

In the  
**Supreme Court of Ohio**

STATE OF OHIO, ex rel. : Case No. 07-2225  
DILLARD DEPARTMENT STORES, INC., :  
 :  
Appellant, :  
 :  
v. : On Appeal from the  
 : Franklin County  
 : Court of Appeals,  
 : Tenth Appellate District  
MARSHA P. RYAN, ADMINISTRATOR, :  
OHIO BUREAU OF WORKERS' :  
COMPENSATION and PAMELA S. SCOTT, : Court of Appeals Case  
 : No. 06AP-726  
Appellees. :

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**BRIEF OF APPELLEE, MARSHA P. RYAN, ADMINISTRATOR,  
BUREAU OF WORKERS' COMPENSATION**

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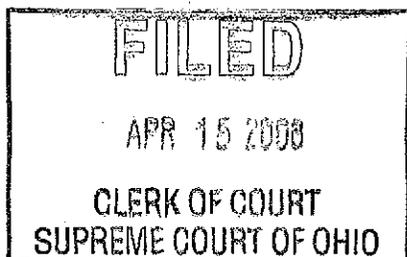
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## INTRODUCTION

This controversy centers on whether a claimant and employer can create a binding settlement agreement that requires the Bureau of Workers' Compensation ("BWC") to finance the settlement and reimburse the self-insured employer, when the BWC was excluded from the settlement process. This case arose because Pamela S. Scott ("Scott") and her self-insured employer, Dillard Department Stores, Inc. ("Dillard"), settled Dillard's R.C. 4123.512 appeal—filed in Trumbull County Common Pleas Court—that challenged Scott's right to participate in the workers' compensation fund for a L4-5 disc bulge.

Settlement negotiations excluded the BWC; nonetheless, Scott and Dillard executed a \$15,000 settlement agreement without the BWC's knowledge or approval, even though the settlement agreement tried to create a \$41,000 *Sysco* rebate for Dillard that would come from the BWC self-insured surplus fund. Scott and Dillard then submitted an "agreed entry" to the common pleas court—without BWC approval—that disallowed the condition and dismissed the pending litigation. Trial counsel for the BWC protested the "agreed dismissal entry" because he opposed any entry creating a reimbursement under *State ex rel. Sysco Food Service of Cleveland, Inc. v. Indus. Comm.* (2000), 89 Ohio St.3d 612, 2000-Ohio-1.

Unbeknownst to the BWC's attorney, the settlement agreement—which indicated a judgment entry would disallow the disputed condition—was earlier filed with the Industrial Commission of Ohio ("commission"). Instead of withdrawing the settlement agreement from the commission because it inaccurately indicated the pending litigation would end with an order disallowing the condition, Scott and Dillard waited until the

settlement agreement was approved by operation of the 30-day cooling-off period in R.C. 4123.65, and then Scott filed a second voluntary dismissal, effectively ending the litigation.

Dillard is not entitled to *Sysco* reimbursement here. First, once a case has settled, a voluntary dismissal under Civ.R. 41(A)(1)(a) does not operate as a “final administrative or judicial action” contemplated by R.C. 4123.512(H) or *Sysco*, and does not entitle Dillard to reimbursement from the BWC surplus fund. Just because Scott terminated the R.C. 4123.512 appeal with a second voluntary dismissal, instead of the usual entry, Dillard cannot assert a right to a refund.

Second, Dillard is not entitled to *Sysco* reimbursement solely by the inaccurate terms of a settlement agreement it executed without input or approval from the BWC, and it cannot transform language in a privately-negotiated settlement into a “final administrative or judicial action” for *Sysco* purposes. Moreover, it cannot make this “settlement language” argument here when it did not argue it administratively.

In short, this Court should affirm the decision of the Court of Appeals and deny Dillard *Sysco* reimbursement.

## STATEMENT OF THE CASE AND FACTS

### *NARRATIVE DESCRIPTION:*

Scott was injured in Dillard’s employ, and the self-insured employer allowed the claim initially for lumbosacral strain/sprain. BWC Appendix at 17, ¶33; hereinafter, “A. \_\_\_”. The commission additionally allowed an L4-5 disc bulge in Scott’s claim, and Dillard appealed the additional allowance to the Trumbull County Common Pleas Court via R.C. 4123.512(A) (A.17, ¶¶ 34-38). In accord with R.C. 4123.512(B), the

“administrator, the claimant, and the employer” were parties to the appeal, and all three were represented by counsel who made appearances in the action. Although Dillard initiated the appeal, Scott, under R.C. 4123.512(D), filed the complaint and assumed the burden of proving her right to participate under the workers’ compensation laws for the L4-5 disc bulge. See *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116, 118. Scott later filed a voluntary dismissal under Civ.R. 41(A)(1)(a). See *Kaiser v. Ameritemps, Inc.* 84 Ohio St.3d 411, 413, 1999-Ohio-360. She refiled a second complaint nearly a year later, within the limitations of the Savings Statute, R.C. 2305.19 (A.18, ¶¶ 39-40).

This dispute arose during the refiled litigation. Normally, the self-insured employer and claimant are the only parties necessary to effectuate a settlement of self-insured claims because BWC funds are uninvolved. However, the negotiations at issue here involved the BWC surplus fund created from contributions of all self-insured employers, and used to reimburse overpayments when a commission order is over-ruled. This controversy originated from the presumption in settlement discussions between trial counsel for Scott and Dillard that the agreement and consent of the BWC was unnecessary in creating a \$41,000 rebate from the BWC self-insured surplus fund to finance a \$15,000 settlement of Scott’s workers’ compensation claims against Dillard. At no time was trial counsel for the BWC included in the settlement negotiations, and he never consented to disallowing the L4-5 disc condition which would create a *Sysco*

reimbursement for Dillard. See *State ex rel. Sysco Food Service of Cleveland, Inc. v. Indus. Comm.* (2000), 89 Ohio St.3d 612.<sup>1</sup>

Counsel for Scott and Dillard memorialized their agreement in two documents: a judgment entry submitted to the common pleas court for approval and a settlement agreement filed with the commission. In the settlement agreement, Dillard and Scott, through their trial counsel, settled all workers' compensation claims (A. 18, ¶ 41). The settlement agreement and release recites \$15,000 as the consideration for the contract. See also Supplement at 1; hereinafter cited as "S. \_\_\_." The final paragraph of the settlement agreement states that the parties intended for dismissal of the case to include an entry reversing the commission order granting Scott's additional condition:

*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 the following order: Pamela S. Scott is not entitled to participate in The Ohio Workers' Compensation Fund for the alleged condition L4-L5 disc bulge at the plaintiff's costs. (Emphasis added.)*

(S. 3.) (Emphasis added.) The agreement's acknowledgment, notarized by Scott's attorney, states that the settlement is final upon commission approval or by operation of R.C. 4123.65(D):

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 [s]he [sic.] may have against Dillard's Department Stores as her free act and deed, after having been informed that approval of this settlement

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<sup>1</sup> *Sysco* reconciled the provisions of R.C. 4123.511(J) and R.C. 4123.512(H), and held that a reimbursement to the employer from the surplus fund is preserved if a claim that was previously allowed is, in fact, ultimately reversed and disallowed.

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. (Emphasis added.)

(S. 4.) Dillard executed the agreement on January 16, 2004 (S. 3).

On January 23, 2004, Dillard filed the settlement agreement with the BWC in compliance with R.C. 4123.65(D), which requires a self-insured employer to mail a copy of the agreement to the BWC within seven days of its execution so that it may be placed in the claimant's file (A. 18, ¶¶ 40-41). Then on January 26, 2004, the settlement agreement was filed with the commission with an application for approval, which is granted by operation of law under R.C. 4123.65(D), if a staff hearing officer fails to find within the 30 days of the settlement's execution that the agreement constitutes "a gross miscarriage of justice" (A. 18, ¶¶ 41-42).

The policy of the Attorney General's Workers' Compensation Section is to monitor the appeals of self-insured cases under R.C. 4123.512 for important legal issues and any action that may have an impact on BWC funds, such as a possible Sysco reimbursement. The first noteworthy event in Dillard's appeal to Trumbull County Common Pleas Court to come to the attention of the assigned AAG occurred when he received a courtesy copy of a dismissal entry prepared for the judge's signature. The submitted dismissal entry states that Scott is not entitled to participate for the additional condition:

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 action be and is hereby *dismissed with prejudice*; costs to Plaintiff. (Emphasis added.)

Second Supplement at 6; hereinafter cited as "S.S. \_\_\_." No counsel for any of the parties had signed the entry. Id. The AAG assigned as trial counsel for the BWC, was not consulted about this judgment entry, did not sign it, did not agree to it, and would not agree to it because it could create a right to *Sysco* reimbursement to Dillard. When the AAG received his copy of the dismissal entry, he protested to the other counsel and the court that he had not agreed to its terms. At all times relevant to this appeal, the AAG was unaware of the settlement agreement submitted to the commission for approval.<sup>2</sup>

Neither Dillard nor Scott withdrew the settlement agreement submitted to the commission for approval, as is permitted by R.C. 4123.65(C), after the BWC's counsel opposed the "agreed dismissal entry." They never submitted an amended agreement to the commission without the language disallowing the additional condition. Instead, they let the commission believe the common pleas case had been dismissed by an order disallowing the L4-5 disc bulge.

In response to the BWC's opposition to the judgment entry disallowing the L4-5 condition, Scott served a second voluntary dismissal by ordinary mail upon an AAG unconnected with the case on Friday, February 13, 2004, so that it could not be delivered to the assigned AAG until at least 32 days after the execution of the settlement agreement on Tuesday, February 17, 2004, when the Attorney General's office reopened after the long Presidents' Day weekend (S.S. 8). The second dismissal "pursuant to Rule

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<sup>2</sup> The BWC's Motion for Relief from Judgment discusses a possible, subsequent settlement instead of a finalized settlement filed with the commission.

41(A)(1)(a)” was file-stamped by the Trumbull County Common Pleas Clerk on February 18, 2004, 33 days after the execution of the settlement agreement and a day after its approval. Id. See also A. 18-19, ¶ 43.

Concurrently, the commission, which was not a party to the common pleas litigation [See R.C. 4123.512(B).], did not disapprove the settlement agreement within the 30-day cooling-off period of R.C. 4123.65. February 15, 2004, was day 30, which was a Sunday. The agreement was approved by operation of law by February 17, 2004 (A. 19, ¶ 44). See R.C. 4123.65(D). The BWC then filed a Civ.R. 60(B) motion for relief from the judgment to prevent “the potential for reimbursement under *Sysco*” (S.S. 3). See also A. 19, ¶ 46.

In June, 2004, Dillard, through its third party administrator, Helmsman Management Services, Inc., requested reimbursement of over \$41,000 in medical bills and indemnity paid for the additionally allowed disc bulge, arguing the second voluntary dismissal acted as a disallowance of the disputed condition (A. 19, ¶ 45). The BWC’s Self-Insured Claims Services denied the request for reimbursement because the “case [was] dismissed as part of [a] settlement and [was] not an over turned decision” (A. 19, ¶ 47 and S.S. 7).

Dillard appealed this denial to the Self-Insured Review Panel (“SIRP”), again arguing the second Civ.R. 41(A)(1)(a) dismissal disallowed the bulging disc by operation of that Civil Rule and was a determination under R.C. 4123.512(H) that Scott should not have been paid compensation and benefits for the additional allowance (A. 19, ¶ 48 and S.S. 10-11). The SIRP order “notes *the lack of any decision reversing the Industrial Commission order* that granted the additional allowance” and points out the \$41,000

reimbursement exceeds the \$15,000 settlement (A. 19, ¶ 49 and 36). (Emphasis added.) That order indicates Dillard argued “the settlement agreement [had] no effect on the employer’s entitlement to reimbursement” (A. 36). In denying Dillard’s administrative appeal, “the Panel finds the claim was *settled prior to the date of the dismissal* with prejudice” (A.19, ¶ 49 and 37). (Emphasis added.)

Dillard then appealed to the Administrator, renewing its argument that the second voluntary dismissal operated as a determination under R.C. 4123.512(H) (A. 20, ¶ 50 and S.S. 24-25). The Administrator’s designee found: “Prior to a determination on the merits by the court, [the] parties entered into a settlement agreement that ended the dispute between them” so that “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” (A. 20, ¶ 50 and 30).

Dillard then filed this mandamus action, alleging the BWC abused its discretion by denying its “clear right” to *Sysco* reimbursement (A. 20, ¶51). “*At issue* was whether as a result of Claimant’s *voluntary dismissal* of the [common pleas court] action, Dillard’s was entitled to be reimbursed from the State’s surplus fund for the amounts that it paid Claimant for the L4-L5 disc bulge condition.” (Emphasis added.) See Appellant’s Brief at 4.

The matter was referred to a magistrate who, after briefing and oral argument, recommended denying Dillard’s prayer for a writ (A. 29-30, ¶¶ 73-74). Following oral argument to the panel, the Tenth District Court of Appeals adopted the magistrate’s findings of fact and conclusions of law and denied the requested writ of mandamus, reasoning the BWC, which had no input in the “settlement,” would have to reimburse the

settling self-insured employer from a surplus fund that would become rapidly depleted to the detriment of other self-insured employers (A. 4, ¶¶ 9-10).

Dillard appealed to this court, asserting a “right” to *Sysco* reimbursement in two propositions of law. One reargues the effect of the second voluntary dismissal. The other changes its administrative argument, claiming a purported “right to reimbursement” per the terms of Dillard’s settlement agreement with Scott—the agreement that misrepresented that the R.C. 4123.512 appeal was dismissed with an order disallowing the disputed L4-5 condition.

Meanwhile, on January 2, 2008, the Trumbull County Common Pleas Court ruled on the BWC Motion to Vacate and on Dillard’s Motion for a Judgment (A. 31-34). The court found it had no basis to rule on either motion, that both were without merit, because “this Court’s docket demonstrates this action was settled and dismissed” (A. 33). Judge

Kontos states:

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.

(A. 33-34.) Dillard has appealed this order to the Eleventh District Court of Appeals.

*CHRONOLOGY OF EVENTS FROM LATE 2003 THROUGH FEBRUARY, 2004:*

Dec. 9, 2003	Scott executes settlement agreement
Jan. 16, 2004	Dillard executes settlement agreement; 30-day cooling-off period commences.
Jan.23, 2004	Settlement agreement mailed to BWC to be placed in claimant’s file
Jan. 26, 2004	Dillard files settlement agreement with commission.
Late Jan, 2004	BWC protests the “agreed dismissal”

Feb. 13, 2004 (Friday)	Scott serves the second voluntary dismissal, mailing it to an AAG not involved in case
Feb. 15, 2004 (Sunday)	30 <sup>th</sup> day after executing settlement agreement
Feb. 16, 2004 (Monday)	Presidents' Day; all state offices closed
Feb. 17, 2004 (Tuesday)	State offices re-open; mail from long weekend distributed
Feb. 18, 2004	Dismissal time-stamped in Trumbull County CP Court

## LAW AND ARGUMENT

### A. STANDARD OF REVIEW

For a writ of mandamus to issue, Dillard must demonstrate that it has a clear legal right to the relief sought and that the BWC had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. To establish a basis for mandamus relief, Dillard must show that the BWC acted contrary to law or otherwise abused its discretion by issuing an order that is not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. An abuse of discretion is “not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the [BWC] could have based its decision.” *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193. Absent such a finding, Dillard is not entitled to a writ of mandamus.

#### **Appellee Administrator’s Proposition of Law No. 1:**

*In an appeal filed under R.C. 4123.512, a settlement negotiated and executed without approval of the Administrator and a dismissal entry under Civ.R. 41(A)(1) do not operate as a “final administrative or judicial action” under R.C. 4123.512(H) allowing reimbursement under State ex rel. Sysco Food Service of Cleveland, Inc. v. Indus. Comm. (2000), 89 Ohio St.3d 612, 2000-Ohio-1.*

The settlement agreement and Civ. R. 41(A)(1) dismissal engineered by Dillard and Scott does not entitle Dillard to Sysco reimbursement for at least two reasons. First,

*Sysco* contemplates a legitimate adjudication, not a back-room deal between private parties. The *Sysco* Court interpreted and reconciled the provisions of R.C. 4123.511(J) and R.C. 4123.512(H) dealing with reimbursements to employers. Subsection (H) provides that if a final administrative or judicial action reverses a BWC award of benefits, the amount paid is charged to the surplus fund:

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.

R.C. 4123.512(H) (Emphasis added.) The Court held that a reimbursement to the employer from the surplus fund is preserved if a claim that was previously allowed is, in fact, ultimately reversed and disallowed. *Sysco*, 89 Ohio St. 3d at 615.

Thus, if an employer prevails in an action that it initiated (i.e., the employer's appeal of the commission's allowance of a claim), it is entitled to reimbursement from the surplus fund of the amount it expended for compensation and benefits. However, both the statute and *Sysco* contemplate a *bona fide* and legitimate adjudication in court, and not, as here, an attempt to have the commission's decision negated and a claim disallowed by an agreement between the employer and the injured worker, without BWC input or knowledge.

Here, Dillard is trying to subvert the statutory scheme by twisting a settlement executed with no input from the BWC and a voluntary dismissal into an adjudication sufficient for *Sysco* reimbursement. Dillard legitimately exercised its right to appeal the commission's order allowing an additional medical condition in Scott's claim. Dillard appealed to the Common Pleas Court of Trumbull County under R.C. 4123.512. Like

other civil litigants, Dillard had the option to adjudicate the issue to a jury or the court, or to resolve the issue by settlement.

Instead, the private parties entered into a mutually-advantageous arrangement whereby Dillard would pay Scott \$15,000 in exchange for Scott's agreement to an entry disallowing the additional medical condition, so that Dillard would be eligible for *Sysco* reimbursement. If it had worked, Dillard would have benefited to the detriment of the surplus fund by obtaining reimbursement for the settlement. But Scott might have benefited too, because if Scott's claim had been fully adjudicated and reversed, she might have been able to get health insurance to cover the medical part of her claim, in addition to getting the settlement proceeds.

Second, treating a Civ.R. 41(A)(1) dismissal as a "final administrative or judicial action" ignores the rationale behind the "second voluntary dismissal" rule. A second voluntary dismissal under Civ. R. 41(A)(1) acts as an adjudication on the merits to prevent prolonged and vexatious litigation by plaintiffs who otherwise could repeatedly dismiss their cases before trial. The "double-dismissal rule" operates as an adjudication on the merits that occurs only if the plaintiff attempts to file a third cause of action. In the typical civil litigation setting, the plaintiff initiates a case asserting a cause of action. He or she has a right to voluntarily dismiss that cause once under Civ.R. 41(A)(1)(a) without prejudice. If refiled, the plaintiff's second dismissal under Civ.R. 41(A)(1)(a) will be deemed to be *with prejudice*, even if contrary language states otherwise. *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, ¶ 10. "The second [unilateral] dismissal is with prejudice under the double-dismissal rule, and *res judicata* applies if the plaintiff files a third complaint asserting the same cause of action." *Id.* (Emphasis added.) See

also, the Court's reference to the 1970 Staff Note to Civ.R. 41(A) that a second notice of dismissal operates "*barring a third suit* on the same claim." Id. at ¶ 18. (Emphasis added.) If the plaintiff files a third time, *res judicata* would apply.

This principle applies to an action arising under R.C. 4123.512. See, for example, *Mays v. Kroger* (1998), 129 Ohio App.3d 159, where the employer successfully obtained summary judgment upon the claimant's filing of a third complaint. But the process has a unique twist when the employer appeals from the commission's final order. For an employer to prevail when the claimant has twice voluntarily dismissed, it must move the trial court to enter a judgment in its favor stating that the plaintiff-claimant does not have the right to participate for the particular medical condition at issue as Dillard has done and now appeals. If truly appropriate, with no signs of the parties misusing the process, the trial court will order that the condition is disallowed, paving the way for the employer to seek *Sysco* reimbursement. See, *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712. The disallowance of the claim negating the claimant's right to participate is not presumed nor implied from the claimant's inaction subsequent to the second voluntary dismissal. Rather, the employer must affirmatively take action to obtain a court entry indicating a reversal of the commission's finding.

Moreover, a settlement *preceding* the second dismissal moots the case and should preclude any motion for a judgment disallowing a condition, or for anything else. Here, Dillard did move the Trumbull County Common Pleas Court in September, 2007, for judgment "requesting that the Court issue an Order that Plaintiff was no longer entitled to participate under the Ohio Workers' Compensation Fund for the L4-5 disc bulge condition" (A. 32). The trial judge overruled Dillard's motion in a January 2, 2008,

Judgment Entry, correctly recognizing that the voluntary dismissal did not amount to an adjudication on the issue of Scott's participation, because the case had been settled:

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.

(A. 33-34)<sup>3</sup>. Once the second dismissal was filed, the court no longer had jurisdiction to consider such a motion. And indeed, the court could have filed an entry at any time after November 2003—when it was first informed of the settlement—dismissing the court case *without* a Civ.R. 41(A) entry.

Moreover, the cases Dillard cites are easily distinguishable. In each of the cases referenced on page 6 of Appellant's brief, express orders reversed the commission's original allowances in the claims. See, *State ex rel. Kokosing Construction Co., Inc. v. Ohio, Bur. of Work. Comp.* 102 Ohio St.3d 429, 2004-Ohio-3664, at ¶¶ 4, 29; *State ex rel. Diversey Corp. v. Bur. of Work. Comp.*, Franklin App. No. 03AP-343, 2004-Ohio-1626, at ¶12; *State ex rel. Interstate Brands Corp. v. Conrad*, Franklin App. No. 03AP-1035, 2004-Ohio-4645, at ¶¶ 12, 13. Thus, in those cases, an administrative body had made definitive findings overturning the prior allowance orders, thus satisfying the condition in R.C. 4123.512 (H) for *Sysco* reimbursement. No similar situation exists here; the commission did not exercise its continuing jurisdiction to reverse its ruling on Scott's additional condition.

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<sup>3</sup> As previously indicated, Dillard has appealed this ruling.

This Court should affirm the appellate decision to ensure that the parties here do not subvert the intent of R.C. 4123.512(H) and 4123.511(J), *Sysco*, and Civ.R. 41(A)(1).

**Appellee Administrator's Proposition of Law No. 2:**

*The terms of a private settlement agreement cannot bind the BWC to a finding that contradicts the final administrative order or judicial determination concerning that claim.*

Dillard cannot use the terms of the settlement agreement filed with the commission to justify *Sysco* reimbursement. This is true for at least two reasons. First, Dillard is procedurally barred because it made no such argument during the administrative proceedings. A party's failure to make a particular argument at the administrative level precludes a *de novo* review of the issue in mandamus. See *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, and *State ex rel. Ohio Civil Service Employees Ass'n, AFSCME, Local 11, AFL-CIO v. State Employment Relations Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363. Dillard made no argument during the original BWC administrative proceedings that the settlement agreement approved by the commission entitled it to *Sysco* reimbursement. On the contrary, Dillard argued to the SIRP "that the settlement agreement [had] no effect on the employer's entitlement to reimbursement" and "that there had been no discussion between the parties to the settlement . . . as to whether surplus fund reimbursement to the employer would result in the creation of an overpayment" (A. 36). Dillard is therefore precluded from raising the argument for the first time in a reviewing court.

Second, even if the argument could be raised, Dillard cannot rely solely on the language in a settlement to which the BWC was not a party to justify raiding a fund that the BWC controls. The BWC is a mandated party in R.C. 4123.512 appeals precisely

because it is the actual or potential stakeholder in every such action. BWC funds are actually or potentially involved and affected by the outcome of every R.C. 4123.512 appeal partly because of the potential for overpayments or the allowance of a disallowed claim.

Dillard ignores that the original “agreed entry” was never approved by the trial court, and that the case was not dismissed with an entry disallowing the disputed condition, but by a voluntary dismissal. Dillard attempts magically to transform language in its settlement into the missing entry. The trial court never held the disputed condition was disallowed, and all parties in the case did not agree to the disallowance.

Looking at it in another way, Dillard is attempting to amend a settlement agreement approved by the commission by pretending that the agreement itself acts as an adjudication of Scott’s entitlement to participate. The language at issue is the final paragraph of the settlement agreement approved by the commission:

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

(S. 3.) (Emphasis added.) Only the two parties to the agreement, the self-insured employer and employee—not the three parties to the common pleas appeal—agreed to disallow the L4-5 condition. Dillard now argues that the agreement itself acts as the entry. But, as explained above, the R.C. 4123.512 appeal ended with a second voluntary dismissal *after* the settlement was final, not an order from the court disallowing the disputed back condition.

In effect, Dillard is attempting to amend the settlement after the fact—after the submitted agreement and its terms had become final by operation of R.C. 4123.65. The commission did not approve the agreement with the understanding that the settlement itself would serve as a final decision for *Sysco* purposes. Dillard and Scott had time to withdraw the agreement after the trial court disapproved the original “agreed entry” and could have modified the agreement to reflect that the case would not end with such an entry. Instead, they let the 30-day period in R.C. 4123.65 run. Thus, neither Dillard nor Scott sought commission approval of an amended settlement agreement.

In short, Dillard wants the Court to sanction appropriation of BWC funds by private parties to a settlement agreement—to which the BWC was not a party—without a required court entry reversing a commission order. Dillard wants to use the BWC self-insured surplus fund as a personal account for its settlements. Nothing in the *Sysco* decision indicates the Court intended to create a self-insured settlement fund. Accordingly, the Court should affirm the Court of Appeals’ denial of the writ.

**CONCLUSION**

The Court should affirm the Court of Appeals' denial of a writ.

Respectfully submitted,  
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## CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Brief of Appellee, Marsha P. Ryan, Administrator, Bureau of Workers' Compensation was served by regular U.S. mail, postage prepaid, on this 15<sup>th</sup> day of April, 2008, to:

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**BWC  
APPENDIX**

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.*

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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 Dillards 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.

No. 06AP-726

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

(REGULAR CALENDAR)

Respondents.

**MAGISTRATE'S DECISION**

Rendered on January 22, 2007

*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.*

**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. Youghiogheny & 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. *Youghioghney*, at 71. The *Youghioghney* 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 *Youghioghenny* to be most helpful. In *Youghioghenny*, 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).

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

PAMELA SCOTT, )  
 )  
Plaintiff, ) CASE NO. 2002 CV 02440  
 )  
vs. ) JUDGE PETER J. KONTOS  
 )  
ADMINISTRATOR, BUREAU OF WORKERS' )  
COMPENSATION, et al., ) JUDGMENT ENTRY  
Defendants. )  
 )  
 )

This matter is before the Court on a Motion for Relief From Judgment and Substitution of Parties filed by Defendant-Appellee Administrator, Bureau of Workers' Compensation (hereinafter, the "Administrator") and a Motion for Judgment filed by Defendant-Appellee Dillard Department Stores (hereinafter, "Dillard"). For the reasons set forth herein, the Court finds both of said motions without merit and therefore overrules the same.

This action is a refiling of a R.C. §4123.512 administrative appeal by self-insured employer Dillard challenging a decision by the Administrator that a Dillard employee, Plaintiff-Appellant Pamela Scott (hereinafter, "Scott"), was entitled to participate in the Ohio Workers' Compensation Fund with respect to a condition (L4-5 disc bulge) arising from a work-related injury. The original notice of appeal from the Administrator's decision was filed by Dillard in November 2000 (Trumbull Common Pleas Case No. 2000 CV 02029), and Scott, as required under the procedure set forth in R.C. 4123.512, then filed her Complaint alleging that she was entitled to participate in the fund. In October 2001, Scott filed a Notice of Voluntary Dismissal under Civ. R. 41(A)(1)(a). Scott refiled her Complaint in October 2002. In November 2003, this Court issued a Docket and Journal Entry stating that counsel had

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 Supplus 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

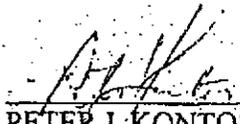
before the Court for decision. This being the case, the Court finds no basis for issuing a judgment stating that Scott is not entitled to participate in the fund.

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.

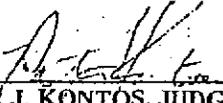
IT IS SO ORDERED.

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

## § 4123.512(B) and § 4123.511(J)

### § 4123.512(B) Appeal to court of common pleas; costs; fees

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.

### § 4123.511(J) Repayment schedule

¶(J) The administrator shall charge the compensation payments made in accordance with division (H) of this section or medical benefits payments made in accordance with division (I) of this section to an employer's experience immediately after the employer has exhausted the employer's administrative appeals as provided in this section or has waived the employer's right to an administrative appeal under division (B) of this section, subject to the adjustment specified in division (H) of section 4123.512 [4123.51.2] of the Revised Code.

**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 (Syseo). 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 Syseo 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.

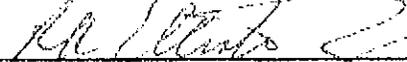
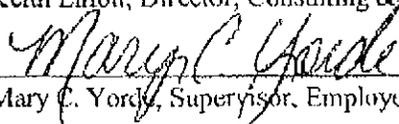
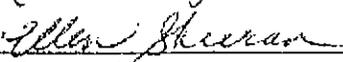
The Panel notes that under the unusual appeal process utilized in workers' compensation cases, the claimant is required to file a complaint in court, even though it is the employer's appeal. Here, the employer appealed IC orders granting an additional allowance into court, but Ms. Scott was required 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. Yordy, Supervisor, Employer Services		
	<input checked="" type="radio"/> Yes	<input type="radio"/> No
Ellen Sheeran (for Kevin Abrams), Attorney, Legal Operations		

ES/lr:law/ellen.higbee@compny

- cc: 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**  
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ORDER

OF THE ADMINISTRATOR OF  
THE OHIO BUREAU OF WORKERS' COMPENSATION

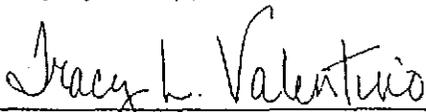
Date of Decision: April 20, 2006

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