no fund to reimburse them.

{¶10} We overrule the objections to the magistrate's decision. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. We deny the request for a writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

DESHLER, J., concurs.  
FRENCH, J., dissents.

DESHLER, J., retired of the Tenth Appellate District,  
assigned to active duty under the authority of Section 6(C),  
Article IV, Ohio Constitution.

FRENCH, J., dissenting.

{¶11} Because I would sustain Dillard's objections and grant the requested writ, I respectfully dissent.

{¶12} This action concerns Dillard's entitlement to reimbursement from the surplus fund for its payments of compensation and medical benefits to Scott, relating to the condition of L4-5 disc bulge. Dillard contends that it is entitled to reimbursement pursuant to *State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.*, 89 Ohio St.3d 612, 2000-Ohio-1. As the majority notes, in *Sysco*, the Ohio Supreme Court held that R.C. 4123.512(H) preserves an employer's right to reimbursement from the surplus fund where, "in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made." *Id.* at 614, quoting R.C. 4123.512(H). BWC denied Dillard's request for reimbursement, based on the lack of a final administrative or judicial determination that compensation and benefit payments should not have been made, and Dillard pursued two unsuccessful administrative appeals from the denial of its request.

{¶13} Here, like BWC, the magistrate concluded that there has been no administrative or judicial determination that Scott was not entitled to participate in the Workers' Compensation Fund. The magistrate also concluded that BWC is a necessary party to any settlement agreement whereby an employer expects reimbursement from the surplus fund. Dillard objects to both of those conclusions. Specifically, Dillard argues that Scott's second voluntary dismissal of her complaint in Dillard's R.C. 4123.512 appeal constitutes a final determination that Scott is not entitled to participate in the Workers' Compensation Fund. In recommending denial of relator's request for a writ of

mandamus, the magistrate concluded that Scott's second voluntary dismissal did not constitute an administrative or judicial determination that Scott was not entitled to participate in the Workers' Compensation Fund and that BWC is a necessary party to any settlement agreement whereby an employer expects reimbursement from the surplus fund.

(¶14) Dillard claims entitlement to reimbursement, pursuant to R.C. 4123.512(H), which provides, in part:

An appeal from an order issued under division (E) of section 4123.511 of the Revised Code \* \* \* in which an award of compensation has been made shall not stay the payment of compensation under the award \* \* \* during the pendency of the appeal. *If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. \* \* \** In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. \* \* \*

(Emphasis added.) In *Sysco*, at 614, the Supreme Court held that R.C. 4123.512(H) must be read as preserving a self-insured employer's right to direct reimbursement from the surplus fund. *Id.* By its terms, R.C. 4123.512(H) "limits reimbursement to situations involving 'a final administrative or judicial action [where] it is determined that payments \* \* \* should not have been made.'" *State ex rel. Kokosing Constr. Co., Inc. v. Ohio Bur. of Workers' Comp.*, 102 Ohio St.3d 429, 2004-Ohio-3664, at ¶30, quoting R.C. 4123.512(H). Neither R.C. 4123.512(H) nor *Sysco* requires more to warrant reimbursement. *Id.* at ¶31.

{¶15} While the majority frames the issue as whether Dillard "prevailed," the primary dispute here, in terms of the statute, is whether there has been a determination, in a final administrative or judicial action, that payments should not have been made to Scott for the alleged condition of L4-5 disc bulge. In my view, determination of that issue requires consideration of the effect of Scott's two voluntary dismissals, pursuant to Civ.R. 41(A), within the unique appellate process under R.C. 4123.512.

{¶16} R.C. 4123.512(A) gives both the claimant and the employer the right to appeal a commission decision regarding the claimant's right to participate in the Workers' Compensation Fund by filing a notice of appeal with the court of common pleas. Regardless of who files the notice of appeal, it is the claimant's responsibility to file a complaint showing a cause of action to participate in the fund and setting forth the basis for the trial court's jurisdiction. R.C. 4123.512(D); *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 413, 1999-Ohio-360. The claimant always bears the burden of going forward with evidence and proof to the satisfaction of the court, despite having already satisfied a similar burden before the commission. *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St.3d 361, 366, 1998-Ohio-432, citing *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116, 118. Appeals pursuant to R.C. 4123.512 are de novo, and the trial court must independently assess whether a claimant is entitled to participate in the Workers' Compensation Fund without regard to the commission's findings. *Youghiogheny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71; *Rice v. Stouffer Foods Corp.* (Nov. 6, 1997), Cuyahoga App. No. 72515.

{¶17} In *Kaiser*, the Supreme Court addressed voluntary dismissals, pursuant to Civ.R. 41(A), in the context of R.C. 4123.512 appeals, holding that "[a] workers'

compensation claimant may employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas brought by an employer under R.C. 4123.512." *Kaiser*, at syllabus. A claimant's dismissal of her complaint does not affect the employer's notice of appeal, which remains pending until the claimant refiles her complaint. *Id.* at 415. However, a claimant may not perpetually delay refile her complaint while continuing to receive benefits because the savings statute, R.C. 2305.19, precludes claims refiled more than one year after a voluntary dismissal. "If an employee does not refile his complaint within a year's time, he can no longer prove his entitlement to participate in the workers' compensation system." *Id.*, citing *Rice*.

{¶18} More recently, in *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, the Supreme Court specifically considered a claimant's failure to refile her voluntarily dismissed complaint within one year, and held:

In an employer-initiated workers' compensation appeal pursuant to R.C. 4123.512, after the employee-claimant files the petition as required by R.C. 4123.512 and voluntarily dismisses it as allowed by Civ.R. 41(A), if the employee-claimant fails to refile within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal. \* \* \*

*Id.* at syllabus. Because the claimant bears the burden of going forward with evidence and proof to the satisfaction of the common pleas court, the claimant's failure to refile a complaint within one year after a voluntary dismissal entitled the employer to a judgment that the claimant was not entitled to participate in the Workers' Compensation Fund, the sole issue before the common pleas court.

{¶19} Other Ohio appellate courts have similarly explained the effect of a claimant's failure to refile a complaint within one year after a voluntary dismissal. The

Third District Court of Appeals has held that such a failure to refile "operates as a forfeiture of [the] right to participate in the [workers' compensation] Fund and warrants judgment as a matter of law" for the employer in an employer-initiated R.C. 4123.512 appeal. *Goodwin v. Better Brake Parts, Inc.*, Allen App. No. 1-04-37, 2004-Ohio-5095, at ¶11, citing *Rice*. The Eighth District Court of Appeals has stated that, "[i]f an employee does not refile his complaint within the year's time, he can no longer prove his entitlement to participate in the workers' compensation system, as is his burden on appeal." *Rice*, citing *Zuljevic* at 118.

{¶20} While Scott did refile her complaint within the savings statute, she voluntarily dismissed her refiled complaint with prejudice. Just as if Scott had failed to refile her complaint, Scott's second voluntary dismissal constituted a forfeiture of her right to participate in the Workers' Compensation Fund. At oral argument, BWC indicated that a claimant's abandonment of her claim, as through a second voluntary dismissal, would ordinarily operate as a determination that the claimant is not entitled to participate in the Workers' Compensation Fund. Notably, in a motion for relief from judgment that BWC filed in the R.C. 4123.512 appeal, BWC stated that, upon Scott's dismissal with prejudice, "[Scott's] claim would be deemed denied by a trial court, and [Dillard] will be entitled to reimbursement from the state surplus fund for compensation paid on [Scott's] previously allowed claim."

{¶21} A notice of dismissal under Civ.R. 41(A)(1) is generally without prejudice "except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." Civ.R. 41(A)(1). In setting forth the double dismissal rule, "Civ.R. 41(A) is clear that a second dismissal by a written

notice \* \* \* operates as an adjudication on the merits and prohibits the plaintiff from pursuing that claim again." *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799, at ¶7, quoting *Fouss v. Bank One, Columbus, NA* (June 27, 1996), Franklin App. No. 96APE01-57. After her second dismissal, Scott can no longer prove her entitlement to participate in the Workers' Compensation Fund for the alleged condition of L4-5 disc bulge, as was her burden in the employer-initiated appeal. Scott's second dismissal constituted an adjudication on the merits of her complaint, i.e., an adjudication that she was not entitled to participate in the Workers' Compensation Fund for the alleged condition of L4-5 disc bulge. Therefore, Scott's second voluntary dismissal of her complaint constituted a determination in a final judicial action that Scott was not entitled to participate in the Workers' Compensation Fund.

{¶22} In her decision, the magistrate relied on *Youghioghney*, in which the Ohio Supreme Court considered "whether an employer's [R.C. 4123.512] appeal \* \* \* is subject to dismissal due to the death of the employee during the pendency of the appeal." *Youghioghney* at 71. The Supreme Court noted that, "[i]f the claimant dies during the appellate process, he obviously cannot personally satisfy the required burden of proof" to establish his entitlement to participate in the Workers' Compensation Fund. *Id.* at 72. However, rather than sanction dismissal of the appeal in favor of either party, the Supreme Court held that the proper procedure was to permit the state to proceed in place of the claimant, so as to "provide the employer with its statutory right to appeal a decision of the commission and also allow the state an opportunity to protect the [surplus] fund." *Id.* The Supreme Court was particularly opposed to precluding an employer's appeal through no fault of the employer. See *id.* Unlike the claimants in *Youghioghney*, who

died before having the opportunity to prove their entitlement to participate in the Workers' Compensation Fund, Scott voluntarily forfeited her right to prove her entitlement by dismissing her refiled complaint with prejudice, thus creating an adjudication on the merits in favor of relator. An employer is not denied the right to appeal an adverse decision of the commission where, as here, the employer participated in settlement negotiations, which led to the execution of a settlement agreement that was approved by the commission, stating that the claimant is not entitled to participate in the Workers' Compensation Fund. Accordingly, I find *Youghiogheny* distinguishable.

{¶23} Furthermore, I do not find that the settlement agreement between Dillard and Scott precludes Dillard's request for reimbursement. "Agreements for final settlement of a workers' compensation claim were recognized as valid and enforceable even before express statutory authority therefor was provided in the Workers' Compensation Act. \* \* \* Especially have such settlements been regarded as valid when approved by the Industrial Commission." *State ex rel. Johnston v. Ohio Bur. of Workers' Comp.*, 92 Ohio St.3d 463, 466, 2001-Ohio-1284, quoting *State ex rel. Weinberger v. Indus. Comm.* (1941), 139 Ohio St. 92, 96-97.

{¶24} Statutory authority for settlement of workers' compensation exists in R.C. 4123.65. In 1993, with the enactment of Am.Sub.H.B. No. 107, the General Assembly made significant changes to that statute, including revisions to the procedure for filing and processing settlement applications and distinctions between the role of state-fund employers and self-insured employers. The amended version of R.C. 4123.65 "gives much more latitude to self-insured employers to negotiate settlements with their employees." *Johnston*, quoting *Estate of Orecny v. Ford Motor Co.* (1996), 109 Ohio

App.3d 462, 466. "The legislature intended by the amendments to promote the use of settlement agreements and to give self-funded employers greater flexibility in negotiating them." *Estate of Orecny* at 467.

{¶25} Here, Scott and Dillard executed a settlement agreement and release, pursuant to which Dillard was to pay Scott \$15,000 in exchange for Scott's release and discharge of Dillard from any further claims arising from her injuries. The settlement agreement provided:

The parties further agree that the referenced workers' compensation court appeal cited Pamela S. Scott v. Dillard's Department Stores, and being Trumbull County Court of Common Pleas Case No. 02 CV 2440, will be dismissed with prejudice with the following order: Pamela S. Scott is not entitled to participate in The Ohio Workers' Compensation Fund for the alleged condition of L4-L5 disc bulge at the plaintiff's costs.

{¶26} R.C. 4123.65(A) requires a self-insured employer that enters into a final settlement agreement with its employee to mail a copy of the settlement agreement, within seven days of its execution, to the administrator of BWC, who shall place the agreement in the claimant's file. R.C. 4123.65(D) requires the self-insured employer to immediately send a copy of the settlement agreement to the commission, which shall assign the matter to an SHO. The SHO must determine, within 30 days after execution of the settlement agreement, whether the settlement agreement is "a gross miscarriage of justice" or "is clearly unfair." R.C. 4123.65(D). If the SHO determines that the settlement agreement is not clearly unfair or fails to act within the 30-day time limit, the settlement agreement is approved. Id. Unless disapproved by the SHO, the settlement agreement takes effect at the end of the 30-day period, absent prior withdrawal of consent by either

the employer or the employee. See R.C. 4123.65(C). The allowance of 30 days for administrative review provided by R.C. 4123.65 protects the interests of the workers' compensation system. *Gibson v. Meadow Gold Dairy* (2000), 88 Ohio St.3d 201, 203.

{¶27} It is undisputed that Dillard sent the settlement agreement to the BWC administrator and to the commission, that an SHO failed to issue an order disapproving the settlement agreement within 30 days after Scott and Dillard executed it, and that the agreement was, therefore, approved. At the latest, the settlement agreement was approved and took effect on February 17, 2004, the day before Scott voluntarily dismissed her complaint with prejudice. The settlement agreement, as approved by the commission, expressly required dismissal of the R.C. 4123.512 appeal with prejudice. The fact that the settlement agreement took effect the day before the dismissal does not alter the conclusion that the dismissal constituted a determination in a final judicial action that Scott was not entitled to participate in the Workers' Compensation Fund.

{¶28} For these reasons, I would conclude that Scott's voluntary dismissal with prejudice constituted a determination, in a final administrative or judicial action, that payments to Scott, relating to the condition of L4-5 disc bulge, should not have been made. Therefore, I would sustain Dillard's first objection to the magistrate's decision.

{¶29} In its second objection, which the majority overrules without discussion, Dillard objects to the magistrate's conclusion that BWC is a necessary party to any settlement agreement whereby a self-insured employer expects reimbursement from the surplus fund. Nothing in R.C. 4123.65, which sets forth the exclusive procedures for settling workers' compensation claims, requires that BWC be included in settlement negotiations or be a party to a settlement agreement between a self-insured employer

and a claimant. To the contrary, R.C. 4123.65(A) speaks of a "self-insuring employer [entering] into a final settlement agreement with an employee," with no mention of BWC's participation in either the settlement process or the final settlement agreement. Were BWC a required party, there would be no need for the statute's requirement that the self-insured employer submit an executed settlement agreement to the BWC administrator. Additionally, R.C. 4123.65(C) provides that "[n]o settlement \* \* \* agreed to by a self-insuring employer and the self-insuring employer's employee shall take effect until thirty days \* \* \* after the self-insuring employer and employee sign the final settlement agreement." Again, the statute is silent as to any requirement that BWC approve a final settlement between a self-insured employer and its employee. Further indication that BWC is not required to approve settlement agreements between self-insured employers and their employees exists in R.C. 4121.121(B). In its recitation of the duties of the BWC administrator, R.C. 4121.121(B)(18) requires the administrator to approve applications for the final settlement of claims, "except in regard to the applications of self-insuring employers and their employees."

(¶30) Despite the absence of statutory authority for its position, BWC argues that it must be a party to a final settlement because of its trustee function in overseeing the proper use and management of the insurance fund. However, the Ohio Supreme Court has stated that R.C. 4123.65's provision of 30 days for administrative review prior to any settlement agreement taking effect is sufficient to protect the interests of the workers' compensation system. See *Gibson* at 203. Here, Dillard complied with the statutory requirements of R.C. 4123.65, and the commission approved Dillard's final settlement with Scott. I find no authority for a requirement that BWC is a necessary party to any

settlement agreement whereby an employer expects to apply for reimbursement from the surplus fund. Accordingly, I would sustain Dillard's second objection to the magistrate's decision.

{¶31} In conclusion, I would adopt the magistrate's findings of fact but sustain Dillard's objections to the magistrate's conclusions of law. Because, in my view, Dillard met the requirements for reimbursement under R.C. 4123.512(H) and Sysco, I would conclude that BWC abused its discretion in denying Dillard's request for reimbursement. Accordingly, I would grant the requested writ and order BWC to grant Dillard's request for reimbursement.

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A P P E N D I X A  
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel.  
Dillard Department Stores, Inc.,

Relator,

v.

William E. Mabe, Administrator, Ohio  
Bureau of Workers' Compensation,  
Ohio Bureau of Workers' Compensation  
and Pamela S. Scott,

Respondents.

No. 06AP-726

(REGULAR CALENDAR)

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MAGISTRATE'S DECISION

Rendered on January 22, 2007

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*Moscarino & Treu, L.L.P., Michael J. Bertsch, Edward S. Jerse and Kathleen E. Gee, for relator.*

*Marc Dann, Attorney General, and Stephen D. Plymale, for respondent William E. Mabe, Administrator, Ohio Bureau of Workers' Compensation.*

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IN MANDAMUS

(¶32) Relator, Dillard Department Stores, Incorporated, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Bureau of Workers' Compensation ("BWC") to vacate the April 20, 2006 order denying relator's request for reimbursement from the surplus fund and ordering the BWC to

reimburse relator. Further, relator seeks an award of costs and attorney fees pursuant to R.C. 2731.11.

Findings of Fact:

{¶33} 1. Pamela S. Scott ("claimant") sustained a work-related injury on June 21, 1999, and relator, a self-insured employer, certified the claim for "lumbosacral strain/sprain."

{¶34} 2. On February 22, 2000, claimant filed a motion requesting that her claim be additionally allowed for the following condition: "L4-5 disc bulge." Claimant also requested treatment by Dr. Jeffrey Stychno.

{¶35} 3. Claimant's motion was heard before a district hearing officer ("DHO"). The DHO determined that claimant's claim should be additionally allowed for the condition L4-5 disc bulge for the following reasons:

\* \* \* This finding is based upon: (1) the MRI report of 08/27/1999; (2) the claimant's testimony at hearing that she has persisted with low back and right leg radicular pain subsequent to her 06/21/1999 injury; (3) the claimant's testimony that she did not suffer from back pain prior to 06/21/1999; and (4) the 02/14/1999 report of Dr. Stychno causally relating the above disorder to the injury in this claim.

{¶36} 4. Relator's appeal was heard before a staff hearing officer ("SHO") on August 3, 2000, and resulted in an order affirming the prior DHO order and additionally allowing claimant's claim for L4-5 disc bulge.

{¶37} 5. Relator's further appeal was refused by order of the commission mailed September 7, 2000.

{¶38} 6. Thereafter, relator filed an appeal pursuant to R.C. 4123.512 in the Trumbull County Court of Common Pleas.

{¶39} 7. As required by R.C. 4123.512(D), claimant filed a complaint in the common pleas court in December 2000.

{¶40} 8. Claimant subsequently filed a voluntary dismissal pursuant to Civ.R. 41(A)(1)(a) and then refiled a complaint within the statutorily-provided time provided by R.C. 2305.19.

{¶41} 9. Before trial began, relator and claimant agreed on a proposed settlement of claimant's entire workers' compensation claim. Pursuant to that settlement agreement, claimant would receive \$15,000, and would forever release and discharge relator from any further claims arising from the injuries she sustained on June 21, 1999. The settlement agreement took into account the fact that the Industrial Commission of Ohio ("commission") had 30 days to approve or disapprove the settlement. Further, the settlement agreement provided that, after the 30-day period and provided that the commission approved the settlement, claimant would dismiss her complaint with prejudice with the following language to be included in the court's order:

\* \* \* Pamela S. Scott is not entitled to participate in  
The Ohio Workers' Compensation Fund for the alleged  
condition of L4-L5 disc bulge at the plaintiff's costs.

Neither the BWC nor the commission participated in the settlement negotiations.

{¶42} 10. Relator filed a copy of the settlement agreement with the BWC on January 23, 2004, and with the commission on January 26, 2004.

{¶43} 11. On or about February 18, 2004, claimant filed a notice of voluntary dismissal with prejudice pursuant to Civ.R. 41(A)(1)(a). The notice provided as follows:

Plaintiff, Pamela S. Scott, does hereby give notice  
that this case is dismissed voluntarily, with prejudice, at

Plaintiff's cost, pursuant to Rule 41(A)(1)(a), of the Ohio Rules of Civil Procedure.

{¶44} 12. Because the commission failed to issue an order either approving or denying the settlement agreement, the settlement agreement was automatically approved.

{¶45} 13. On June 11, 2004, relator, through its third-party administrator, applied for reimbursement from the surplus fund for compensation and medical benefits which relator had paid to claimant for the condition L4-5 disc bulge.

{¶46} 14. On August 4, 2004, the office of the Ohio Attorney General filed a motion for relief from judgment and substitution of parties on behalf of the BWC. The BWC requested relief, pursuant to Civ.R. 60(B)(5), due to relator's assertion that it was entitled to reimbursement from the surplus fund pursuant to *State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm.* (2000), 89 Ohio St.3d 612, and *State ex rel. Youghioghney & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70.

{¶47} 15. By letter dated August 23, 2004, relator was notified by the BWC that its request for reimbursement was being denied.

{¶48} 16. By letter dated September 21, 2004, relator informed the BWC that it was appealing the decision to deny relator reimbursement to the Self-Insured Review Panel.

{¶49} 17. By order mailed November 1, 2005, the Self-Insured Review Panel determined that relator was not entitled to reimbursement from the surplus fund because there was no final administrative or judicial determination that compensation and benefit payments should not have been paid to claimant for the disputed condition.

{¶50} 18. Relator appealed that decision and, by order dated April 20, 2006, the administrator of the BWC upheld the decision of the Self-Insured Review Panel denying relator's request for reimbursement from the surplus fund pursuant to Sysco, for the following reasons:

\* \* \* [T]he dispute between the employer and the injured worker concerned a request for an additional allowance in the claim. The injured worker's request for the additional allowance was granted at the administrative level by the Industrial Commission, and the employer then filed an appeal to court on this issue. Prior to a determination on the merits by the court, parties entered into a settlement agreement that ended the dispute between them. \* \* \* [W]hile the settlement ended the dispute, the employer did not "prevail," and there is no administrative or judicial determination that compensation and benefit payments should not have been paid for the disputed condition. The claim remains allowed, as does the disputed condition.

{¶51} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶52} The issue before the magistrate is framed as follows: When it is the employer who has initiated an appeal, pursuant to R.C. 4123.512, to a common pleas court from an order of the commission finding that the claimant is entitled to participate in the workers' compensation fund for a certain condition and where the employer and the claimant enter into a settlement agreement, without the participation of a representative from the BWC, whereby the claimant agrees to accept a certain sum of money from the employer in exchange for the claimant voluntarily dismissing the complaint with prejudice and agreeing that the claimant is not entitled to participate in the workers' compensation fund for that allowed condition, does the employer have the right to be automatically reimbursed from the surplus fund pursuant to Sysco? For the

reasons that follow, it is this magistrate's decision that the employer, relator herein, does not have an automatic right to reimbursement.

{¶53} R.C. 4123.512 (formerly R.C. 4123.519) provides an employer or a claimant with the opportunity to appeal certain adverse rulings by the commission. The appeal is initiated by the filing of a notice of appeal by the party seeking relief from the commission's order. Regardless of which party files the notice of the appeal, the employer or the claimant, R.C. 4123.512 requires that the claimant will thereafter file a complaint in the common pleas court.

{¶54} The appeal authorized by R.C. 4123.512 is unique in that it is considered a trial de novo. *Youghiogheny*, at 71. The *Youghiogheny* court stated further:

\* \* \* The burden of proof, as well as the burden of going forward, remains with the claimant. \* \* \* This court recently stated that "\* \* \* where an employer appeals an unfavorable administrative decision to the court the claimant must, in effect, reestablish his workers' compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level." [*Zuljevic v. Midland-Ross* (1980), 62 Ohio St.2d 116], at 118.

Id.

{¶55} Because the action is de novo, the common pleas court ultimately can either find that the claimant is entitled to participate in the workers' compensation fund or that the claimant is not entitled to participate. Sometimes, the decision of the common pleas court is opposite from the decision rendered by the commission. As such, sometimes employers now become liable to pay benefits to a claimant whose claim was formerly disallowed by the commission, and sometimes, a claimant's previously allowed claim is denied. When the claimant prevails, the claim is allowed

and the employer becomes responsible for the payment of medical bills and potentially for future compensation. However, when the employer prevails, the employer has often already paid medical bills and even other compensation to the claimant who is now no longer entitled to that compensation. In *Sysco*, the court stated that the employer's right to recover this money is unquestioned.

{¶56} Effective October 20, 1993, R.C. 4123.511(J) and 4123.512(H) were enacted and R.C. 4123.515 and 4123.519, which provided for dollar-reimbursement via direct payments from the surplus fund to the self-insured employer, were repealed. R.C. 4123.511(J) provides, in pertinent part:

Upon the final administrative or judicial determination under this section or section 4123.512 of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled[.] \* \* \*

{¶57} R.C. 4123.512(H) compliments R.C. 4123.511(J), and provides, in pertinent part:

An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. *If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under*

*division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. \* \* \**

(Emphasis added.)

{¶58} In the Sysco case, the claimant's claim was allowed at the commission level. The employer appealed the claim and continued to pay temporary total disability compensation and medical benefits during the course of the common pleas court proceedings. Ultimately, the court disallowed the claimant's claim in its entirety and the Cuyahoga County Court of Appeals affirmed that decision. Thereafter, Sysco sought reimbursement from the state surplus fund for the compensation and benefits it had been required to pay the claimant. The commission denied Sysco's request stating that Sysco's recovery rights were governed by R.C. 4123.511(J), which provides for reimbursement via an offset from any future claims made by the claimant.

{¶59} Sysco appealed and argued that R.C. 4123.511(J), as applied to self-insured employers, denies the right to a remedy guaranteed by Section 16, Article 1, Ohio Constitution. Sysco argued that R.C. 4123.512(H) must be read as preserving the right to reimbursement from the surplus fund. The Supreme Court of Ohio agreed.

{¶60} In the present case, relator argues that the dismissal with prejudice of claimant's complaint in the common pleas court constitutes a "final \* \* \* judicial action" determining that "payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made," and that pursuant to R.C. 4123.512(H), the

amount of benefits and compensation paid by relator to claimant must be charged to the surplus fund.

{¶61} The BWC argues that the settlement agreement and subsequent dismissal of claimant's complaint does not constitute a "final \* \* \* judicial action" which determined that "payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made." The BWC's argument focuses on the fact that the settlement agreement entered into between relator and claimant preceded the dismissal of claimant's complaint and that relator cannot turn that into a final judicial determination that claimant is not entitled to participate in the workers' compensation fund for L4-5 disc bulge which would automatically trigger relator's right to reimbursement under Sysco and the Ohio Revised Code.

{¶62} In arguing that a final judicial termination is not required in order for surplus fund reimbursement to be made, relator points to the court's decision in *State ex rel. Kokosing Constr. Co., Inc. v. Ohio Bur. of Workers' Comp.*, 102 Ohio St.3d 429, 2004-Ohio-3664. In *Kokosing*, the claimant, Gregory D. Neff, had sustained at least two industrial back injuries and hurt his back in a 1985 car accident *before* he commenced employment with Kokosing. In March 1992, Neff told his employer that he had just slipped while on the roof and had injured his back. Kokosing certified Neff's workers' compensation claim as valid and paid medical bills and compensation to Neff.

{¶63} In 1997, Neff admitted that he had fabricated the accident at Kokosing in order to get renewed treatment for back pain which had continued to bother him since the 1980s. Kokosing asked the commission to exercise its continuing jurisdiction to deny the claim based upon Neff's confession and requested reimbursement of all

payments Kokosing had paid to Neff. While the matter was pending, Kokosing and Neff entered into a stipulation and agreement whereby:

\* \* \* In exchange for Kokosing's agreement to forgo any action against Neff's residence, Neff, among other things, reiterated his admission that the accident did not occur, concurred in the denial of his claim, and agreed that if he became reemployed he would repay Kokosing \$100 per week. This stipulation and agreement was filed in the Stark County Probate Court as part of guardianship proceedings and was also incorporated into an October 28, 1997 ex parte commission order that denied the claim in its entirety and ordered reimbursement pursuant to the filed document.

*Kokosing*, at ¶4.

(¶64) Neff repaid only \$400 as of August 2001, leaving Kokosing with "\$133,419.26 in unreimbursed expenses related to the fraudulent claim." *Id.* at ¶5. Thereafter, Kokosing requested reimbursement from the state surplus fund pursuant to R.C. 4123.512(H) and Sysco. The BWC denied Kokosing's request finding that Sysco was inapplicable. Kokosing filed a mandamus action and this court issued a writ of mandamus vacating the BWC's order and commanding the BWC to enter a new decision reimbursing Kokosing from the state surplus fund pursuant to Sysco.

(¶65) Upon appeal to the Supreme Court of Ohio, this court's decision was affirmed. The BWC argued the following:

\* \* \* Sysco applies only to what it calls "straight-line appeals," i.e., an employer's appeal of the initial workers' compensation claim allowance. \* \* \*

*Id.* at ¶28. The court disagreed and stated, in pertinent part:

Kokosing contested Neff's claim years later because evidence of fraud did not surface until years later. Like Sysco, Kokosing paid extensive compensation and benefits pursuant to an award that was eventually overturned. The

bureau has offered no compelling legal, practical, or financial reason for treating Kokosing any differently from Sysco or for confining surplus fund reimbursement to "straight-line appeals."

\*\*\*

*This case involves a deliberate fabrication of an industrial accident. Kokosing initially relied on what it believed to be claimant's good-faith assertion of an injury and expended tens of thousands of dollars in compensation and benefit payments before claimant's conscience generated a confession. Kokosing then obtained what the statute requires for surplus fund reimbursement—an administrative declaration that the claim was fraudulent and that the allowance, and the consequent payment of compensation and benefits, should never have occurred.*

\*\*\*

Id. at ¶29-31. (Emphasis added.)

{¶66} In the present case, the magistrate finds that the compelling reasons present in *Kokosing* are not present in this case. As such, *Kokosing* does not apply. As noted previously in the findings of fact, claimant had been successful before the commission. Relator filed a notice of appeal in the common pleas court. Pursuant to R.C. 4123.512, claimant was thereafter *required* to file a complaint in the common pleas court. Thereafter, prior to any determination that claimant was not entitled to participate in the workers' compensation fund, relator and claimant entered into a settlement agreement. Thereafter, claimant dismissed her complaint.

{¶67} In considering this issue, the magistrate finds the rationale from *Youghioghny* to be most helpful. In *Youghioghny*, the claimant, Robert Fairclough, Jr., filed a claim for occupational disease benefits alleging that he was suffering from coal workers' pneumoconiosis with the BWC. The BWC and the commission agreed

and Fairclough's claim was allowed. Thereafter, the employer, a self-insured employer, filed an appeal in the Harrison County Court of Common Pleas pursuant to former R.C. 4123.519, now 4123.512. Fairclough died just before the matter proceeded to trial. Upon motion, the trial court dismissed the action thereby precluding the employer's appeal. The court of appeals affirmed the dismissal. Ultimately, the matter was appealed to the Supreme Court of Ohio pursuant to a motion to certify that case with another case. The *Youghioghney* court set out the issue as follows:

\* \* \* [W]hether an employer's appeal from an adverse ruling by the Industrial Commission is subject to dismissal due to the death of the employee during the pendency of the appeal. \* \* \*

Id. at 71.

{¶68} The BWC argued that a workers' compensation claim abates upon the death of the claimant and cited *Ratliff v. Flowers* (1970), 25 Ohio App.2d 113, in support. In *Ratliff*, the employee was initially granted benefits by the commission. Thereafter, *Ratliff* filed a further claim for additional compensation for a subsequent disability alleged to have arisen from the original accident. The claim was denied and the claimant appealed the matter to the Scioto County Court of Common Pleas. *Ratliff* died prior to any disposition of his appeal. The court ultimately concluded that an employee must recover pursuant to his individual right under the workers' compensation statutes and that right abates upon the death of the employee.

{¶69} In *Youghioghney*, the court distinguished *Ratliff* specifically on the basis that the rationale from *Ratliff* should not be applied to an appeal initiated by the employer because that would violate the rationale behind former R.C. 4123.519

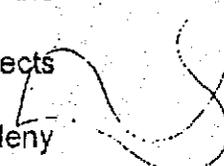
(4123.512), and preclude an employer's appeal through no fault of its own. As such, the court found that upon the death of the employee, the state of Ohio becomes the real party in interest to the litigation and the state should proceed in place of the claimant because this "will provide the employer with its statutory right to appeal a decision of the commission and also allow the state an opportunity to protect the fund." *Id.* at 72.

{¶70} In *Youghioghny*, the court stressed that there is a difference between an appeal to the common pleas court initiated by the employee/claimant and an appeal initiated by the employer. When the employer is the party appealing the decision of the commission, it is the employer's appeal even though it is the employee/claimant who is required to file the complaint and who has the burden of proof. As such, if the employee/claimant dies before a final determination, the employee/claimant's estate is not substituted as a party since the employee/claimant's right abates at death. However, when it is the employer who has initiated the appeal, it would be unfair and deny the employer the opportunity to recover any amount of improperly paid benefits.

{¶71} Because relator initiated the appeal in the common pleas court, this magistrate finds that the appeal was, in reality, relator's. When relator and claimant entered into settlement negotiations and reached an agreement whereby claimant would dismiss the complaint, claimant was, in reality, dismissing relator's appeal. Unlike the *Kokosing* case where the claimant had committed fraud and the BWC and commission were both involved and administratively an order was put on denying Neff's claim in its entirety, the BWC was not a party to the settlement negotiations and was not a party to the agreement.

{¶72} At oral argument, the magistrate ascertained and counsel agreed that claimants and employers do settle and dismiss R.C. 4123.512 appeals with some regularity. Obviously, some of these cases are settled in the employer's favor. Further, counsel argued that often employees who prevail in this manner have been permitted to be reimbursed from the surplus fund. In other words, the BWC has permitted some employers to be reimbursed. However, in the present case, the BWC did not agree to permit the employer (relator) to be reimbursed. Relator argues that, as a matter of law, reimbursement is automatic. As explained herein before, this magistrate disagrees. Further, the fact that the BWC has previously approved reimbursements does not make it a legally enforceable right in the absence of either BWC approval or a final determination that claimant is not entitled to participate.

{¶73} The magistrate finds that, in this case, claimant's dismissal of her complaint following a settlement agreement between her and relator actually constitutes a dismissal of relator's action and does not constitute a final determination by either the commission or a court that claimant is not entitled to participate in the workers' compensation fund. Further, the magistrate finds that relator's attempt to include language in the dismissal entry that claimant is not entitled to participate in the surplus fund for L4-5 disc bulge does not turn that dismissal into something which it is not. Lastly, because surplus fund reimbursement directly involves the BWC and the funds which the BWC is legally charged by law with the responsibility of safeguarding, the BWC is a necessary party to any settlement agreement whereby an employer expects to receive reimbursement from the BWC's surplus fund. As such, this court should deny



{¶74} relator's request for a writ of mandamus. Relator's request for an award of costs and attorney fees is denied.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE

**NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.  
Dillard Department Stores, Inc.,

Relator,

v.

William E. Mabe, Administrator, Ohio  
Bureau of Workers' Compensation,  
Ohio Bureau of Workers' Compensation  
and Pamela S. Scott,

Respondents.

No. 06AP-726

(REGULAR CALENDAR)

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MAGISTRATE'S DECISION

Rendered on January 22, 2007

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*Moscarino & Treu, L.L.P., Michael J. Bertsch, Edward S. Jerse and Kathleen E. Gee, for relator.*

*Marc Dann, Attorney General, and Stephen D. Plymale, for respondent William E. Mabe, Administrator, Ohio Bureau of Workers' Compensation.*

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Relator, Dillard Department Stores, Incorporated, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Bureau of Workers' Compensation ("BWC") to vacate the April 20, 2006 order denying relator's request for reimbursement from the surplus fund and ordering the BWC to reimburse relator. Further, relator seeks an award of costs and attorney fees pursuant to R.C. 2731.11.

FILED  
JAN 23 2007  
CLERK OF COURTS  
1000 EAST 17TH AVE  
COLUMBUS OH 43260

Findings of Fact:

1. Pamela S. Scott ("claimant") sustained a work-related injury on June 21, 1999, and relator, a self-insured employer, certified the claim for "lumbosacral strain/sprain."

2. On February 22, 2000, claimant filed a motion requesting that her claim be additionally allowed for the following condition: "L4-5 disc bulge." Claimant also requested treatment by Dr. Jeffrey Stychno.

3. Claimant's motion was heard before a district hearing officer ("DHO"). The DHO determined that claimant's claim should be additionally allowed for the condition L4-5 disc bulge for the following reasons:

\* \* \* This finding is based upon: (1) the MRI report of 08/27/1999; (2) the claimant's testimony at hearing that she has persisted with low back and right leg radicular pain subsequent to her 06/21/1999 injury; (3) the claimant's testimony that she did not suffer from back pain prior to 06/21/1999; and (4) the 02/14/1999 report of Dr. Stychno causally relating the above disorder to the injury in this claim.

4. Relator's appeal was heard before a staff hearing officer ("SHO") on August 3, 2000, and resulted in an order affirming the prior DHO order and additionally allowing claimant's claim for L4-5 disc bulge.

5. Relator's further appeal was refused by order of the commission mailed September 7, 2000.

6. Thereafter, relator filed an appeal pursuant to R.C. 4123.512 in the Trumbull County Court of Common Pleas.

7. As required by R.C. 4123.512(D), claimant filed a complaint in the common pleas court in December 2000.

8. Claimant subsequently filed a voluntary dismissal pursuant to Civ.R. 41(A)(1)(a) and then refiled a complaint within the statutorily-provided time provided by R.C. 2305.19.

9. Before trial began, relator and claimant agreed on a proposed settlement of claimant's entire workers' compensation claim. Pursuant to that settlement agreement, claimant would receive \$15,000, and would forever release and discharge relator from any further claims arising from the injuries she sustained on June 21, 1999. The settlement agreement took into account the fact that the Industrial Commission of Ohio ("commission") had 30 days to approve or disapprove the settlement. Further, the settlement agreement provided that, after the 30-day period and provided that the commission approved the settlement, claimant would dismiss her complaint with prejudice with the following language to be included in the court's order:

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16. By letter dated September 21, 2004, relator informed the BWC that it was appealing the decision to deny relator reimbursement to the Self-Insured Review Panel.

17. By order mailed November 1, 2005, the Self-Insured Review Panel determined that relator was not entitled to reimbursement from the surplus fund because there was no final administrative or judicial determination that compensation and benefit payments should not have been paid to claimant for the disputed condition.

18. Relator appealed that decision and, by order dated April 20, 2006, the administrator of the BWC upheld the decision of the Self-Insured Review Panel denying relator's request for reimbursement from the surplus fund pursuant to Sysco, for the following reasons:

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19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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R.C. 4123.512 (formerly R.C. 4123.519) provides an employer or a claimant with the opportunity to appeal certain adverse rulings by the commission. The appeal is initiated by the filing of a notice of appeal by the party seeking relief from the commission's order. Regardless of which party files the notice of the appeal, the em-

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direct payments from the surplus fund to the self-insured employer, were repealed.

R.C. 4123.511(J) provides, in pertinent part:

Upon the final administrative or judicial determination under this section or section 4123.512 of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled[.] \* \* \*

R.C. 4123.512(H) compliments R.C. 4123.511(J), and provides, in pertinent part:

An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. *If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. \* \* \**

(Emphasis added.)

In the Sysco case, the claimant's claim was allowed at the commission level. The employer appealed the claim and continued to pay temporary total disability compensation and medical benefits during the course of the common pleas court proceedings. Ultimately, the court disallowed the claimant's claim in its entirety and the

Cuyahoga County Court of Appeals affirmed that decision. Thereafter, Sysco sought reimbursement from the state surplus fund for the compensation, and benefits it had been required to pay the claimant. The commission denied Sysco's request stating that Sysco's recovery rights were governed by R.C. 4123.511(J), which provides for reimbursement via an offset from any future claims made by the claimant.

Sysco appealed and argued that R.C. 4123.511(J), as applied to self-insured employers, denies the right to a remedy guaranteed by Section 16, Article 1, Ohio Constitution. Sysco argued that R.C. 4123.512(H) must be read as preserving the right to reimbursement from the surplus fund. The Supreme Court of Ohio agreed.

In the present case, relator argues that the dismissal with prejudice of claimant's complaint in the common pleas court constitutes a "final \* \* \* judicial action" determining that "payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made," and that pursuant to R.C. 4123.512(H), the amount of benefits and compensation paid by relator to claimant must be charged to the surplus fund.

The BWC argues that the settlement agreement and subsequent dismissal of claimant's complaint does not constitute a "final \* \* \* judicial action" which determined that "payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made." The BWC's argument focuses on the fact that the settlement agreement entered into between relator and claimant preceded the dismissal of claimant's complaint and that relator cannot turn that into a final judicial determination that claimant is not entitled to participate in the workers' compensation fund for L4-5 disc bulge which would automatically trigger relator's right to reimbursement under Sysco and the Ohio Revised Code.

In arguing that a final judicial termination is not required in order for surplus fund reimbursement to be made, relator points to the court's decision in *State ex rel. Kokosing Constr. Co., Inc. v. Ohio Bur. of Workers' Comp.*, 102 Ohio St.3d 429, 2004-Ohio-3664. In *Kokosing*, the claimant, Gregory D. Neff, had sustained at least two industrial back injuries and hurt his back in a 1985 car accident *before* he commenced employment with Kokosing. In March 1992, Neff told his employer that he had just slipped while on the roof and had injured his back. Kokosing certified Neff's workers' compensation claim as valid and paid medical bills and compensation to Neff.

In 1997, Neff admitted that he had fabricated the accident at Kokosing in order to get renewed treatment for back pain which had continued to bother him since the 1980s. Kokosing asked the commission to exercise its continuing jurisdiction to deny the claim based upon Neff's confession and requested reimbursement of all payments Kokosing had paid to Neff. While the matter was pending, Kokosing and Neff entered into a stipulation and agreement whereby:

\* \* \* In exchange for Kokosing's agreement to forgo any action against Neff's residence, Neff, among other things, reiterated his admission that the accident did not occur, concurred in the denial of his claim, and agreed that if he became reemployed he would repay Kokosing \$100 per week. This stipulation and agreement was filed in the Stark County Probate Court as part of guardianship proceedings and was also incorporated into an October 28, 1997 *ex parte* commission order that denied the claim in its entirety and ordered reimbursement pursuant to the filed document.

*Kokosing*, at ¶4.

Neff repaid only \$400 as of August 2001, leaving Kokosing with "\$133,419.26 in unreimbursed expenses related to the fraudulent claim." *Id.* at ¶5. Thereafter, Kokosing requested reimbursement from the state surplus fund pursuant to R.C. 4123.512(H) and Sysco. The BWC denied Kokosing's request finding that Sysco

was inapplicable. Kokosing filed a mandamus action and this court issued a writ of mandamus vacating the BWC's order and commanding the BWC to enter a new decision reimbursing Kokosing from the state surplus fund pursuant to Sysco.

Upon appeal to the Supreme Court of Ohio, this court's decision was affirmed. The BWC argued the following:

\* \* \* Sysco applies only to what it calls "straight-line appeals," i.e., an employer's appeal of the initial workers' compensation claim allowance. \* \* \*

Id. at ¶28. The court disagreed and stated, in pertinent part:

Kokosing contested Neff's claim years later because evidence of fraud did not surface until years later. Like Sysco, Kokosing paid extensive compensation and benefits pursuant to an award that was eventually overturned. The bureau has offered no compelling legal, practical, or financial reason for treating Kokosing any differently from Sysco or for confining surplus fund reimbursement to "straight-line appeals."

\* \* \*

*This case involves a deliberate fabrication of an industrial accident. Kokosing initially relied on what it believed to be claimant's good-faith assertion of an injury and expended tens of thousands of dollars in compensation and benefit payments before claimant's conscience generated a confession. Kokosing then obtained what the statute requires for surplus fund reimbursement—an administrative declaration that the claim was fraudulent and that the allowance, and the consequent payment of compensation and benefits, should never have occurred. \* \* \**

Id. at ¶29-31. (Emphasis added.)

In the present case, the magistrate finds that the compelling reasons present in *Kokosing* are not present in this case. As such, *Kokosing* does not apply. As noted previously in the findings of fact, claimant had been successful before the commission. Relator filed a notice of appeal in the common pleas court. Pursuant to R.C. 4123.512, claimant was thereafter *required* to file a complaint in the common pleas

court. Thereafter, prior to any determination that claimant was not entitled to participate in the workers' compensation fund, relator and claimant entered into a settlement agreement. Thereafter, claimant dismissed her complaint.

In considering this issue, the magistrate finds the rationale from *Youghioghney* to be most helpful. In *Youghioghney*, the claimant, Robert Fairclough, Jr., filed a claim for occupational disease benefits alleging that he was suffering from coal workers' pneumoconiosis with the BWC. The BWC and the commission agreed and Fairclough's claim was allowed. Thereafter, the employer, a self-insured employer, filed an appeal in the Harrison County Court of Common Pleas pursuant to former R.C. 4123.519, now 4123.512. Fairclough died just before the matter proceeded to trial. Upon motion, the trial court dismissed the action thereby precluding the employer's appeal. The court of appeals affirmed the dismissal. Ultimately, the matter was appealed to the Supreme Court of Ohio pursuant to a motion to certify that case with another case. The *Youghioghney* court set out the issue as follows:

\* \* \* [W]hether an employer's appeal from an adverse ruling by the Industrial Commission is subject to dismissal due to the death of the employee during the pendency of the appeal. \* \* \*

Id. at 71. .

The BWC argued that a workers' compensation claim abates upon the death of the claimant and cited *Ratliff v. Flowers* (1970), 25 Ohio App.2d 113, in support. In *Ratliff*, the employee was initially granted benefits by the commission. Thereafter, Ratliff filed a further claim for additional compensation for a subsequent disability alleged to have arisen from the original accident. The claim was denied and the claimant appealed the matter to the Scioto County Court of Common Pleas. Ratliff died prior to any disposition of his appeal. The court ultimately concluded that an employee must

recover pursuant to his individual right under the workers' compensation statutes and that right abates upon the death of the employee.

In *Youghioghery*, the court distinguished *Ratliff* specifically on the basis that the rationale from *Ratliff* should not be applied to an appeal initiated by the employer because that would violate the rationale behind former R.C. 4123.519 (4123.512), and preclude an employer's appeal through no fault of its own. As such, the court found that upon the death of the employee, the state of Ohio becomes the real party in interest to the litigation and the state should proceed in place of the claimant because this "will provide the employer with its statutory right to appeal a decision of the commission and also allow the state an opportunity to protect the fund." *Id.* at 72.

In *Youghioghery*, the court stressed that there is a difference between an appeal to the common pleas court initiated by the employee/claimant and an appeal initiated by the employer. When the employer is the party appealing the decision of the commission, it is the employer's appeal even though it is the employee/claimant who is required to file the complaint and who has the burden of proof. As such, if the employee/claimant dies before a final determination, the employee/claimant's estate is not substituted as a party since the employee/claimant's right abates at death. However, when it is the employer who has initiated the appeal, it would be unfair and deny the employer the opportunity to recover any amount of improperly paid benefits.

Because relator initiated the appeal in the common pleas court, this magistrate finds that the appeal was, in reality, relator's. When relator and claimant entered into settlement negotiations and reached an agreement whereby claimant would dismiss the complaint, claimant was, in reality, dismissing relator's appeal. Unlike the *Kokosing* case where the claimant had committed fraud and the BWC and commission

were both involved and administratively an order was put on denying Neff's claim in its entirety, the BWC was not a party to the settlement negotiations and was not a party to the agreement.

At oral argument, the magistrate ascertained and counsel agreed that claimants and employers do settle and dismiss R.C. 4123.512 appeals with some regularity. Obviously, some of these cases are settled in the employer's favor. Further, counsel argued that often employees who prevail in this manner have been permitted to be reimbursed from the surplus fund. In other words, the BWC has permitted some employers to be reimbursed. However, in the present case, the BWC did not agree to permit the employer (relator) to be reimbursed. Relator argues that, as a matter of law, reimbursement is automatic. As explained herein before, this magistrate disagrees. Further, the fact that the BWC has previously approved reimbursements does not make it a legally enforceable right in the absence of either BWC approval or a final determination that claimant is not entitled to participate.

The magistrate finds that, in this case, claimant's dismissal of her complaint following a settlement agreement between her and relator actually constitutes a dismissal of relator's action and does not constitute a final determination by either the commission or a court that claimant is not entitled to participate in the workers' compensation fund. Further, the magistrate finds that relator's attempt to include language in the dismissal entry that claimant is not entitled to participate in the surplus fund for L4-5 disc bulge does not turn that dismissal into something which it is not. Lastly, because surplus fund reimbursement directly involves the BWC and the funds which the BWC is legally charged by law with the responsibility of safeguarding, the BWC is a necessary party to any settlement agreement whereby an employer expects to receive reimburse-

ment from the BWC's surplus fund. As such, this court should deny relator's request for a writ of mandamus. Relator's request for an award of costs and attorney fees is denied.



STEPHANIE BISCA BROOKS  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

ORDER  
OF THE ADMINISTRATOR OF  
THE OHIO BUREAU OF WORKERS' COMPENSATION

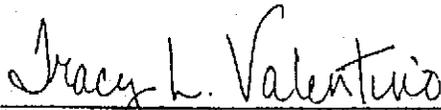
Date of Decision: April 20, 2006

Employer: Higbee Company/Dillard Department Stores, Inc.  
Risk Number: SI# 20003044

Pursuant to Ohio Administrative Code Rule 4123-19-14, the Administrator's Designee considered the employer's appeal of the Self-Insured Review Panel order from an informal conference held on January 26, 2005. The issue presented concerned the employer's appeal of the denial of a request for reimbursement from the surplus fund pursuant to the Sysco case in claim 99-511602 for Pamela Scott.

The Administrator's Designee met with the employer's representative and reviewed the additional information provided in support of this appeal. The Administrator's Designee notes that the dispute between the employer and the injured worker concerned a request for an additional allowance in the claim. The injured worker's request for the additional allowance was granted at the administrative level by the Industrial Commission, and the employer then filed an appeal to court on this issue. Prior to a determination on the merits by the court, parties entered into a settlement agreement that ended the dispute between them. The Administrator's Designee notes that while the settlement ended the dispute, the employer did not "prevail," and there is no administrative or judicial determination that compensation and benefit payments should not have been paid for the disputed condition. The claim remains allowed, as does the disputed condition.

For these reasons, the Administrator's Designee finds that it was appropriate for the Self-Insured Review Panel to uphold the denial of the employer's request for reimbursement from the surplus fund pursuant to the Sysco case. The employer's appeal is denied.



Tracy L. Valentino, Interim Chief Financial Officer  
Administrator's Designee

c: William E. Mabe, Administrator/CEO  
Michael J. Bertsch, Moscarino & Treu, L.L.P.  
Keith Elliott, Consulting & Audit  
Mary Yorde, Employer Services

Dave Boyd, Director, Self-Insured Department  
John Bittengle, Supervisor, SIBC  
Jennifer Gropper, Supervisor, SIUS  
Jo Ann Woodrum, Self-Insured Department  
Richard Blake, Attorney, Legal Operations  
Larry Rhodebeck, Attorney, Legal Operations  
Ellen Sheeran, Attorney, Legal Operations  
Aniko Nagy, Legal Operations  
Carol Wander, Manager, Accounts Receivable  
Bobbie Doneghy, Supervisor, Collections  
Josette Frye, Supervisor, Collections  
Catherine Phillips, Supervisor, Direct Billing  
Juanita Smith, Account Examiner, Collections

ORDER  
THE SELF-INSURED REVIEW PANEL  
THE OHIO BUREAU OF WORKERS' COMPENSATION

Employer: Higbee Company  
Risk Number: SI# 20003044  
For the Employer: Michael J. Bertsch, Moscarino & Treu, L.L.P.

This matter was set for conference on January 26, 2005 before the members of the Self-Insured Review Panel. The issue presented concerned the employer's appeal of the denial of its request for reimbursement from the surplus fund pursuant to the case of State ex rel. Sysco Food Serv. of Cleveland, Inc. v. Indus. Comm. (2000), 89 Ohio St.3d 612 (Sysco). Specifically, the employer requested reimbursement in the amount of \$41,813.20 for compensation and benefits paid in claim 99-511602 for Pamela Scott.

The statement of facts indicates that the Higbee Company (Higbee) has operated a self-insured workers' compensation program in the state of Ohio from November 1, 1971 to the present. Ms. Scott was injured on June 21, 1999, and her claim was charged to Higbee's self-insured risk number. On February 22, 2000, the claimant filed a motion seeking an additional allowance for L4-5 disc bulge, which was granted following a hearing before a District Hearing Officer (DHO) on June 12, 2000. The employer appealed, and the additional allowance was affirmed after a hearing before a Staff Hearing Officer (SHO) on August 3, 2000. The employer's appeal of this order was refused by the Industrial Commission (IC) on September 7, 2000, and the employer filed an appeal to court on November 2, 2000. Ms. Scott filed a complaint in court, which she subsequently dismissed voluntarily, without prejudice, on October 23, 2001. The complaint was refiled by Ms. Scott on October 7, 2002. On January 26, 2004, representatives of the employer and the injured worker filed a settlement agreement with the IC in which the employer agreed to pay Ms. Scott the sum of \$15,000.00, and Ms. Scott agreed to the dismissal of her complaint against the employer. The IC reviewed the settlement on February 6, 2004. On February 18, 2004, Ms. Scott dismissed her complaint voluntarily, with prejudice, under Rule 41(A) of the Ohio Rules of Civil Procedure. The employer subsequently requested reimbursement from surplus fund in the amount of \$41,813.20 for compensation and benefits paid in connection with the allowance for L4-5 disc bulge. The Self-Insured Department denied the request, giving rise to this appeal.

At the conference, the employer's representative argued that Higbee is entitled to reimbursement from the surplus fund pursuant to the Sysco case because by dismissing her complaint with prejudice, Ms. Scott is unable to establish her continued right to participate in Ohio's workers' compensation system for the disputed condition. The representative stated that this dismissal by the claimant is equivalent to a final determination that Ms. Scott is not eligible for benefits for that condition, so the employer is entitled to reimbursement from the surplus fund. The representative pointed out that the settlement agreement was not rejected by the IC, and also argued that the settlement agreement has no effect on the employer's entitlement to reimbursement. The representative advised the Panel that there had been no discussion between the parties to the settlement in the amount of \$15,000 as to whether surplus fund reimbursement

to the employer would result in the creation of an overpayment to the injured worker in the amount of \$41,813.20.

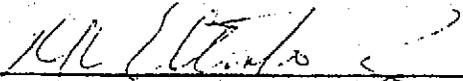
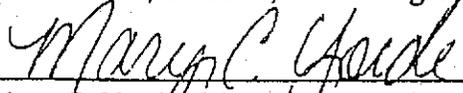
The Panel notes that under the unusual appeal process utilized in workers' compensation cases, the claimant is required to file a complaint in court, even though it is the employer's appeal. Here, the employer appealed IC orders granting an additional allowance into court, but Ms. Scott was required to file a complaint in court. In accordance with procedural rules, Ms. Scott dismissed her first complaint without prejudice and then refiled it. While the second complaint was pending, Ms. Scott and the employer agreed to settle the employer's court appeal through the payment of \$15,000 to Ms. Scott, who subsequently dismissed her complaint with prejudice. The employer is now requesting surplus fund reimbursement pursuant to the Sysco case, arguing that Ms. Scott's dismissal with prejudice is equivalent to a determination that she is not entitled to participate in Ohio's workers' compensation system for the disputed condition. However, the Panel notes that Ms. Scott was successful at the last level of appeal in which a decision was issued, and specifically notes the lack of any decision reversing the Industrial Commission order that granted the additional allowance. The Panel also notes that reimbursement to the employer will create an overpayment to Ms. Scott in the amount of about \$41,000, which is larger than the settlement amount of \$15,000.

BWC has received a number of requests from self-insuring employers for reimbursement from the surplus fund pursuant to the Sysco case. Requests have been granted when the employer is able to document a final administrative or judicial declaration where it is determined that compensation and benefit payments should not have been made. Here, there is no such administrative or judicial declaration. In fact, the claim was settled prior to the date of the dismissal with prejudice. Instead, the employer argues that Ms. Scott's dismissal of her complaint in exchange for payment of a settlement is equivalent to this determination. BWC's policy regarding requests for reimbursement following a settlement is based on the practice followed by the Industrial Commission, which previously handled these requests prior to legislative changes. Requests for reimbursement in claims with settlements have been granted when the employer is able to document that it prevailed at the most recent hearing prior to the settlement. Under this standard, the employer would not be entitled to reimbursement, as Ms. Scott was successful at the most recent hearing prior to the settlement.

After a review of the information presented at the conference, as well as a review of all materials presented by the employer, the Panel finds that the self-insuring employer is not entitled to reimbursement from the surplus fund, as there is no final administrative or judicial determination that compensation and benefit payments should not have been paid to Ms. Scott for the disputed condition. The Panel also finds that the employer is not entitled to reimbursement under the policy applied to claims with settlements, as the employer did not prevail at the most recent hearing prior to the settlement. Finally, the Panel finds that the claim was settled prior to the date of the dismissal with prejudice. For these reasons, the employer's appeal is denied.

A written appeal of this order may be filed within fourteen (14) days of receipt of the order. Appeals may be directed to Ms. Tracy L. Valentino, Chief Finance Officer, at the Bureau of Workers' Compensation, 30 W. Spring Street, Level 29, Columbus, Ohio 43215.

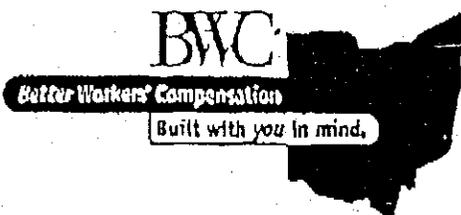
Members of the Self-Insured Review Panel:

	<input checked="" type="radio"/> Yes	<input type="radio"/> No
Keith Elliott, Director, Consulting & Audit		
	<input checked="" type="radio"/> Yes	<input type="radio"/> No
Mary C. Yordis, Supervisor, Employer Services		
	<input checked="" type="radio"/> Yes	<input type="radio"/> No
Ellen Sheeran (for Kevin Abrams), Attorney, Legal Operations		

ES/h:law/ellen/highcompany

- ec: David Boyd, Director, Self-Insured Department  
Stephanie Ramsey, Assistant Director, Self-Insured Department  
Carol Angel, Supervisor, Self-Insured Department  
John Bittengle, Supervisor, SIBC  
Jennifer Gropper, Supervisor, SIUS  
Jo Ann Woodrum, Self-Insured Department  
Richard Blake, Attorney, Legal Operations  
Larry Rhodebeck, Attorney, Legal Operations  
Carol Wander, Manager, Accounts Receivable  
Catherine Phillips, Supervisor, Direct Billing  
Ron Suttles, Supervisor, Collections  
Juanita Smith, Account Examiner, Collection  
Risk File 20003044  
Claim File 99-511602 for Pamela Scott  
Claimant Representative Paul W. Newendorp, Brown and Margolius Co, LPA

**MAILED**  
NOV 1 2005



Bob Taft  
Governor

James Conrad  
Administrator/CEO

The Ohio Bureau of Workers' Compensation  
Self Insured Department  
30 West Spring Street, 28th Floor, Columbus, Ohio 43215-2258

Toll free: 1-800-644-6292  
Fax: (614) 762-7908

August 23, 2004

Dillards Department Stores Inc  
C/O Helmsman Management  
P.O. Box 307230  
Gahanna Ohio 43230

Claim Number: 99-511602  
Claimant Name: Pamela Scott

Your request for reimbursement has been received. Please be advised that your request for reimbursement is denied. Per the settlement agreement case dismissed as part of settlement and not an over turned decision.

Therefore, your request for reimbursement per the Sysco Court case is denied. You may resubmit for further consideration along with clear documentation to substantiate the amounts requested. When resubmitting request for reimbursement please include the AWW/FWW, proof of payment and all pertinent hearing orders.

Should you have additional information, which should be considered, please provide such documentation in the next thirty days. If you have questions or if I can be of assistance, please feel free to contact me at (614) 728-4747.

Sincerely,  
Daniel R Lappert  
Self-Insured Claims Services

Cc: Dillard Dept Stores



advised that the case was settled and that a judgment entry would follow. In February 2004, Scott filed a Notice of Voluntary Dismissal pursuant Civ. R. 41(A)(1)(a), specifically stating therein that the dismissal was with prejudice. It is undisputed that Scott and Dillard did, in fact, enter into a settlement whereby Dillard paid Scott \$15,000.00 to resolve all of Scott's workers' compensation claims (including the L4-5 disc bulge claim), and that Scott filed her Notice of Voluntary Dismissal pursuant to this settlement agreement.

In August 2004, the Administrator filed a Motion for Relief from Judgment and Substitution of Parties, asking that this case be reinstated on the Court's docket and that the Administrator be substituted for Scott as the plaintiff-appellant. In September 2007, Dillard filed a Motion for Judgment requesting that the Court issue an Order that Plaintiff was no longer entitled to participate in the Ohio Workers' Compensation Fund for the L4-5 disc bulge condition. In the interim between the filing of the two motions, the Administrator and Dillard litigated a separate mandamus action in the Tenth District Court of Appeals regarding whether, as the result of Scott's voluntary dismissal of this action, Dillard was entitled to be reimbursed from the State Surplus Fund for the amounts it had paid Scott for the L4-5 disc bulge condition. In January 2007, the appellate court magistrate issued a decision rejecting Dillard's request for a writ ordering reimbursement and in October 2007, the Tenth District issued an opinion overruling Dillard's objections and adopting the magistrate's decision (*State of Ohio, ex rel. Dillard Department Stores, Inc. v. [Ryan], Admr., Ohio Bureau of Workers' Compensation*, 10<sup>th</sup> Dist. No. 06AP-726, 2007-Ohio-5556). In its decision, the Tenth District held that Scott's voluntary dismissal of her claim did not constitute a "final determination" that Scott was not entitled to participate in the fund for purposes of assessing whether Dillard was entitled to reimbursement from the surplus fund.

As this Court's docket demonstrates, this action was settled and dismissed. Due solely to the perceived impact of Scott's dismissal on the issue of whether Dillard could obtain reimbursement for the State Surplus Fund for amounts it had paid to Scott, however, both the Administrator and Dillard filed the motions now before the Court. As the appellate court decision in the mandamus action demonstrates, however, further action by this Court was neither necessary, nor would it have been determinative, of Dillard's right to reimbursement.

Further, both the Administrator's and Dillard's motion are without merit for independent reasons. First, to the extent the Administrator requested that this Court vacate a judgment, it is plain here that this Court did not, nor was it required to, issue any final judgment in this matter. Rather, this case was settled and dismissed, and was concluded when Scott filed her notice of voluntary dismissal as permitted under Civ. R. 41(A)(1)(a). Thus, there is simply no judgment here to be vacated. Additionally, the Administrator's claim that his ability to protect the state surplus fund would be denied unless he were substituted for Scott as plaintiff-appellant is belied by the fact that the Administrator was fully able to assert its interests with respect to the state surplus fund both when Dillard first requested reimbursement and in the mandamus action which followed.

As to Dillard's Motion for Judgment, the Tenth District cogently observed that what, in fact, occurred in this case was that "Dillard, in essence, bought the dismissal of the appeal to the common pleas court as a part of the settlement," and therefore, did not "prevail" in this matter. *State of Ohio, ex rel. Dillard Department Stores, Inc.*, supra, at ¶8. This Court was never asked to consider, nor did it actually consider, the issue of whether Scott was legally entitled to participate in the workers' compensation fund with respect to the L4-5 disc bulge condition. Rather, this case was settled and dismissed prior to that issue ever being brought

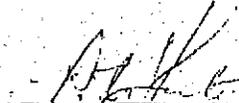
before the Court for decision. This being the case, the Court finds no basis for issuing a judgment stating that Scott is not entitled to participate in the fund.

For the reasons thus stated, the Court finds both the Administrator's Motion to Vacate Judgment and for Substitution of Parties, and Dillard's Motion for Judgment to be without merit and it is therefore ORDERED, ADJUDGED, and DECREED that said motions are OVERRULED.

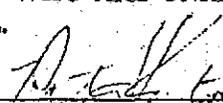
IT IS SO ORDERED.

DATE

1/2/05

  
\_\_\_\_\_  
PETER J. KONTOS, Judge  
Court of Common Pleas  
Trumbull County, Ohio

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

  
\_\_\_\_\_  
PETER J. KONTOS, JUDGE

**RULE 41. Dismissal of Actions**

**(A) Voluntary dismissal: effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

(2) **By order of court.** Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

**(B) Involuntary dismissal: effect thereof.**

(1) **Failure to prosecute.** Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

(2) **Dismissal; non-jury action.** After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

(3) **Adjudication on the merits; exception.** A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) **Failure other than on the merits.** A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

(a) lack of jurisdiction over the person or the subject matter;

(b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

(C) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

(D) **Costs of previously dismissed action.** If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 2001.]

#### **Staff Note (July 1, 2001 Amendment)**

#### **Civil Rule 41 Dismissal of Actions**

This rule was amended (1) to reflect more precisely its interpretation by the Supreme Court in *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594 (1999); (2) to conform Civ. R. 41(D) with Civ. R. 41(A) as amended; and (3) to reflect that Civ. R. 23.1 provides that a shareholder derivative action "shall not be dismissed or compromised without the approval of the court."

In divisions (B) and (C), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to divisions (B) and (C) was intended.

## 4121-3-18 Administrative appeals.

### (A) Administrative appeals.

(1) The claimant, the employer or the administrator may appeal from decisions of district hearing officers and regional boards of review, as provided in section 4123.516 of the Revised Code. Appeals from decisions of staff hearing officers are governed by sections 4121.35 and 4123.343 of the Revised Code.

(a) The claimant and the employer may appeal to court from decisions of staff hearing officers other than decisions as to the extent of disability rendered on appeals from orders of regional boards of review. Such decisions are not appealable to the industrial commission. There is no appeal from a decision of a staff hearing officer on reconsideration of a percentage of permanent partial disability award. Such a decision is final.

(b) The claimant and the employer may appeal to the industrial commission from a decision of a staff hearing officer on a matter listed in divisions (B)(1) to (B)(4) of section 4121.35 of the Revised Code, provided that such a decision was rendered by the staff hearing officer in its own name. If, however, the staff hearing officer acted as a deputy of the industrial commission under section 4121.06 of the Revised Code and its order was approved and confirmed in writing by the majority of the members of the industrial commission, there is no appeal to the industrial commission from such an order.

(c) Section 4123.343 of the Revised Code specifically provides for appeals by the administrator to the commission from orders of staff hearing officers on handicap reimbursement. The employer may also appeal to the industrial commission from such orders of staff hearing officers (paragraph (H) of rule 4121-3-28 of the Administrative Code). The administrator may appeal from decisions of district hearing officers and regional boards of review, as provided in section 4123.516 of the Revised Code, and from a decision of a staff hearing officer, as provided by statute.

(d) Appeals to the regional boards must be disposed of upon the merits, or if not timely filed, or improperly completed, then on a jurisdictional basis.

(e) The industrial commission has discretion to hear appeals from orders of regional boards of review or to refuse such appeals.

(2) Appeals should be made on "Form I-12"; in lieu thereof the regional board of review, staff hearing officer or industrial commission will accept a written statement from an aggrieved party, signed in handwriting, as such an appeal, provided that the statement is filed within the period specified by law and provided that it contains the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom, as provided by law.

(3) All such applications shall be signed in handwriting by the party appealing or authorized representative on behalf of such party, including the administrator or representative. Such appeal applications may be filed with any office of the bureau of workers' compensation, any regional board of review or of the industrial commission.

(4) The right of administrative appeal is limited to the claimant, the employer and the administrator. No appeal shall be taken by the administrator in cases where the employer was represented at the hearing where the order was adopted unless the appeal is based upon questions of law or allegations of fraud. An appeal filed by any other person shall be denied, by order, without special hearing.

(5) Appeals from orders of a district hearing officer to a regional board of review shall be filed within the period of twenty days of receipt of the order from which the appeal is taken. The Industrial commission shall assign such appeal for hearing before one of the regional boards of review. Such regional board of review shall assign such appeal for hearing in a location which will permit sufficient accessibility to the hearing for claimants, employers and other interested parties but in such location as would be most convenient to the claimant. The commission may at any time recall such appeal which it has assigned to a board and assign it to another board. A hearing with notice on such an appeal shall be at a time and place designated by the regional board of review.

(6) The industrial commission shall notify the claimant, employer, their representatives, and the administrator of the assignment of the appeal.

(7) The regional board of review shall render a decision within two months of the filing of any appeal unless the board demonstrates to the commission adequate grounds for a reasonable delay.

(8) For the right to appeal a decision of a regional board of review or a staff hearing officer see paragraphs (A)(1)(a) to (A)(1)(c) of this rule. An appeal to the industrial commission from an order of a regional board of review or a staff hearing officer shall be filed with twenty days of receipt of the order. When an appeal from an order of a regional board of review is filed it shall be submitted to the industrial commission or staff hearing officers to determine whether the appeal will be refused or allowed. The industrial commission shall forthwith notify the claimant, the employer and the administrator of its decision. If the appeal is prepared for hearing, the industrial commission shall notify the claimant, employer and administrator as to the date, time and place of the special hearing to consider the merits of the appeal.

(9) The industrial commission or staff hearing officers will allow appeals to be heard from orders of the regional boards of review where:

(a) Such appeal is filed in an occupational disease claim on the question of allowance or disallowance of the claim where the inception of disability was prior to January 1, 1979.

(b) The decisions of the district hearing officer and the regional board of review are in conflict.

(c) The proof on file indicates the existence of an unusual legal, medical, or factual problem.

(d) One of the parties has failed or refused to supply needed material or factual proof within the knowledge of such party.

(e) It appears that a substantial injustice has been done to one of the parties.

(f) The proof on file indicates the possible existence of fraud.

(10) Prior to the hearing on an appeal the regional board of review or the industrial commission may require the claimant, the employer and the administrator to confer in an endeavor to make such agreements and arrangements in regard to uncontroverted facts, definition of controverted issues and other matters which may expedite the determination of the appeal. If, however, the regional board of review or the industrial commission is of the opinion that a prehearing conference will serve no useful purpose, it may record such opinion (that a prehearing conference will serve no useful purpose) in the file of the claim and, thereupon, dispense with such conference.

(11) Before making or denying an award at a hearing on an appeal the regional board of review or industrial commission shall afford the claimant, employer and administrator an opportunity to be heard upon reasonable notice and to present the testimony of witnesses or other evidence.

(12) The regional board of review or the industrial commission shall in its order make a concise statement of the matter decided, a notation as to the notices provided and the appearance of the parties, a description of the part of the body and the nature of the disability recognized in the claim. The order is to be signed by each regional board member participating in the hearing or such member of the industrial commission who participated in the hearing, the signatures to be verification of the vote of such person.

(13) The decision of the regional board of review shall be the decision of the industrial commission, except where an appeal is granted by the industrial commission or by a court under section 4123.519 of the Revised Code.

(14) Appeals and payment in a contested claim against a noncomplying employer are governed by the provisions of Chapter 4123, of the Revised Code, which generally govern appeals to the regional board, industrial commission and the courts.

(15) In case of an application for reconsideration from a determination by a district hearing officer made under division (B) of section 4123.57 of the Revised Code, no payment shall be made to the claimant until a final decision of the staff hearing officer allows compensation.

(16) In all other cases, if the decision of the district hearing officer is appealed by the administrator or the employer, the bureau of workers' compensation shall withhold compensation and benefits during the course of the appeal to a regional board of review, but if such regional board of review rules in favor of the claimant, compensation and benefits shall then be paid by the bureau or the self-insuring employer whether or not a further appeal is taken.

(17) If the claim is subsequently denied, payments shall be charged to the statutory surplus fund. If the employer is a state risk such amount shall not be charged to the employer's experience. If the employer is a self-insurer such amount will be paid to the self-insurer from the surplus fund.

(B) Court appeals.

(1) The claimant or the employer may appeal a decision of the industrial commission or of its staff hearing officer made pursuant to division (B)(6) of section 4121.35 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability.

(a) In injury claims, such appeal shall be filed with the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made, if the injury occurred without this state. Such a party may also appeal from the decision of the regional board of review from which the industrial commission or its staff hearing officer has refused to permit an appeal.

(b) In occupational disease claims, the appeal shall be filed with the court of common pleas of the county in which the exposure that caused the disease occurred. Such a party may also appeal from the decision of the regional board of review from which the industrial commission or its staff hearing officer has refused to permit an appeal.

(2) Notices of appeals stating the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom must be filed with the court of common pleas within sixty days after the date of receipt of such decision. If the claimant obtains a judgment on a court appeal in a case wherein the employer contested the claimant's right to participate in the fund, the statutory attorney fee for claimant's attorney shall be paid by the administrator and the employer shall then be billed for such fee by the accounts section.

HISTORY: Eff 10-17-68; 1-10-78; 12-11-78; 11-26-79

Rule promulgated under: RC Chapter 119.

Rule amplifies: RC 4121.31, 4121.35, 4123.515, 4123.516, 4123.519, 4123.57(B) in conjunction with 4121.13 and 4123.05

## 4123.512 Appeal to court.

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the

appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be

charged to the surplus fund under division (A) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Effective Date: 08-06-1999; (SB 7) 10-11-2006; 2007 HB100 09-10-2007

## **4123.65 Application for approval of final settlement.**

(A) A state fund employer or the employee of such an employer may file an application with the administrator of workers' compensation for approval of a final settlement of a claim under this chapter. The application shall include the settlement agreement, and except as otherwise specified in this division, be signed by the claimant and employer, and clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable and that the parties agree to the terms of the settlement agreement. A claimant may file an application without an employer's signature in the following situations:

- (1) The employer is no longer doing business in Ohio;
- (2) The claim no longer is in the employer's industrial accident or occupational disease experience as provided in division (B) of section 4123.34 of the Revised Code and the claimant no longer is employed with that employer;
- (3) The employer has failed to comply with section 4123.35 of the Revised Code.

If a claimant files an application without an employer's signature, and the employer still is doing business in this state, the administrator shall send written notice of the application to the employer immediately upon receipt of the application. If the employer fails to respond to the notice within thirty days after the notice is sent, the application need not contain the employer's signature.

If a state fund employer or an employee of such an employer has not filed an application for a final settlement under this division, the administrator may file an application on behalf of the employer or the employee, provided that the administrator gives notice of the filing to the employer and the employee and to the representative of record of the employer and of the employee immediately upon the filing. An application filed by the administrator shall contain all of the information and signatures required of an employer or an employee who files an application under this division. Every self-insuring employer that enters into a final settlement agreement with an employee shall mail, within seven days of executing the agreement, a copy of the agreement to the administrator and the employee's representative. The administrator shall place the agreement into the claimant's file.

(B) Except as provided in divisions (C) and (D) of this section, a settlement agreed to under this section is binding upon all parties thereto and as to items, injuries, and occupational diseases to which the settlement applies.

(C) No settlement agreed to under division (A) of this section or agreed to by a self-insuring employer and the self-insuring employer's employee shall take effect until thirty days after the administrator approves the settlement for state fund employees and employers, or after the self-insuring employer and employee sign the final settlement agreement. During the thirty-day period, the employer, employee, or administrator, for state fund settlements, and the employer or employee, for self-insuring settlements, may withdraw consent to the settlement by an employer providing written notice to the employer's employee and the administrator or by an employee providing written notice to the employee's employer and the administrator, or by the administrator providing written notice to the state fund employer and employee. If an employee dies during the thirty-day waiting period following the approval of a settlement, the settlement can be voided by any party for good cause shown.

(D) At the time of agreement to any final settlement agreement under division (A) of this section or agreement between a self-insuring employer and the self-insuring employer's employee, the administrator, for state fund settlements, and the self-insuring employer, for self-insuring settlements, immediately shall send a copy of the agreement to the industrial commission who shall assign the matter to a staff hearing officer. The staff hearing officer shall determine, within the time limitations specified in division (C) of this section, whether the settlement agreement is or is not a gross miscarriage of justice. If the staff hearing officer determines within that time period that the settlement agreement is clearly unfair, the staff hearing officer shall issue an order disapproving the settlement agreement. If the staff hearing officer determines that the settlement agreement is not clearly unfair or fails to act within those time limits, the settlement agreement is approved.

(E) A settlement entered into under this section may pertain to one or more claims of a claimant, or one or more parts of a claim, or the compensation or benefits pertaining to either, or any combination thereof, provided that nothing in this section shall be interpreted to require a claimant to enter into a settlement agreement for every claim that has been filed with the bureau of workers' compensation by that claimant under Chapter 4121., 4123., 4127., or 4131. of the Revised Code.

(F) A settlement entered into under this section is not appealable under section 4123.511 or 4123.512 of the Revised Code.

Effective Date: 10-01-1996; (SB 7) 10-11-2006

OHIO BUREAU OF WORKERS' COMPENSATION  
INDUSTRIAL COMMISSION OF OHIO  
FINAL SETTLEMENT OF CLAIMS

860 1 123004

PAMELA S. SCOTT, ) CLAIM NO: 99-511602  
 ) And Any and All Other Claims Against  
 Plaintiff, ) Dillard Department Stores, Inc.  
 )  
 v. ) Trumbull County Court of Common  
 ) Case No. 02 CV 2440  
 )  
 DILLARDS DEPARTMENT )  
 STORES, INC., et al. ) DATE OF INJURY: June 21, 1999  
 )  
 Defendants. ) CLAIMANT'S SOCIAL SECURITY NO:  
 ) 464-49-7649  
 )

JOINT APPLICATION FOR APPROVAL OF  
SETTLEMENT AGREEMENT

Pamela S. Scott, Claimant, and Dillard's Department Stores, Employer, hereby make application to the Administrator of the Bureau of Workers' Compensation and Industrial Commission of Ohio for approval of the settlement of the entirety of her Claim No. 99-511602, as well as any and all other claims which she may have against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims.

SETTLEMENT AGREEMENT & RELEASE

I, Pamela S. Scott, for and in consideration of the sum of Fifteen Thousand Dollars (\$15,000.00), which sum Dillard's Department Stores agree to pay to me upon

approval by the Industrial Commission of Ohio of this settlement agreement and/or at the expiration of the thirty (30) day time period prescribed in Ohio Revised Code §4123.65(D), do hereby for myself and for anyone claiming by, through or under me, forever release and discharge said Dillard's Department Stores, its directors, employees, agents, representatives, successors, and assigns, the Industrial Commission of Ohio, the Bureau of Workers' Compensation, the State Insurance Fund, and all persons, firms or corporations from any and all claims, demands, actions or causes of action, which I now have or which I may hereafter claim to have, whether known or unknown, arising in any manner from my industrial injuries sustained on or about June 21, 1999, and any and all other injuries in any other claims which I may have against Dillard's Department Stores. Claimant acknowledges that this settlement agreement applies to the entirety of Claim No. 99-511602, as well as to any and all other claims which she may have against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims; and for the settlement of any and all contested medical bills and/or chiropractic treatment since the last date of payment of such treatment.

Pamela S. Scott and Dillard's Department Stores further agree that any and all bills for medical services, nursing services, hospital services, drugs and medications attributable to conditions currently allowed in any of claimant's claims against Dillard's Department Stores, timely filed with Dillard's Department Stores prior to the date of this agreement, and properly payable under the rules of the Industrial Commission of Ohio and Bureau of Workers' Compensation, shall be the responsibility of Dillard's Department Stores, but if such costs were incurred prior to the date of this agreement and have not been filed with Dillard's Department Stores prior to the date of this

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agreement, then such medical bills shall be the responsibility of Pamela S. Scott. The cost of all medical services provided to Pamela S. Scott on or after the date of this agreement shall also be her responsibility.

The parties further agree that the referenced workers' compensation court appeal cited Pamela S. Scott v. Dillard's Department Stores, and being Trumbull County Court of Common Pleas Case No. 02 CV 2440, will be dismissed with prejudice with the following order: Pamela S. Scott is not entitled to participate in The Ohio Workers' Compensation Fund for the alleged condition of L4-L5 disc bulge at the plaintiff's costs.

IN WITNESS WHEREOF, the parties have signed this Final Settlement Agreement on the respective dates indicated.

DILLARDS DEPARTMENT STORES

Pamela Scott  
PAMELA S. SCOTT

Date: 12-09-03

By: Jeanette Krilow  
Its: Authorized Representative

Date: 1-16-04

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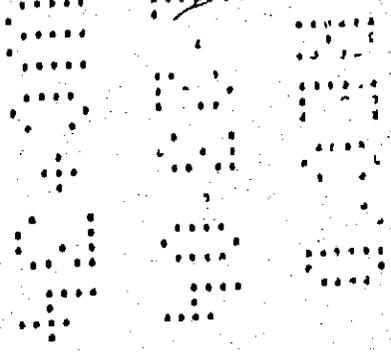
STATE OF OHIO }  
COUNTY OF TRUMBULL } SS:

BEFORE ME, a Notary Public in and for said State and County, personally appeared PAMELA S. SCOTT, who acknowledged execution of the foregoing agreement for final settlement of Claim No. 99-511602, as well as any and all other claims which he may have against Dillard's Department Stores as her free act and deed, after having been informed that approval of this settlement agreement by the Industrial Commission of Ohio and/or expiration of the thirty day time period prescribed in Ohio Revised Code §4123.65(D) will result in the complete and final settlement of the entirety of any and all of her claims against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims.

*gls*  
IN WITNESS WHEREOF, I have hereunto set my hand and official seal, this        day of November, 2003.  
December

*Paul W. Newendorp*  
NOTARY PUBLIC

PAUL W. NEWENDORP, Attorney At Law  
Notary Public - State of Ohio  
My commission has no expiration date.  
Section 147.03 R. C.



25190/04271

OHIO BUREAU OF WORKERS' COMPENSATION  
INDUSTRIAL COMMISSION OF OHIO  
FINAL SETTLEMENT OF CLAIMS

860 1 123004

PAMELA S. SCOTT, ) CLAIM NO: 99-511602  
 ) And Any and All Other Claims Against  
 Plaintiff, ) Dillard Department Stores, Inc.  
 )  
 v. ) Trumbull County Court of Common  
 ) Case No. 02 CV 2440  
 DILLARDS DEPARTMENT )  
 STORES, INC., et al. ) DATE OF INJURY: June 21, 1999  
 )  
 Defendants. ) CLAIMANT'S SOCIAL SECURITY NO:  
 ) 464-49-7649  
 )

JOINT APPLICATION FOR APPROVAL OF  
SETTLEMENT AGREEMENT

Pamela S. Scott, Claimant, and Dillard's Department Stores, Employer, hereby make application to the Administrator of the Bureau of Workers' Compensation and Industrial Commission of Ohio for approval of the settlement of the entirety of her claim No. 99-511602, as well as any and all other claims which she may have against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims.

SETTLEMENT AGREEMENT & RELEASE

I, Pamela S. Scott, for and in consideration of the sum of Fifteen Thousand Dollars (\$15,000.00), which sum Dillard's Department Stores agree to pay to me upon

approval by the Industrial Commission of Ohio of this settlement agreement and/or at the expiration of the thirty (30) day time period prescribed in Ohio Revised Code §4123.65(D), do hereby for myself and for anyone claiming by, through or under me, forever release and discharge said Dillard's Department Stores, its directors, employees, agents, representatives, successors, and assigns, the Industrial Commission of Ohio, the Bureau of Workers' Compensation, the State Insurance Fund, and all persons, firms or corporations from any and all claims, demands, actions or causes of action, which I now have or which I may hereafter claim to have, whether known or unknown, arising in any manner from my industrial injuries sustained on or about June 21, 1999, and any and all other injuries in any other claims which I may have against Dillard's Department Stores. Claimant acknowledges that this settlement agreement applies to the entire of Claim No. 99-511602, as well as to any and all other claims which she may have against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims; and for the settlement of any and all contested medical bills and/or chiropractic treatment since the last date of payment of such treatment.

Pamela S. Scott and Dillard's Department Stores further agree that any and all bills for medical services, nursing services, hospital services, drugs and medications attributable to conditions currently allowed in any of claimant's claims against Dillard's Department Stores, timely filed with Dillard's Department Stores prior to the date of this agreement, and properly payable under the rules of the Industrial Commission of Ohio and Bureau of Workers' Compensation, shall be the responsibility of Dillard's Department Stores, but if such costs were incurred prior to the date of this agreement and have not been filed with Dillard's Department Stores prior to the date of this

INDUSTRIAL COMMISSION  
OFFICE  
2001 JUN 26 P 06  
CITY OF CLEVELAND, OHIO

agreement, then such medical bills shall be the responsibility of Pamela S. Scott. The cost of all medical services provided to Pamela S. Scott on or after the date of this agreement shall also be her responsibility.

The parties further agree that the referenced workers' compensation court appeal cited Pamela S. Scott v. Dillard's Department Stores, and being Trumbull County Court of Common Pleas Case No. 02 CV 2440, will be dismissed with prejudice with the following order: Pamela S. Scott is not entitled to participate in The Ohio Workers' Compensation Fund for the alleged condition of L4-L5 disc bulge at the plaintiff's costs.

IN WITNESS WHEREOF, the parties have signed this Final Settlement Agreement on the respective dates indicated.

Pamela Scott  
PAMELA S. SCOTT

Date: 12-09-03

DILLARDS DEPARTMENT STORES

By: Jeanette Krul  
Its: Authorized Representative

Date: 1-16-04

INDUSTRIAL COMMISSION  
OHIO  
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OFFICE

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STATE OF OHIO }  
COUNTY OF TRUMBULL } SS:

BEFORE ME, a Notary Public in and for said State and County, personally appeared PAMELA S. SCOTT, who acknowledged execution of the foregoing agreement for final settlement of Claim No. 99-511602, as well as any and all other claims which he may have against Dillard's Department Stores as her free act and deed, after having been informed that approval of this settlement agreement by the Industrial Commission of Ohio and/or expiration of the thirty day time period prescribed in Ohio Revised Code §4123.65(D) will result in the complete and final settlement of the entirety of any and all of her claims against Dillard's Department Stores, for any and all rights to compensation and medical benefits under any and all claims.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, this 9th day of ~~November~~, 2003.  
December

*Paul W. Newendorp*  
NOTARY PUBLIC

PAUL W. NEWENDORP, Attorney At Law  
Notary Public - State of Ohio  
My commission has no expiration date.  
Section 147.03 R. C.

25190/04271

INDUSTRIAL COMMISSION  
OF OHIO  
2004 JAN 26 P 2:06  
CLEVE REGIONAL OFFICE

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

PAMELA S. SCOTT

Plaintiff,

v.

DILLARD'S DEPT. STORES, INC., et al.

Defendants

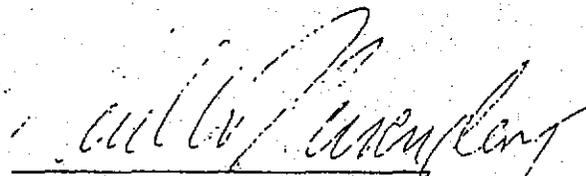
CASE NO. 02 QV 2440

JUDGE PETER KONTOS

PLAINTIFF'S NOTICE OF  
VOLUNTARY DISMISSAL  
WITH PREJUDICE PURSUANT  
TO CIV. R. 41(A)(1)(a)

Plaintiff, Pamela S. Scott, does hereby give notice that this case is dismissed voluntarily, with prejudice, at Plaintiff's cost, pursuant to Rule 41(A)(1)(a), of the Ohio Rules of Civil Procedure.

Respectfully submitted,



Paul W. Newendorp (0000779)  
BROWN AND MARGOLIUS CO., LPA  
55 Public Square, Suite 1100  
Cleveland, OH 44113  
(216) 621-2034

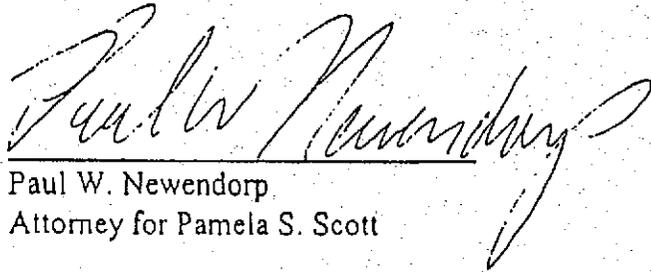
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff's Notice of Voluntary Dismissal With Prejudice* was served this 13<sup>th</sup> day of February, 2004 by regular U.S. mail upon:

Michael J. Bertsch, Esq.  
Moscarino & Treu, L.L.P.  
The Hanna Bldg.  
1422 Euclid Ave., Suite 630  
Cleveland, OH 44115

and

Sandra L. Nimrick, Esq.  
Assistant Attorney General  
Workers' Compensation Section  
State Office Building, 11<sup>th</sup> Floor  
615 W. Superior Ave.  
Cleveland, OH 44113

  
Paul W. Newendorp  
Attorney for Pamela S. Scott

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

PAMELA SCOTT,

Plaintiff-Appellee,

vs.

ADMINISTRATOR, Bureau of  
Workers' Compensation, et al.

Defendants-Appellants.

)  
)  
) TRUMBULL COUNTY CASE  
) NO. 02 CV 2440

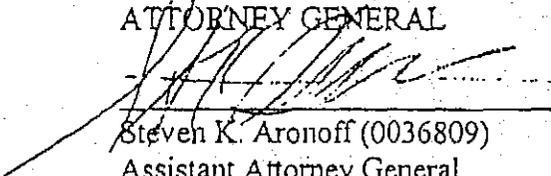
)  
) JUDGE: KONTOS

)  
) MOTION FOR RELIEF FROM  
) JUDGMENT AND SUBSTITUTION  
) OF PARTIES

Pursuant to Ohio Rules of Civil Procedure, Rule 60 (B)(5), the undersigned seeks relief from the Judgment dismissing this case with prejudice. The reasons for this motion are contained in the Memorandum that is attached hereto and hereby incorporated by reference herein.

Respectfully submitted,

JIM PETRO  
ATTORNEY GENERAL

  
Steven K. Aronoff (0036809)  
Assistant Attorney General  
State Office Bldg. - 11th Floor  
615 West Superior Avenue  
Cleveland, OH 44113-1899  
Attorney for Defendant, BWC

AUG 05 2004



signed that entry the employer would have been entitled to reimbursement for benefits paid out on the L4-L5 disc bulge condition. However, the undersigned informed all parties that since he had never been consulted, there clearly was no agreement of the parties on this entry.

In another effort to end the case, while still being entitled to reimbursement from the surplus fund, the employer and plaintiff agreed to have the plaintiff dismiss the case with prejudice. Once the case was dismissed, the employer could fulfill whatever settlement obligation it made with the plaintiff and, then, attempt to obtain reimbursement from the surplus fund. While on its face, a voluntary dismissal may seem inconsequential, the result would be prejudicial to Defendant-Administrator. The Ohio Supreme Court, in 2000, ruled in *The State ex. Rel Sysco Food Service of Cleveland Inc. v. Industrial Commission of Ohio, et al* (2000), 89 Ohio St. 3d 612, 734 N.E. 2d 361, 2000 Lexis 2073, that a self-insured employer is to be reimbursed from the state surplus fund for compensation paid to an employee when the claim is originally allowed by the Industrial Commission, and then subsequently is denied by a trial court. If Plaintiff-Claimant dismisses her claim, and there is no party to take her position, then Defendant-Employer could receive a default judgment for want of prosecution—or in this case, the plaintiff dismissed her case with prejudice. Thus Plaintiff-Claimant's claim would be deemed denied by a trial court, and Defendant-Employer will be entitled to reimbursement from the state surplus fund for compensation paid on Plaintiff-Claimant's previously allowed claim.

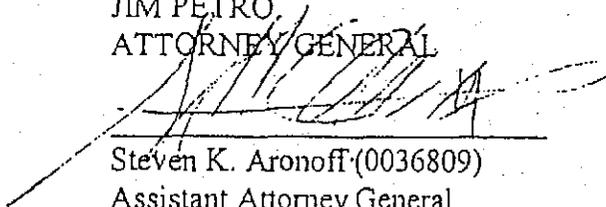
Given the potential for reimbursement under *Sysco*, Defendant-Administrator becomes the real party in interest in self-insured employer appeals when a Plaintiff-Claimant fails to either file or prosecute their complaint. In *Youghioghny and Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St. 3d 70, 72, the Ohio Supreme Court stated: "[i]n order to preserve the surplus fund, we believe the correct procedure is to permit the state, which is already a party to the appeal, to

proceed in place of the claimant. This will provide the employer with its statutory right to appeal a decision of the commission and also allow the state an opportunity to protect the [surplus] fund." In *Youghioghney*, the claimant had passed away before the trial date in an employer's appeal, leaving no one to prosecute his complaint. The similarities between *Youghioghney* and the case in issue lie in the fact that the state surplus fund is left undefended because of a lack of participating claimant. See also *Hamar v. First National Supermarkets*, 1994 Ohio App. Lexis 2047 (Ninth App. Dist. 1994)(copy attached as Exhibit B); *Hook v. City of Springfield*, 750 N.E.2d 1162, 141 Ohio app.3d 260 (Second App. Dist. 2001); *Ezell v S. E. Johnson Companies*, Lorain C.P. Case No. 02 CV 131808 (copy attached as Exhibit C)(employer settled case and then attempted to file a stipulated entry of dismissal in order to get Sysco reimbursement. The Court denied the employer's motion for judgment on the pleadings)

Therefore, based on the Supreme Court's decisions in *Sysco* and *Youghioghney and Ohio Coal Co.* the State, by way of the Bureau of Workers' Compensation, must be substituted for the plaintiff and the case be reinstated on the Court's docket. This clearly is in the interest of justice and meets the requirements of Rule 60 (B)(5). Only by granting this motion can the Court meet the tenets of *Youghioghney and Ohio Coal Co.* Only then can the State defend the State Surplus Fund, as set forth in *Youghioghney and Ohio Coal Co.*

Respectfully submitted,

JIM PETRO  
ATTORNEY GENERAL

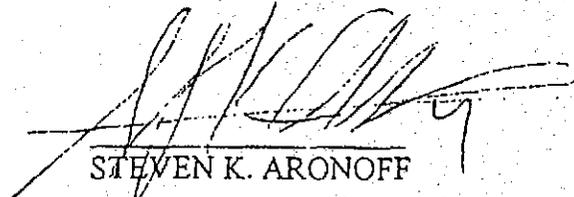


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Steven K. Aronoff (0036809)  
Assistant Attorney General  
State Office Bldg. - 11th Floor  
615 West Superior Avenue  
Cleveland, OH 44113-1899  
Attorney for Defendant, BWC

CERTIFICATE OF SERVICE

A copy of the foregoing Motion and Memorandum was sent by regular United States Mail, postage prepaid, on this 4<sup>th</sup> day of August 2004 to: Mike Bertsch, The Hanna Bldg., 1422 Euclid Ave., Suite 630, Cleveland, Ohio 44115 and Paul Newendorp, 55 Public Square, Suite 1100, Cleveland, Ohio 44113.

  
STEVEN K. ARONOFF

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

PAMELA S. SCOTT,	)	CASE NO. 02 CV 2440
	)	
Plaintiff,	)	JUDGE PETER J. KONTOS
	)	
v.	)	
	)	JUDGMENT ENTRY
DILLARD DEPARTMENT STORES,	)	
INC., et al.	)	
	)	
Defendants.	)	

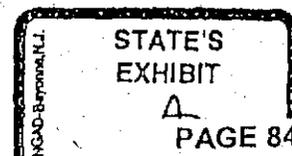
By agreement of the parties and after due consideration thereof, it is Ordered,  
Adjudged and Decreed as follows:

Plaintiff/Claimant Pamela S. Scott is not entitled to participate in the Ohio Workers' Compensation Fund for the alleged condition of L4-L5 disc bulge and that the within action be and is hereby dismissed with prejudice; costs to Plaintiff.

IT IS SO ORDERED.

\_\_\_\_\_  
JUDGE PETER J. KONTOS

\_\_\_\_\_  
DATE



WILLIAM HAMAR, Appellant v. FIRST NATIONAL SUPERMARKETS, INC.  
C.A. NOS. 16467, 16468, 16469

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

1994 Ohio App. LEXIS 2047

May 11, 1994, Decided

NOTICE:

[\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEALS FROM JUDGMENTS ENTERED IN THE COMMON PLEAS COURT, COUNTY OF SUMMIT, OHIO. CASE NOS. 85 11 3471, 91 01 0327, 91 12 4666

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant widow challenged a decision from the Common Pleas Court of Summit County (Ohio), which denied the widow's motion to be substituted as nominal party plaintiff on her deceased husband's workers' compensation claim. The husband died after initiating an appeal, under *Ohio Rev. Code Ann. § 4123.519*, of the administrative denial of his occupational disease claims. The widow had been appointed administratrix of her husband's estate.

OVERVIEW: The trial court denied the widow's motion to substitute herself for her deceased husband as the nominal party plaintiff for purposes of the appeal on the basis that the widow was not a real party in interest. The widow asserted that she was a "real party in interest" with respect to her deceased husband's appeal of the administrative denial of his workers' compensation claims. On appeal, the court affirmed, holding that: (1) a representative of the deceased claimant's estate could not be substituted on appeal pursuant to Ohio R. Civ. P. 25 because the estate did not have an interest in the appeal due to the language of *Ohio Rev. Code Ann. § 4123.519*; (2) the legal representative of the estate of a workers' compensation claimant could not appeal a decision of the Industrial Commission to a common pleas court pursuant to § 4123.519; (3) a claimant's workers' compensation claim abated upon the death of the claimant; and (4)

upon the death of a claimant, dependents of the deceased employee could not continue the claimant's action, but had to initiate a dependent's death benefit cause of action under *Ohio Rev. Code Ann. § 4123.59* to recover.

OUTCOME: The court affirmed the trial court's decision.

CORE TERMS: claimant, workers' compensation, real party in interest, deceased, nominal party, legal representative, substituted, subject matter jurisdiction, judicial interpretation, assignment of error, injured employee, cause of action, statutory right, death benefit, abate, died, dies, journal entry, occupational disease, substitution.

LexisNexis(R) Headnotes

Workers' Compensation & SSDI: Administrative Proceedings: Claims

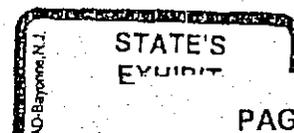
Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review

[HN1] An employer's appeal, pursuant to *Ohio Rev. Code Ann. § 4123.519*, from an adverse ruling by the Industrial Commission is not subject to dismissal due to the death of the employee during the pendency of the appeal. Upon the employee's death, the State becomes the real party in interest to the litigation. By allowing the state to proceed in place of the deceased claimant, the employer is afforded its statutory right to appeal a decision of the commission and the state is provided with the opportunity to protect the workers' compensation fund.

Civil Procedure: Joinder of Claims & Parties: Substitution of Parties

Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review

[HN2] A representative of the claimant's estate cannot be substituted on appeal pursuant to Ohio R. Civ. P. 25, as



the estate does not have an interest in the appeal due to the language of *Ohio Rev. Code Ann. § 4123.519*.

Workers' Compensation & SSDI: Administrative Proceedings: Claims

Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review

[HN3] The legal representative of the estate of a workers' compensation claimant may not appeal a decision of the Industrial Commission to a common pleas court pursuant to *Ohio Rev. Code Ann. § 4123.519*. The court of common pleas has only such jurisdiction over workers' compensation claims as conferred upon it by § 4123.519. Section 4123.519 unambiguously limits the right of appeal to the claimant and the employer. The legal representative of the claimant's estate has no statutory right to file an appeal under § 4123.519, as he was neither claimant nor employer.

Civil Procedure: Joinder of Claims & Parties: Substitution of Parties

Workers' Compensation & SSDI: Administrative Proceedings: Claims

Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review

[HN4] Separate causes of action accrue to an injured employee and the dependents of an injured employee after the employee's death resulting from such an injury. A claimant's workers' compensation claims abate upon the death of the claimant. Ohio R. Civ. P. 25(A)(1) allows for a substitution of parties only if a party dies and the claim is not thereby extinguished. Accordingly, upon the death of a claimant, dependents of a deceased employee cannot continue the claimant's action, but must initiate a dependent's death benefit cause of action under *Ohio Rev. Code Ann. § 4123.59* to recover.

Governments: Legislation: Interpretation

[HN5] A statute which is free from ambiguity is not subject to judicial modification under the guise of interpretation.

Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Action

Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review

[HN6] A review of the judicial interpretation of *Ohio Rev. Code Ann. § 4123.519* reveals that, as a claimant's workers' compensation cause of action abates upon death, a representative of the deceased claimant's estate does not become a "real party in interest" under *Ohio Rev. Code Ann. § 4123.519*. As a consequence, a trial court lacks subject matter jurisdiction to entertain an appeal of a claimant's workers' compensation claims where a representative of the deceased claimant's estate is substituted as the nominal party plaintiff.

COUNSEL: JANICE MAZURKIEWCZ, Attorney at Law, 55 Public Square, Cleveland, OH 44113 for Appellant.

THOMAS CAROLIN, Attorney at Law, 1370 W. Sixth St., #203, Cleveland, OH 44113 for Appellee. CASH MISCHKA, Asst. Attorney General, 615 W. Superior Ave., N.W., Cleveland, OH 44113 for Appellee. JAMES FRENCH, Attorney at Law, 1514 Terminal Tower, Cleveland, OH 44113 for Appellee.

JUDGES: QUILLIN, REECE, DICKINSON

OPINIONBY: FOR THE COURT: DANIEL B. QUILLIN

OPINION: DECISION AND JOURNAL ENTRY

Dated: May 11, 1994

These causes were heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, J. Appellant, Johann Hamar, appeals from the trial court's order denying her motion to be substituted as nominal party plaintiff on her deceased husband's workers' compensation claim. We affirm.

This case has a long and complicated history dating back to 1984, when William Hamar originally[\*2] filed an occupational disease claim with the Ohio Bureau of Workers' Compensation. The case has proceeded through several administrative and judicial levels and is currently before this court upon appeal from the trial court's order denying appellant's Civ.R. 25 motion.

On January 18, 1993, William Hamar died after initiating an appeal, under *R.C. 4123.519*, of the administrative denial of his occupational disease claims. A suggestion of death was filed with the trial court on January 20, 1993. On April 27, 1993, the Probate Court of Summit County appointed William Hamar's wife, Johann Hamar, as executrix of William Hamar's estate. On May 13, 1993, Johann Hamar filed a motion to substitute herself for her deceased husband as the nominal party plaintiff for purposes of the appeal. The trial court denied appellant's motion, ruling that Johann Hamar's not a real party in interest. Johann Hamar appeals the order, raising a single assignment of error.

Assignment of Error

"The trial court erred in denying appellant-executrix Johann Hamar's motion to substitute upon death of

plaintiff (claimant William Hamar) as a nominal party plaintiff and the trial court erred in finding that appellant[\*3] Johann Hamar, surviving spouse of claimant William Hamar, was not a real party in interest."

Appellant asserts that she is a "real party in interest" with respect to her deceased husband's appeal of the administrative denial of his workers' compensation claims for occupational diseases. We disagree.

In determining who is to be considered the "real party in interest" when a claimant dies after perfecting an appeal under R.C. 4123.519, we are guided by the language and reasoning employed by the Supreme Court of Ohio in two of its opinions. In *Youghioghney & Ohio Coal Co. v. Maysfield* (1984), 11 Ohio St.3d 70, 72, 464 N.E.2d 133, paragraph one of the syllabus, the Supreme Court of Ohio held that [HN1] "an employer's appeal, pursuant to R.C. 4123.519, from an adverse ruling by the Industrial Commission is not subject to dismissal due to the death of the employee during the pendency of the appeal. In determining the issue, the court stated that, upon the employee's death, the state becomes the real party in interest to the litigation. In so reasoning, the court stressed the policy consideration that, by allowing the state to proceed in place of the deceased claimant, the employer is afforded[\*4] its statutory right to appeal a decision of the commission and the state is provided with the opportunity to protect the workers' compensation fund:

In determining who becomes the "real party in interest" for purposes of the appeal, the Youghioghney court considered and expressly rejected the substitution of a representative of the claimant's estate, stating:

"We decline to substitute [HN2] a representative of the claimant's estate to the appeal pursuant to Civ. R. 25, as the estate does not have an interest in the appeal due to the language of R.C. 4123.519."

*Id.* at 72, fn.3.

In *Breidenbach v. Maysfield* (1988), 37 Ohio St.3d 138, 524 N.E.2d 502, paragraph one of the syllabus, the Supreme Court of Ohio held that [HN3] "the legal representative of the estate of a workers' compensation claimant may not appeal a decision of the Industrial Commission to a common pleas court pursuant to R.C. 4123.519." In *Breidenbach, supra*, at 140, the court stated that the court of common pleas has only such jurisdiction over workers' compensation claims as conferred upon it by R.C. 4123.519. The court then went on to analyze the language of R.C. 4123.519 and held that it unambiguously[\*5] limited the right of appeal to

the claimant and the employer. *Id.* at 140-141. The court then held that the legal representative of the claimant's estate had no statutory right to file an appeal under R.C. 4123.519, as he was neither claimant nor employer. *Id.* In the majority opinion written for the court, Justice Locher additionally addressed the precise issue presented in the case sub judice, stating:

"Assuming [claimant] had filed the appeal in her own right, and then died, we would be compelled to follow our decision in *Youghioghney & Ohio Coal Co. v. Maysfield* (1984), 11 Ohio St.3d 70, 72, 464 N.E.2d 133 \* \* \*. In footnote 3, we declined to substitute a representative of the claimant's estate to the appeal pursuant to Civ. R. 25, as the estate does not have any interest in the appeal due to the language of R.C. 4123.519."

*Breidenbach, supra*, at 141, fn.3.

Ohio courts have traditionally held that [HN4] separate causes of action accrue to an injured employee and the dependents of an injured employee after the employee's death resulting from such an injury. See, e.g., *Industrial Comm. v. Davis* (1933), 126 Ohio St. 593, 186 N.E. 505, paragraphs one[\*6] and two of the syllabus. Further, a claimant's workers' compensation claims abate upon the death of the claimant. *State ex rel. Hamlin v. Indus. Comm.* (1993), 68 Ohio St.3d 21, 22, 623 N.E.2d 35. Civ.R. 25(A)(1) allows for a substitution of parties only "if a party dies and the claim is not thereby extinguished[.]" Accordingly, upon the death of a claimant, dependents of a deceased employee cannot continue the claimant's action, but must initiate a dependent's death benefit cause of action under R.C. 4123.59 to recover. Appellant has filed her claim as a dependent under R.C. 4123.59, but asserts that the res judicata effect of the administrative denial of William Hamar's workers' compensation claims will preclude her recovery. Accordingly, appellant claims she is a "real party in interest" to the appeal. We disagree.

In *Breidenbach, supra*, at 141, the Supreme Court of Ohio held that "the legal representative of the estate of a workers' compensation claimant may not appeal a decision of the Industrial Commission to a common pleas court pursuant to R.C. 4123.519." In so holding, the court stated that "while this may be a harsh result, we find that to construe this provision[\*7] otherwise would be legislation by unjustified judicial interpretation." *Id.* The *Breidenbach* court ultimately based its decision on the reasoning that, because the executor was neither claimant nor employer, the trial court did not possess subject matter jurisdiction over an appeal filed pursuant to R.C. 4123.519. In so reasoning, the court stated that [HN5] "[a] statute which is free from ambiguity is not subject to

judicial modification under the guise of interpretation." Id. We believe this reasoning is equally applicable to a situation in which the representative of a deceased claimant's estate attempts to be substituted as the nominal party plaintiff in an appeal brought under *R.C. 4123.519*.

[HN6] A review of the judicial interpretation of *R.C. 4123.519* reveals that, as a claimant's workers' compensation cause of action abates upon death, a representative of the deceased claimant's estate does not become a "real party in interest" under *R.C. 4123.519*. As a consequence, a trial court would lack subject matter jurisdiction to entertain an appeal of a claimant's workers' compensation claims where a representative of the deceased claimant's estate is substituted as the nominal party[\*8] plaintiff. Accordingly, we decline to address the merits of appellant's arguments as they relate to the res judicata effects of a claimant's workers' compensation claims upon a dependent's death benefit claims under *R.C. 4123.59*.

The judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for these appeals.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN, FOR THE COURT

REECE, P. J.  
DICKINSON, J.  
CONCUR



COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

Ron Nabakowski, Clerk  
JOURNAL ENTRY  
Kosma J. Glavas, Judge

Date: March 22, 2004

Case No. 02CV131808

Robert L. Ezell

Plaintiff

VS

S.E. Johnson Companies,  
Inc., et al.

Defendant

\_\_\_\_\_  
Plaintiff's Attorney

\_\_\_\_\_  
Defendant's Attorney

This matter came on for consideration of Defendant S.E. Johnson Companies, Inc.' Motion for Judgment on the Pleadings. An off the record oral Hearing was held on March 19, 2004.

After careful consideration of the Briefs submitted and arguments advanced, this Court makes the following determinations. This Court finds that on October 7, 2003, it rendered a judgment entry stating that the parties had advised this Court that this matter had been settled. This Court further ordered that a Dismissal Entry be submitted within thirty days.

Rather than submit a Dismissal Entry as ordered, Plaintiff filed a Notice of Dismissal on October 31, 2003. This Court dismissed this case pursuant to that Dismissal Notice on November 5, 2003.

On November 14, 2003, Defendant S.E. Johnson filed its Motion for Judgment on the Pleadings. Contrary to the cases in support of its argument, this Court did not deny Plaintiff's claim. Instead, this Court dismissed this case without making any such determination as a result of the parties advising it that this case had been settled. At no time was this Court asked to, nor did it, approve or otherwise journalize the settlement agreement allegedly reached between two of the three parties. Defendant Ohio Bureau of Workers' Compensation, who filed a Brief in Opposition and appeared at the Hearing, has still not signed off on the alleged settlement agreement.

As this case was concluded on November 5, 2003 by a dismissal entry, Defendant S.E. Johnson, Inc.'s Motion is found not well-taken. Defendant S. E. Johnson, Inc.'s Motion is hereby denied.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_



Judge Kosma J. Glavas

Cc: Attys Victor Kademenos/Christopher Clark  
Attys John T. Landwehr/Robert J. Gilmer  
Atty Sandra Lisowski

[-

Rice v. Stouffer Foods Corp. Ohio App. 8 Dist., 1997. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

Michael L. RICE, Plaintiff-Appellee

v.

STOUFFER FOODS CORP., et al. nka Nestle Frozen Food Company, Defendant-Appellant  
No. 72515.

Nov. 6, 1997.

Civil Appeal from Court of Common Pleas, No. 267708.

Thomas E. Davis, John R. Barrett, Akron, Ohio, for plaintiff-appellee.

Louis J. Licata, Ellyn Tamulewicz, Licata & Assoc. Co., L.P.A., Cleveland, Ohio, for defendant-appellant.

JOURNAL ENTRY AND OPINION  
PER CURIAM.

\*1 This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 25.

Defendant-appellant Nestle Frozen Food Company (formerly known as Stouffer Foods Corporation) appeals from an order of the trial court denying Nestle's motion for judgment for failure of plaintiff-appellee Michael L. Rice to prosecute his workers' compensation claim in the trial court. We find the appeal well taken and reverse and enter judgment for defendant-appellant.

This case arises from Nestle's appeal from an order of the Industrial Commission allowing the claim of Nestle's employee, plaintiff Rice, "for fracture of the right fifth metatarsal resulting from an industrial accident on 3-23-90; that all compensation and benefits paid from date of injury until six weeks thereafter are allowed and paid pursuant to this order  
\*\*\* "

Nestle exercised its statutory right to appeal by filing its notice of appeal from the order in the Common Pleas Court on March 24, 1994. Under R.C. 4123.512(D), within thirty days of service of the

notice of appeal, plaintiff Rice was required to file a complaint showing his cause of action to participate in the workers' compensation fund. Notice of appeal was served on Rice on October 25, 1994, thereby requiring Rice to file his complaint by November 24, 1994. Plaintiff Rice failed to file his complaint by that date and offered no explanation for said failure.

After six months passed without the filing of a complaint, Nestle moved the trial court, under Civ.R. 41(B)(1) and (3), to enter judgment for Nestle for plaintiff's failure to prosecute. Plaintiff's response offered no explanation for disregarding his statutory obligations and argued that Nestle sustained no prejudice from the delay, and further, that a court should not decide the merits of an action on procedural grounds. The trial court denied Nestle's motion and allowed the filing of plaintiff's complaint in instanter on June 1, 1995.

The trial court scheduled the case for trial on January 17, 1996. On January 16, 1996, one day before the scheduled trial date, plaintiff voluntarily dismissed his complaint without prejudice pursuant to Civ.R. 41(A)(1)(a). The dismissal entry expressly stated in full text as follows:

Upon notice of the Plaintiff, the Plaintiff hereby voluntarily dismisses his Complaint under the terms and conditions stated herein. This dismissal shall be pursuant to Ohio Rule of Civil Procedure 41(A), shall be without prejudice to future actions, shall be for failure otherwise than upon the merits, and shall specifically allow the Plaintiff to retain the right to refile his cause of action within one (1) year from the date of this Dismissal as prescribed by law. This dismissal of Plaintiff's Complaint shall not operate as a dismissal of Defendant's, Stouffer's Foods Corporation, previously and timely filed R.C. 4123.519 Notice of Appeal.

The dismissal ostensibly precluded the trial court from rendering a decision concerning Nestle's appeal, *i.e.*, whether plaintiff was entitled to participate in the workers' compensation fund.

\*2 In any event, plaintiff did not refile his complaint within one year as permitted by Ohio's savings statute, R.C. 2305.19. On the premise that plaintiff could no longer refile his complaint once the savings statute had lapsed to establish his right to participate in the workers' compensation system, Nestle moved the trial court, pursuant to Civ.R. 41(B)(1), for judgment on February 20, 1997. On April 15, 1997, the trial court denied Nestle's motion as "moot," finding that "the issue need be considered only upon

refiling." The net effect of this procedural posture appears to deprive Nestle of any right to have a trial court determination of its obligation to pay benefits or have an appeal heard since plaintiff has no economic incentive to refile his complaint. Nestle appealed the trial court's "mootness" decision to this Court by notice filed May 15, 1997. Appellee has filed no brief in this Court.

We will address Nestle's second assignment of error first as we find it dispositive of the appeal.

II. THE TRIAL COURT DENIED APPELLANT NESTLE FROZEN FOOD COMPANY ITS STATUTORY RIGHT TO APPEAL AN ADVERSE ADMINISTRATIVE DECISION BY REFUSING TO ENTER AN ORDER PROHIBITING APPELLEE FROM PARTICIPATING IN THE WORKERS' COMPENSATION SYSTEM AFTER APPELLEE FAILED TO REFILE HIS COMPLAINT WITHIN ONE YEAR OF ITS DISMISSAL.

In ruling that Nestle's motion for judgment was moot, we assume that the trial court found that it had no jurisdiction to enter judgment for Nestle until plaintiff refiled his complaint pursuant to the savings statute. Alternatively, the trial court may have decided that the issue was not ripe or justiciable until the complaint was refiled. Unfortunately, that decision fails to take into account the statutory procedures unique to workers' compensation appeals.

Unlike a typical civil action, the filing of a complaint in a workers' compensation matter does not "commence" the action and confer jurisdiction. Compare R.C. 4123.512(A) with Civ.R. 3(A) ("A civil action is commenced by filing a complaint with the court \*\*\*."). In a workers' compensation appeal: Under Section 4123.519, Revised Code, the filing of a petition is not jurisdictional. The filing of a notice of appeal with the Industrial Commission of Ohio and the Court of Common Pleas is the only act required to perfect the appeal and vest jurisdiction in the court.

Singer Sewing Machine Co. v. Puckett (1964), 176 Ohio St. 32, ¶ 2, 197 N.E.2d 353 of syllabus; Thompson v. Reibel (1964), 176 Ohio St. 258, 260, 199 N.E.2d 117 ("It is the filing of the notice of appeal which vests jurisdiction in the court and not the filing of the [complaint] by the claimant."). See, also, Rhynehardt v. Sears Logistics Services (1995), 105 Ohio App.3d 327, 332, 663 N.E.2d 1319; Ford Motor Co. v. Hamilton (1983), 9 Ohio App.3d 17,

457 N.E.2d 937; Yates v. General Motors (1967), 10 Ohio App.2d 9, 13, 225 N.E.2d 274; Smoliga v. Keller (1965), 3 Ohio App.2d 250, 255, 210 N.E.2d 269.

It therefore follows that the mere voluntary dismissal of the complaint does not oust the common pleas court of jurisdiction. "The claimant's dismissal of her complaint does just that and nothing more. The complaint is dismissed, but it does not dismiss the employer's appeal or divest the common pleas court of jurisdiction." Rhynehardt v. Sears Logistics Serv., *supra* at 332, 663 N.E.2d 1319; see, also, Anderson v. Sonoco Products Co. (1996), 112 Ohio App.3d 305, 309, 678 N.E.2d 631. Plaintiff's voluntary dismissal herein recognized this principle by stating: "This dismissal of Plaintiff's Complaint shall not operate as a dismissal of Defendant's, Stouffer's Foods Corporation [[[Nestle's]], previously and timely filed R.C. 4123.519 Notice of Appeal."

\*3 The issue still remains whether defendant Nestle can continue to be charged for the payment of benefits to plaintiff now that time for refiled plaintiff's petition under the savings statute has passed. R.C. 4123.512(A) confers a statutory right on an employee and an employer to appeal a decision of the Industrial Commission to the court of common pleas:

The claimant or the employer may appeal an order of the industrial commission \*\*\* in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas \*\*\*.

An appeal pursuant to R.C. 4123.512(A) does not stay the payment of an award of compensation once made by the Commission. R.C. 4123.512(H). In other words, an employer remains responsible for benefit payments pending appeal until the court denies the employee the right to participate in the fund. State, ex. rel. Rossetti v. Industrial Comm. (1983), 5 Ohio St.3d 230, 233, 450 N.E.2d 1151. In the instant case, Nestle paid six weeks of benefits to its employee which it is contesting. As a self-insured, Nestle is entitled to recoup the amount from the surplus fund if those benefits were erroneously paid. R.C. 4123.512(H); Kokitka v. Ford Motor Co. (June 17, 1993), Cuyahoga App. No. 62410, unreported at 11; Robinson v. B.O.C. Group, General Motors Corp. (Oct. 11, 1996), Trumbull App. No. 96-T-5419, unreported at 4.

Appeals taken pursuant to R.C. 4123.512 are *de*

*novo*, that is, the trial court must independently assess whether an employee is entitled to participate in the workers' compensation system without regard to the Commission's findings and decisions. *Youghioghny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71, 464 N.E.2d 133; *Forster v. Ohio Bur. Of Workers' Comp* (1995), 102 Ohio App.3d 744, 746, 658 N.E.2d 7. The burden of proof is always on the employee. See *Youghioghny*, 11 Ohio St.3d at 71, 464 N.E.2d 133, citing *Zuljevic v. Midland-Ross* (1980), 62 Ohio St.2d 116, 118, 403 N.E.2d 986.

[W]here an employer appeals an unfavorable administrative decision to the court the [employee] must, in effect, reestablish his workers' compensation claim to the satisfaction of the common pleas court even though the [employee] has previously satisfied a similar burden at the administrative level.

This Court has ruled that Civ.R. 41(A) concerning voluntary dismissals apply to all workers' compensation appeals. *Rogers v. Ford Motor Co.* (Aug. 18, 1994), Cuyahoga App. No. 66118, unreported at 5-6. An employee can voluntarily dismiss his complaint and thereafter avail himself of Ohio's savings statute. *Rogers* at 5. If an employee refiles his action within one year of the voluntary dismissal, the matter will proceed until the court of common pleas renders a decision regarding the employee's eligibility to participate in the workers' compensation system. *Id.*

Unfortunately, the unreported decisions of this Court tend to promote confusion in this area. The leading case appears to be *Ross v. Wolf Envelope Co.* (Aug. 2, 1990), Cuyahoga App. No. 57015, unreported, where the employer-appellee appealed compensation awarded to an employee-appellant. In acknowledging the employee's right to enter a voluntary dismissal, we also recognized that this did not dismiss the employer's appeal. We stated as follows at 7-8:

\*4 The Rules of Civil Procedure are applicable to proceedings brought under R.C. 4123.519. *Price v. Westinghouse Electric Corp.* (1982), 70 Ohio St.2d 131, 435 N.E.2d 1114. Civ.R. 41(A)(1)(a) expressly provides for a unilateral dismissal by a "plaintiff." When an employer files a notice of appeal pursuant to R.C. 4123.519, the claimant is required to file a complaint showing his cause of action to participate or to continue to participate in the fund. The claimant is listed in the caption of that action as the "plaintiff." *United Parcel Serv., Inc. v. Rice* (1982), 4 Ohio App.3d 4, 446 N.E.2d 184. Accordingly, appellant had a right to dismiss his complaint once,

pursuant to Civ.R. 41(A)(1)(a).

Appellee's appeal from the decision of the Industrial Commission cannot be dismissed due to the voluntary dismissal of appellant's complaint. Cf. *Ford Motor Co. v. Hamilton* (1983), 9 Ohio App.3d 17, 457 N.E.2d 937. Appellee fulfilled its legal responsibility by filing a timely notice of appeal under R.C. 4123.519, thus, its appeal cannot be dismissed.

Appellant's right to file another complaint in accordance with R.C. 4123.519 has not been prejudiced. R.C. 2305.19, the savings statute, is applicable to worker's compensation complaints filed in the court of common pleas. *Lewis v. Connor* (1985), 21 Ohio St.3d 1, 487 N.E.2d 285, syllabus. Therefore, the date for filing another complaint under R.C. 4123.519 relates back to the filing date for the original complaint for limitations purposes. *Id.*; see, also, *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St.3d 162, 163, 451 N.E.2d 1196.

Faced with a similar fact situation and procedural posture, this Court followed the *Ross* decision in *Rogers v. Ford Motor Company*, *supra* at 4-6:

In *Ross v. Wolf Envelope Co.* (Aug. 2, 1990), Cuyahoga App. No. 57015, unreported, this court held that where an employer filed an appeal pursuant to R.C. 4123.519, the trial court erred in denying the employee's Civ.R. 41(A)(1)(a) motion to dismiss his complaint. The employer's appeal would remain pending, but the employee could file another complaint within the one year period of the savings statute. Appellee contends the *Ross* decision is incorrect because only the party who commences the action can dismiss under Civ.R. 41(A)(1)(a). Civ.R. 41(A)(1)(a) states that a "plaintiff" may dismiss the action. In a R.C. 4123.519 appeal, the claimant is a plaintiff. *United Parcel Serv. Inc. v. Rice* (1982), 4 Ohio App.3d 4, 446 N.E.2d 184; *Ross, supra*.

Appellee contends that *Ross* is contrary to *Ford Motor Company v. Hamilton* (1983), 9 Ohio App.3d 17, 457 N.E.2d 937 and *Powell v. Interstate Motor Freight Sys.* (Sept. 4, 1987), Lucas App. No. L-87-009, unreported. These cases held the court could not dismiss an employer's appeal pursuant to Civ.R. 41(B)(1) due to the employee's failure to prosecute. *Ross* and the case at hand are distinguishable because they deal with the employee's dismissal of the complaint, pursuant to Civ.R. 41(A)(1)(a) and do not involve dismissal of the employer's appeal. See *Liggins v. Powertrain Division General Motors Corp.* (Feb. 25, 1994), Lucas App. No. L-93-170,

unreported.

\*5 Appellee also contends that Lewis v. Connor (1985), 21 Ohio St.3d 1, 487 N.E.2d 285, Civ.R. 41 and R.C. 2305.19 (the savings statute) refer to dismissal of an "action." Therefore, the entire action must be dismissed, not just the complaint. We disagree with this interpretation of the above cited authorities. The entire action does not have to be dismissed, as a counterclaim can remain pending for independent adjudication. Civ.R. 41(A)(1)(a), Holly v. Osleisek (1988), 40 Ohio App.3d 90, 531 N.E.2d 766.

Appellee argues that dismissal by the appellant would interfere with its right to have their appeal heard expeditiously. See, R.C. 4123.519(G). R.C. 4123.519(G) does not create a right to an expeditious appeal. It provides only that the appeal will be preferred over most of the other civil actions on the trial court docket.

Our decision in Ross, *supra*, was correct. Thus, the trial court erred in refusing to recognize appellant's notice of dismissal pursuant to Civ.R. 41(A)(1)(a).

This Court also followed the analysis of Ross and Rogers in Moore v. Trimble and Manfredi (Aug. 15, 1996), Cuyahoga App. No. 67895, unreported, and held that an employee could voluntarily dismiss his complaint pursuant to Civ.R. 41(A)(1) and that such a dismissal did not mean the entire action was dismissed.

Most recently, this Court again had occasion to address the identical fact situation presented in Ross, Rogers and Moore in Schade v. LTV Steel Company (March 13, 1997), Cuyahoga App. No. 70950, unreported, where the Court reviewed the pertinent authorities and stated as follows at 8-9:

Finally, in 1996, our court again addressed this exact issue in Moore v. Wesley Trimble and Manfredi Motor Transit Co. In Moore, the employer, Manfredi Transit, filed its notice of appeal from the Industrial Commission's allowance of employee Moore's claim for injuries. Moore properly filed the petition with the Cuyahoga County Common Pleas Court. During settlement negotiations, Moore filed a Civ.R. 41(A)(1)(a) motion to voluntarily dismiss the action. The trial court, however, set a trial date and denied Moore's motion to voluntarily dismiss his action against Manfredi. Moore appealed the trial court's action, and on appeal, our court, following the reasoning of the Rogers court, determined that the trial court erred when it failed to recognize Moore's right to voluntarily dismiss his action.

Accordingly, it is the position of our court that in this

district the Rules of Civil Procedure apply to these workers' compensation appeals. We recognize that pursuant to the civil rules, a plaintiff has the right to voluntarily dismiss his or her case once without prejudice, invoking the saving statute. A voluntary dismissal is accomplished by the filing of a dismissal notice with the court. Once such notice is filed, the court is divested of jurisdiction.

We, therefore, hold, once again, that the trial court may not vacate the claimant/plaintiff's notice of voluntary dismissal brought pursuant to Civ.R. 41(A)(1)(a) even where the appeal is brought to the lower court by the employer.

\*6 With all due respect, this panel of the Court does not find that once a notice of voluntary dismissal is filed by the employee in a workers' compensation appeal, "the court is divested of jurisdiction." We suggest that, in the context, the Schade court was referring generically to a voluntary dismissal under the civil rules. Therefore, we believe that Ross, Rogers and Moore all recognize that the complaint is dismissed but the employer's appeal is still pending, subject to a refiling of the complaint under the savings statute. Consequently, we hold that the court did not lose jurisdiction at the time of the voluntary dismissal.

None of the aforesaid cases reach the issue presented by the present appeal, *i.e.*, what effect does the lapse of the savings statute (the passage of one year) without the refiling of a complaint have on the employer's pending appeal. For the reasons hereinafter stated, we find the issue is ripe for decision. We find the trial court erred in holding the matter was moot until refiling of the complaint, the time for which has now passed.

If an employee does not refile his complaint within the year's time, he can no longer prove his entitlement to participate in the workers' compensation system, as is his burden on appeal. Zuljevic, supra at 118, 403 N.E.2d 986. In that instance, the employee's failure to refile his complaint warrants judgment for the employer in the same fashion that a defendant's failure to answer a complaint warrants default judgment for the plaintiff. Williams v. E. & L. Transport Co. (1991), 81 Ohio App.3d 108, 110, 610 N.E.2d 491 (court entered judgment for employer because claimant's refiled claim which was previously voluntarily dismissed, was filed outside the one year savings statute). Any other conclusion places the employer in an untenable position because the employer remains accountable

for all medical expenses and disability benefits arising from the underlying claim until the court orders a disallowance of the claim. See R.C. 4123.512(H).

Moreover, any other conclusion contravenes public policy and effectively denies the employer due process of law as intended by the General Assembly. R.C. 4123.512 confers a statutory right to the employer to appeal an allowed claim. A court's refusal to enter judgment for the employer upon an employee's failure to refile his action effectively renders the employer's right to appeal a nullity because the employer cannot obtain its desired relief, *i.e.*, a court order denying the employee the right to participate in the system. If the General Assembly intended this result, it would never have granted an employer the right to appeal. Consequently, we hold that an employee's failure to refile his complaint within the savings statute operates as a forfeiture of his right to participate in the workers' compensation system.

For the foregoing reasons, we sustain Assignment of Error II, reverse the trial court and enter judgment for defendant Nestle on its appeal.

\*7 Given the disposition of Assignment of Error II, it is unnecessary for us to review Assignment of Error I, which is moot. App.R. 12(A)(1)(c).

Judgment reversed; judgment entered for defendant-appellant.

It is ordered that appellant recover of appellee its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, C.J., DAVID T. MATIA and JAMES M. PORTER, JJ.

Ohio App. 8 Dist., 1997.

Rice v. Stouffer Foods Corp.

Not Reported in N.E.2d, 1997 WL 691156 (Ohio App. 8 Dist.)

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