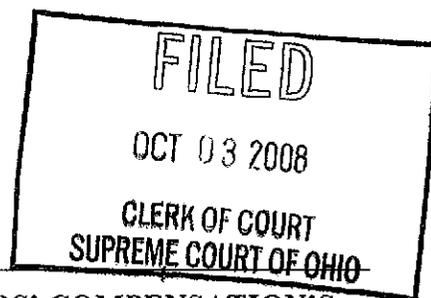


In the
Supreme Court of Ohio

DIAZONIA BENTON,
Plaintiff-Appellant,
and
ADMINISTRATOR, BUREAU OF
WORKERS' COMPENSATION,
Defendant-Appellant,
v.
HAMILTON COUNTY EDUCATIONAL
SERVICE CENTER,
Defendant-Appellee.

Case No. **08-1946**

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District
Court of Appeals
Case No. C070223



**DEFENDANT ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

GREGORY W. BELLMAN (0067740)
MICHAEL L. WEBER (0042331)
Weber, Dickey & Bellman
813 Broadway, First Floor
Cincinnati, Ohio 45202
513-621-2260
513-621-2389 fax
weberbellman@yahoo.com

Counsel for Plaintiff-Appellee,
Daizonia Benton

DAVID J. LAMPE (0072890)
Ennis, Roberts & Fischer Co., LPA
121 West Ninth Street
Cincinnati, Ohio 45202
513-421-2540
513-562-4986 fax
dlampe@erflegal.com

Counsel for Defendant-Appellant,
Hamilton County Educational Service

NANCY H. ROGERS (0002375)
Attorney General of Ohio

BENJAMIN MIZER* (0083089)
Solicitor General

* *Counsel of Record*

ELISE PORTER (0055548)
Assistant Solicitor

JAMES M. CARROLL (0016177)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980
614-466-5087 fax
bmizer@ag.state.oh.us
eport@ag.state.oh.us

Counsel for Defendant-Appellant
Administrator, Bureau of Workers'
Compensation

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST.....	3
A. The Court should grant jurisdiction because the issue in this case involves the most basic of jurisdictional questions in the workers' compensation system: whether a particular claim is appealable under R.C. 4123.512.....	3
B. The Court should grant jurisdiction because the issue in this case divides the appellate districts and requires this Court's guidance.	4
ARGUMENT.....	6
<u>Administrator's Proposition of Law:</u>	
<i>A court of common pleas lacks jurisdiction to hear appeals under R.C. 4123.512 once a workers' compensation claimant's right to participate is established and has not been appealed or discontinued.</i>	6
CONCLUSION	8
CERTIFICATE OF SERVICE.....	unnumbered

INTRODUCTION

This case involves a critical issue in worker's compensation litigation: the ability of a party to seek judicial review of an Industrial Commission ruling under R.C. 4123.512. This Court has narrowly limited appeals under R.C. 4123.512 to cases that ask "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St. 3d 276, 279, 2000-Ohio-73.

The question here is whether *Liposchak* and R.C. 4123.512 allow an employer to appeal a Commission order when the employer does not challenge the initial allowance of a worker's compensation claim, but rather argues that the claim should be barred because the employee has committed fraud. The answer to the question is "no," and, more important, the issue warrants the Court's attention for two reasons.

First, the case involves a basic jurisdictional question in workers' compensation law that could affect many cases throughout Ohio. The appeals court in this case improperly expanded the scope of appellate jurisdiction under R.C. 4123.512 in a way that is not only statutorily unauthorized, but also might greatly expand the number of cases that strain the courts' dockets.

Second, the various appellate districts are divided in answering this question, as the Court of Appeals recognized by certifying a conflict here. (Ex. 3). This Court has never squarely addressed the issue, and therefore this Court's guidance is needed to provide consistent results in these cases.

The Court should accept jurisdiction and decide that an employer's request to discontinue the allowance of a claim is not appealable under R.C. 4123.512.

STATEMENT OF THE CASE AND FACTS

The claimant, Diazonia N. Benton, was injured in a car accident in 2003. The Bureau of Workers' Compensation ("BWC") allowed her workers' compensation claim in 2005, and the Bureau allowed some additional conditions to the claim in 2006. Her employer, the Hamilton County Educational Service Center ("Hamilton"), did not appeal either the initial allowance or the additional conditions under R.C. 4123.512.

Roughly a year after the initial allowance and shortly after the allowance of additional conditions, however, Hamilton filed a motion requesting that the Commission exercise continuing jurisdiction and find that Benton had committed fraud in applying for benefits. The Commission denied Hamilton's motion, finding no evidence that Benton had committed fraud. Hamilton then appealed the denial of the fraud motion under R.C. 4123.512 to the Hamilton County Court of Common Pleas.

Benton and the Bureau moved to dismiss for lack of subject matter jurisdiction, arguing that Hamilton could not appeal under R.C. 4123.512. That provision states that "[t]he claimant or the employer may appeal an order of the industrial commission . . . in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas" R.C. 4123.512(A). Benton and the Bureau argued that this provision is construed narrowly and does not include fraud claims like Hamilton's. The trial court agreed and granted the motions.

Hamilton appealed to the First District, which reversed. The appeals held that a motion for fraud directly asks whether the injury occurred in the course of, or arose out of, the claimant's employment. *Benton v. Hamilton County Educational Service Center*, Appeal No. C-070223, ¶ 16. (Ex. 2 at p. 7)

Benton and the Bureau filed a motion to certify a conflict between this decision and decisions in other District Courts of Appeals, which the appeals court granted. Ex. 3. The Bureau has notified the Court of the certified conflict, and now also urges this Court to accept discretionary jurisdiction.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should accept jurisdiction and decide this issue for two reasons. First, the case involves an issue of basic jurisdiction in workers' compensation law. Second, a clear conflict exists in the various courts of appeals regarding this issue, and indeed, the appeals court here certified a conflict.

A. The Court should grant jurisdiction because the issue in this case involves the most basic of jurisdictional questions in the workers' compensation system: whether a particular claim is appealable under R.C. 4123.512.

The Court should grant jurisdiction in this case because it concerns the most basic, and in many ways the most important, decision a workers' compensation litigant must make: whether he can appeal an order of the Commission to the common pleas court under R.C. 4123.512 (formerly R.C. 4123.519), or whether he must use some other mechanism to challenge the order. R.C. 4123.512 defines the jurisdiction of common pleas courts in appeals from decisions of the Commission. It provides that decisions other than those on extent of disability are appealable:

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

R.C. 4123.512(A). In *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St. 3d 234, 240, the Court held that “[o]nce the right to participation for a specific condition is determined by the commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to R.C. 4123.519.”

The Court has repeatedly emphasized the limited nature of R.C. 4123.512 appeals, and has held that only challenges to one question are appealable: “whether an employee’s injury, disease, or death occurred in the course of and arising out of his or her employment.” *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St. 3d 276, 279, 2000-Ohio-73; *Felty*, 65 Ohio St. 3d at 238. The question here is whether an employer’s later allegation of fraud falls within the *Felty* and *Liposchak* formulations for an appeal under R.C. 4123.512.

This basic question of workers’ compensation jurisdiction warrants the Court’s attention. It affects not only employers, as in this case, but employees who might lose a fraud allegation before the Commission. See, e.g. *Schultz v. Adm’r, Ohio Bur. of Workers’ Comp.*, 148 Ohio App. 3d 310, 2002-Ohio-3622 (claimant’s appeal of Commission finding of fraud).

Moreover, appeals under R.C. 4123.512 have a two-year statute of limitations, so it is vital that a litigant know right away whether a particular question can be appealed. Where, when, and how to appeal a Commission order affects numerous workers’ compensation litigants, and it is important for those litigants that the Court take and resolve the specific issue here.

In addition, the decision below contradicts the basic policy, articulated in *Felty*, that the courts not “review all the decisions of the commission.” 65 Ohio St. 3d at 238. The decision here, together with decisions from the Fifth and Tenth districts, threatens to expand the narrow jurisdiction of the courts of common pleas in the workers’ compensation system, and thereby both undermine the *Felty* non-interventionist approach and potentially overburden the common pleas courts with numerous workers’ compensation cases.

B. The Court should grant jurisdiction because the issue in this case divides the appellate districts and requires this Court’s guidance.

Although this Court has touched on this issue in dicta, it has never decided it. In *Thomas v. Conrad* (1998), 81 Ohio St. 3d 475, the Court addressed a slightly different fact situation. In that

case, after submitting a worker's compensation claim, the claimant was attacked by a dog. The employer objected to her continued participation in the system because, it said, her current complaints were caused by the intervening dog attack, not her industrial injury. The Commission disagreed and continued Thomas's compensation. The Court held that the decision to discontinue participation in this context was a question of extent of disability, rather than right to participate. But the Court went on to comment on the Fifth and Tenth Districts' treatment of the issue here:

Our opinion today does not change the reasoning of the courts of appeals in *Moore v. Trimble* and in *Jones v. Massillon Bd. of Edn.* The employers in *Moore* and *Jones* questioned the claimants' right to continue to participate in the fund, alleging fraud with regard to facts surrounding the respective claimant's initial claims. . . . Here [the employer] did not raise the issue of fraud or question [the employee's] original claim.

81 Ohio St. 3d at 478-79 (emphasis in original). Thus, while commenting on and distinguishing the Fifth and Tenth Districts' interpretation of the issue in dicta, the Court has never directly decided this precise issue.

The lack of guidance on this question from this court has led to conflicting decisions in the courts below and, consequently, confusion for the workers' compensation bar. On one hand, the First, Fifth, and Tenth districts have held that a common pleas court has jurisdiction to hear a R.C. 4123.512 appeal in a decision regarding the continuation or termination of a claimant's right to participate due to fraud. See *Benton v. Hamilton County Educational Service Center*, Appeal No. C-070223 (Ex. 2); *Jones v. Massillon Bd. of Educ.*, 1994 Ohio App. LEXIS 2891 (June 13, 1994), Stark App. No. 94CA0018, unreported; *Moore v. Trimble*, 1993 Ohio App. LEXIS 6204 (Dec. 21, 1993), Franklin App. No. 93APE08-1084, unreported. On the other hand, the Fourth and Eleventh districts have held that a Commission order denying a disallowance due to fraud is not appealable. See *Brown v. Thomas Asphalt Paving Co.*, 11th District No. 2000-P-

0098, 2001-Ohio-8720; *Harper v. Adm'r, Bur. of Workers' Comp.*, 1993 Ohio App. LEXIS 6068 (Dec. 17, 1993), 11th District No. 93-T-4863, unreported; *Schultz v. Adm'r, Ohio Bur. of Workers' Comp.* (4th Dist.), 148 Ohio App. 3d 310, 2002-Ohio-3622. Indeed, the appeals court in this case certified a conflict on the following question:

Whether the refusal by the Industrial Commission of Ohio to exercise continuing jurisdiction to make a finding of fraud is a right to participate issue under R.C. 4123.512?

Entry of September 18, 2008 (Ex. 3). This Court should therefore grant review of this case to resolve the conflict among the appellate districts and provide guidance on this issue.

ARGUMENT

Administrator's Proposition of Law:

A court of common pleas lacks jurisdiction to hear appeals under R.C. 4123.512 once a workers' compensation claimant's right to participate is established and has not been appealed or discontinued.

This Court's decisions establish that a court of common pleas lacks jurisdiction to hear appeals under R.C. 4123.512 once a claimant's right to participate is established and has not been appealed. The statutory underpinning of this precedent is the language of R.C. 4123.512 (formerly R.C. 4123.519), which, as explained above, defines the jurisdiction of common pleas courts in appeals from decisions of the Industrial Commission. This Court has repeatedly underscored the limited nature of R.C. 4123.512 appeals, and has specifically held that only challenges of one question are appealable: "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St. 3d 276, 279, 2000-Ohio-73; *Felty*, 65 Ohio St. 3d at 238.

The Court has emphasized that the limited nature of R.C. 4123.512 appeals guarantees that the workers' compensation system will function largely outside the courts. This is to prevent courts of common pleas from being overburdened by appeals of every administrative decision:

The courts simply cannot review all the decisions of the commission if the commission is to be an effective and independent agency. Unless a narrow reading of R.C. 4123.519 is adhered to, almost every decision of the commission, major or minor, could eventually find its way to the common pleas court.

Felty, 65 Ohio St. 3d at 238. Thus, the Court has consistently held that an appeal under R.C. 4123.512 can only be on the narrow question of right to participate.

Indeed, the Court has recently reiterated the limited scope of R.C. 4123.512 in holding that only a claimant whose right to continue to participate in the fund has been *terminated* may appeal under R.C. 4123.512(D). *White v. Conrad*, 102 Ohio St. 3d 125, 127, 2004-Ohio-2148 (claimant may appeal an order that terminates right to participate). An employer may not appeal when the right to participate is *not* discontinued. *Thomas*, 81 Ohio St. 3d at 478 (employer may not appeal an order not to terminate participation.) Thus, an employer does not have the right to appeal, under R.C. 4123.512, an order not to terminate participation in the fund.

This case is just such a situation. Here, the injured worker's claim was allowed, and never appealed. Only after the appeal time had run did the employer ask the Commission to discontinue participation because the claimant had committed fraud. The Commission decided to continue participation, just as it did in *Thomas*. As in *Thomas*, Hamilton cannot appeal that decision under R.C. 4123.512. If Hamilton is allowed to appeal its fraud allegation under R.C. 4123.512, then any employer could, at any time after the initial claim is allowed, allege fraud (or some other reason for discontinuance) and effectively appeal the original allowance. This approach constitutes an end-run around the limits of appellate jurisdiction under R.C. 4123.512 and this Court's case law.

The Court has consistently held that an appeal under R.C. 4123.512 can only be on the narrow question of right to participate. It follows that, once that decision has been made, any other question arising on that allowed claim—except a decision to discontinue participation—is

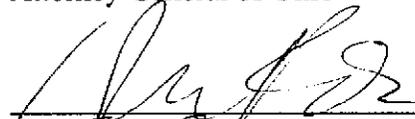
not appealable, but must be challenged by mandamus or declaratory judgment. *Felty*, 65 Ohio St. 3d at 237.

CONCLUSION

For the above reasons, the Administrator urges the Court to grant jurisdiction in this case, and overrule the court below.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio



BENJAMIN MIZER* (0083089)
Solicitor General

** Counsel of Record*

ELISE PORTER (0055548)

Assistant Solicitor

JAMES M. CARROLL (0016177)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bmizer@ag.state.oh.us

eporter@ag.state.oh.us

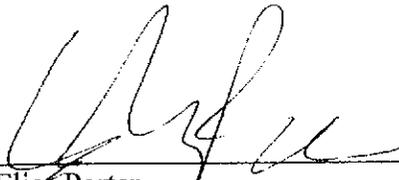
Counsel for Defendant-Appellant
Administrator, Bureau of Workers'
Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendant Administrator, Bureau of Workers' Compensation's Memorandum in Support of Jurisdiction was served by U.S. mail this 3rd day of October, 2008 upon the following counsel:

Gregory W. Bellman, Esq.
Michael L. Weber, Esq.
Weber, Dickey & Bellman
813 Broadway, First Floor
Cincinnati, OH 45202

David J. Lampe, Esq.
Ennis, Roberts & Fischer Co., LPA
121 West Ninth Street
Cincinnati, OH 45202



Elise Porter

EXHIBIT 1

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



D79829889



DIAZONIA BENTON,	:	APPEAL NO. C-070223
Plaintiff-Appellee,	:	TRIAL NO. A-0609684
vs.	:	JUDGMENT ENTRY.
HAMILTON COUNTY EDUCATIONAL	:	
SERVICE CENTER,	:	
Defendant-Appellant,	:	
and	:	
ADMINISTRATOR, OHIO BUREAU	:	
OF WORKERS' COMPENSATION,	:	
Defendant-Appellee.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on August 22, 2008 per Order of the Court.

By: _____

Presiding Judge

EXHIBIT 2

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

DIAZONIA BENTON,	:	APPEAL NO. C-070223
Plaintiff-Appellee,	:	TRIAL NO. A-0609684
vs.	:	<i>DECISION.</i>
HAMILTON COUNTY EDUCATIONAL SERVICE CENTER,	:	
Defendant-Appellant,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
and	:	AUG 22 2008
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION,	:	COURT OF APPEALS
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 22, 2008

Gregory W. Bellman, Sr., and Webey, Dickey, & Bellman, for Plaintiff-Appellee,

David Lampe and Ennis Roberts & Fischer, L.P.A., for Defendant-Appellant,

*Marc Dann, Attorney General of Ohio, and James Carroll, Assistant Attorney
General, for Defendant-Appellee.*

Please note: This case has been removed from the accelerated calendar.

OHIO FIRST DISTRICT COURT OF APPEALS

SUNDERMANN, Judge.

{¶1} Defendant-appellant Hamilton County Educational Service Center (“HCEC”) appeals from the trial court’s entry dismissing its administrative appeal pursuant to R.C. 4123.512 for lack of subject-matter jurisdiction.

{¶2} HCEC’s appeal to the common pleas court stemmed from injuries plaintiff-appellee Diazonia Benton sustained on March 19, 2003, in a motor vehicle accident. On February 18, 2005, Benton filed an application for workers’ compensation benefits in which she claimed that her injuries had occurred in the scope of her employment with HCEC. On March 9, 2005, Benton’s workers’ compensation claim was allowed for neck sprain, lumbar sprain, and a contusion to her left elbow. HCEC received the order, but did not appeal the allowance of Benton’s claim.

{¶3} On April 27, 2005, Benton filed a C-86 motion requesting that her workers’ compensation claim be amended to allow the additional conditions of radiculopathy and a herniated disc at L5-S1. HCEC elected to have Benton undergo an independent medical examination by Dr. Roger Meyer, who determined that Benton’s other conditions were causally related to her original industrial injury. As a result, both a district hearing officer (“DHO”) and a staff hearing officer (“SHO”) allowed Benton’s workers’ compensation claim for these additional conditions.

{¶4} HCEC did not appeal the SHO’s allowance of these additional conditions. Instead, on February 3, 2006, it filed a C-86 motion requesting that the Industrial Commission exercise continuing jurisdiction over Benton’s claim under R.C. 4123.52 and make a finding that Benton had committed fraud by filing a claim

OHIO FIRST DISTRICT COURT OF APPEALS

for workers' compensation benefits for injuries that had not occurred in the course or scope of her employment with HCESC. HCESC sought an order from the Industrial Commission terminating Benton's right to continued participation in the workers' compensation fund and reimbursing it for workers' compensation benefits wrongfully paid to Benton.

{¶5} A DHO denied HCESC's motion. A SHO affirmed the DHO's ruling, finding no evidence that Benton had misrepresented her account of the March 2003 accident. The Industrial Commission declined to hear HCESC's appeal. HCESC then filed a timely notice of appeal with the common pleas court pursuant to R.C. 4123.512(A). Benton filed a complaint as statutorily required. She then moved to dismiss HCESC's appeal on the basis that the trial court lacked subject-matter jurisdiction. The trial court granted Benton's motion to dismiss. This appeal followed.

{¶6} In its sole assignment of error, HCESC argues the trial court erred in dismissing its appeal from the Industrial Commission for lack of subject-matter jurisdiction.

{¶7} R.C. 4123.512(A) provides that a "claimant * * * may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in an injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted * * *." The Ohio Supreme Court has interpreted R.C. 4123.512 narrowly to allow claimants and employers to appeal only those Industrial Commission orders that involve a claimant's right to participate or to continue to participate in the

OHIO FIRST DISTRICT COURT OF APPEALS

workers' compensation fund.¹ The supreme court has further held that the only right-to-participate question that is subject to judicial review is "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment."² Determinations as to the extent of a claimant's disability, on the other hand, are not appealable to the common pleas court and must be challenged in an action for mandamus.³

{¶8} HCESC contends that the trial court had jurisdiction to entertain its appeal under R.C. 4123.512, because it had alleged that Benton had committed fraud and had directly sought the termination of her right to continue participating in the workers' compensation fund. Benton and the Administrator argue, on the other hand, that the Industrial Commission's refusal to exercise continuing jurisdiction to make a fraud determination was not a right-to-participate issue under R.C. 4123.512, and was, therefore, outside the jurisdiction of the common pleas court.

{¶9} Although this court has not specifically addressed this issue, we recognize that there is a split of authority among appellate districts regarding whether an employer's allegation of fraud is appealable under R.C. 4123.512. HCESC relies on cases from the Fifth and Tenth Appellate Districts that hold that such issues are appealable, while Benton and the Administrator rely primarily upon

¹ *White v. Conrad*, 102 Ohio St.3d 125, 2004-Ohio-2148, 807 N.E.2d 327, at ¶10-13, citing *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 239, 602 N.E.2d 1141; see, also, *Lawson v. Robert Lee Brown, Inc.* (Mar. 20, 1998), 1st Dist. Nos. C-970109 and C-970132.

² *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 279, 2000-Ohio-73, 737 N.E.2d 519; *Felty*, supra, at paragraph two of the syllabus; *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175, paragraph one of the syllabus; *State ex rel. Evans v. Indus. Comm.*, 64 Ohio St.3d 236, 1992-Ohio-8, 594 N.E.2d 609.

³ *Id.*; *Thomas v. Conrad* (1998), 81 Ohio St.3d 475, 477, 692 N.E.2d 205; *Felty*, supra, at paragraph two of the syllabus.

OHIO FIRST DISTRICT COURT OF APPEALS

the reasoning in a Second Appellate District case and an Eleventh Appellate District case, which hold that they are not.

{¶10} In *Jones v. Massillon Bd. of Edn.*, the Fifth Appellate District held that the court of common pleas had jurisdiction over Industrial Commission decisions regarding the termination of a claimant's right to participate due to fraud in establishing the claim.⁴ In that case, the employer had certified an employee's claim for a knee injury. Five months later, however, the employer moved to disallow the claim on the basis of newly discovered evidence that the employee's knee injury had not occurred within the course and scope of his employment, but was actually the result of a nonoccupational, recreational, sports injury that he had sustained two years earlier. The Fifth Appellate District held that because the employer's motion had sought to discontinue the employee's "right to participate in the State Insurance Fund," the employer could appeal the commission's decision refusing to disallow the claim.

{¶11} In *Moore v. Trimble*, the Tenth Appellate District held that the common pleas court had jurisdiction to entertain an employer's appeal from the denial of its C-86 motion requesting the vacation of an employee's claim based upon newly discovered evidence that the employee had been injured at home, lifting a motorcycle, and not at the workplace.⁵ The court held that because the employer had attempted to terminate the employee's right to participate based upon the employee's alleged fraud, the court had jurisdiction to entertain the employer's appeal under R.C. 4123.519.

⁴ (June 13, 1994), 5th Dist. No. 94CA0018.

⁵ (Dec. 21, 1993), 10th Dist. No. 93APE08-1084.

{¶12} In *Thomas v. Conrad*, the Second Appellate District rejected an employer's argument that the trial court had erred in dismissing its appeal under R.C. 4123.512 because it concerned "whether [an employee] had a right to continue participating in the workers' compensation system in light of 'intervening' dog attack injuries she [had] sustained."⁶ In concluding that the employer's motion and the Industrial Commission's ruling were not appealable because they had involved the extent of the employee's disability, the court analyzed and criticized the holdings of the Fifth and Tenth Appellate Districts in *Jones* and *Moore*. The Second Appellate District then certified the case to the Ohio Supreme Court for review.

{¶13} Although the Ohio Supreme Court ultimately affirmed the Second Appellate District's decision in *Thomas v. Conrad*, it rejected the court's analysis of *Jones* and *Moore*.⁷ The supreme court held that the employer in *Thomas*, unlike the employers in *Jones* and *Moore*, had not raised the issue of fraud or questioned Thomas's original claim for benefits.⁸ Rather, the employer's motion had "involved [an intervening] dog attack and its effect on Thomas's allowed conditions."⁹ Thus, the employer had only raised a question as to the extent of Thomas's disability.¹⁰

{¶14} The supreme court went on to state that its opinion did "not change the reasoning of the courts of appeal in *Moore v. Trimble* and in *Jones v. Massillon Board of Education*" because the "employers in *Moore* and *Jones* [had] questioned the claimant's right to continue to participate in the fund, alleging fraud with regard

⁶ (Feb. 14, 1997), 2nd Dist. Nos. 15873 and 15898.

⁷ 81 Ohio St.3d 475, 692 N.E.2d 205.

⁸ Id. at 478-479.

⁹ Id.

¹⁰ Id.

to the facts surrounding the respective claimants' initial claims and "[had] challenged each claimant's right to participate and tried to terminate that right."¹¹

{¶15} In *Brown v. Thomas Asphalt Paving Co.*,¹² the Eleventh Appellate District held, in a two-to-one decision, that the common pleas court lacked subject-matter jurisdiction under R.C. 4123.512 to entertain an employer's appeal on allegations of fraud. The trial court had relied on language in *Thomas v. Conrad* to permit an employer's appeal and a subsequent trial on the issue of the employee's fraud. A majority of the appellate court, however, concluded that the supreme court's language explaining *Moore* and *Jones* was merely dicta and was thus not binding on it. The majority then relied on a case it had earlier decided, *Harper v. Administrator, Bureau of Workers' Compensation*,¹³ to conclude that the common pleas court lacked jurisdiction.

{¶16} After carefully reviewing these conflicting authorities and the parties' briefs, we are persuaded that the Fifth and Tenth Appellate Districts' approach is the better-reasoned position. In those cases, the employers made a factually similar argument to the one that HCESC makes here, that the claimant was not injured within the course and scope of his employment. Furthermore, the *Harper* decision, upon which the Eleventh Appellate District relied in the *Brown* case, is factually distinguishable in that the employer in *Harper* had argued that the employee had committed fraud by failing to disclose an extant shoulder condition.

{¶17} While we recognize that the supreme court has not squarely addressed this issue, we believe that the rationale and dicta in the *Thomas* case

¹¹ Id.

¹² 11th Dist. No. 2000-P-0098, 2001-Ohio-8720.

¹³ (Dec. 17, 1993), 11th Dist. No. 93-T-4863.

OHIO FIRST DISTRICT COURT OF APPEALS

supports the conclusion that HCESC's motion for fraud directly questioned whether Benton's injury had occurred in the course of and had arisen out of her employment with HCESC. As the Ohio Supreme Court stated in *State ex. rel. Liposchak v. Indus. Comm.*, "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment" is a right-to-participate issue that is appealable to the common pleas court.¹⁴

{¶18} Because HCESC's motion in this case related directly to Benton's right to continue participating in the workers' compensation fund for the injuries she had sustained in the March 19, 2003, automobile accident, it was proper for HCESC to have appealed the Industrial Commission's decision to the trial court under R.C. 4123.512. We, therefore, reverse the judgment of the trial court and remand this case for further proceedings consistent with this decision and the law.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

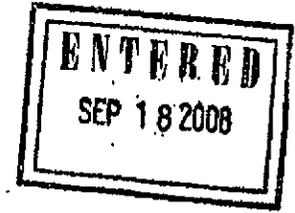
Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁴ *Liposchak*, supra, at 279; see, also, *Felty*, supra, at paragraph two of the syllabus; *Afrates*, supra, at paragraph one of the syllabus; *State ex rel Evans*, supra, at paragraph one of the syllabus; see, also, *State ex rel. Forest v. Anchor Hocking Consumer Glass*, 10th Dist. No. 03AP-190, 2003-Ohio-6077, at ¶6 (stating that "[i]n an appeal pursuant to R.C. 4123.512, the issues to be addressed by the trial court would be those relating to the presence of a medical condition and whether or not it was a work-related injury").

EXHIBIT 3

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



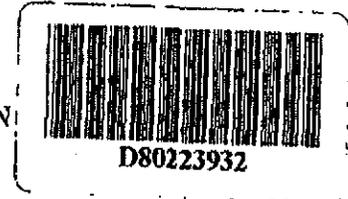
DIAZONIA BENTON,

APPEAL NO. C-070223

Appellee,

vs.

ENTRY GRANTING MOTION
TO CERTIFY CONFLICT



HAMILTON COUNTY EDUCATION
SERVICE CENTER,

Appellant,

and

ADMINISTRATOR, BUREAU OF
WORKERS' COMPENSATION,

Appellee.

This cause came on to be considered upon the separate motions of the appellees to certify a conflict, and upon the memorandum in opposition.

The Court finds that the motion to certify is well taken and is granted.

This appeal is certified to the Ohio Supreme Court as being in conflict with *Thomas v. Conrad* (Feb.14, 1997) Second District Nos. 15873 and 15898, and *Brown v. Thomas Asphalt Paving Co.*, Eleventh District, No. 2000-P-0098, 2001-Ohio-8720

The certified issue is as follows:

Whether the refusal by the Industrial Commission of Ohio to exercise continuing jurisdiction to make a finding of fraud is a right to participate issue under R.C. 4123.512?

To The Clerk:

Enter upon the Journal of the Court on SEP 18 2008 per order of the Court.

By: _____


Presiding Judge

(Copies sent to all counsel)