

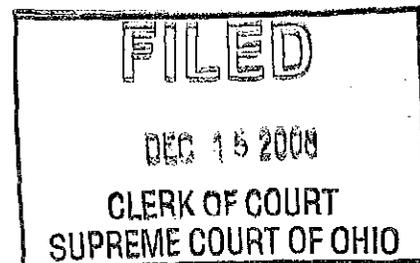
IN THE SUPREME COURT OF OHIO

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

MOTION OF APPELLANT, KAREN S. JORDAN, FOR RECONSIDERATION
OF THE MERIT DECISION FILED DECEMBER 3, 2008

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

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



MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Introduction

Appellant, Karen S. Jordan (Mrs. Jordan), hereby requests that this Court reconsider its per curium decision filed December 3, 2008. Mrs. Jordan files this motion pursuant to Supreme Court Rule of Practice IX, Section 2.

Reconsideration is appropriate in this case because this Court's decision:

- 1) is contrary to R.C. 1.48 and this Court's own precedent regarding the legal test to be employed in a case involving a claim of improper retroactive application of a law; and
- 2) is contrary to law and common sense with regard to the issue of "vested rights".

Facts

The facts of this case are simple. Mrs. Jordan sustained a severe injury to her right knee in 1984. Since that time, her workers' compensation claim has been allowed for numerous conditions and she has undergone multiple surgeries. Ultimately, she was awarded permanent total disability.

At the time of Mrs. Jordan's injury, Ohio law did not limit the amount that the workers' compensation system paid for brand name medications. In 1997, Ohio Adm.Code 4123-6-21 was promulgated. Under that rule, the system would pay the cost of a brand name drug only if prior authorization were obtained for such payment. Otherwise, payment was limited to the cost of the generic equivalent of the brand name drug. It is undisputed that Mrs. Jordan obtained prior authorization for her brand name drugs in August of 2005. In fact, on page one of its decision, this Court noted that the

issue before it is whether Mrs. Jordan should “*continue* to receive full payment for brand name drugs” (emphasis added).

Effective October of 2005, Ohio Adm.Code 4123-6-21 was amended. Under the new version of the rule, payment for brand name drugs was eliminated from the system without exception. It is clear that had it not been for this change in the law, the cost of Mrs. Jordan’s brand name drugs would have remained covered under her claim.

Argument

1. **This Court erred by failing to apply R.C. 1.48 and abandoning its long-standing commitment to deciding cases on statutory before constitutional grounds.**

In its decision, this Court correctly noted the history of Ohio Adm.Code 4123-6-21, as well as the fact that Mrs. Jordan obtained prior authorization for the cost of brand name medications in August of 2005, prior to the October 2005 effective date of the amendment that prohibited such payments. However, without even mentioning R.C. 1.48, the statute that controls such issues, this Court held that no improper retroactive application of the law occurred because Mrs. Jordan did not have a “vested right” to payment for brand name drugs.

In a line of precedent dating back to 1986, this Court has repeatedly and consistently held that the issue of whether a law may be applied retroactively does not arise unless the law itself specifies that it may so apply. See *Kinser v. Coleman* (1986), 28 Ohio St.3d 259, 262. On its face, R.C. 1.48 establishes a threshold analysis which must be utilized prior to the issue of whether the case involves “vested” or substantive rights under Section 28, Art. II of the Ohio Constitution. See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, paragraph one of the syllabus. In every

retroactive law case that it has decided since 1986, this Court has applied R.C. 1.48 prior to engaging in a discussion of vested or substantive rights. See, e.g., *Warren Cty. Bd. of Commrs. v. Lebanon* (1989), 43 Ohio St.3d 188, 189-190; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350; *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258; *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363.

For reasons that are unclear, in the instant case, this Court broke with two decades of precedent and disregarded R.C. 1.48. In its decision, this Court simply jumped to the issue of vested rights and did not even cite R.C. 1.48. This omission warrants reconsideration.

As this Court has repeatedly noted, R.C. 1.48 establishes a legislative presumption of prospective application for all laws. Unless the law explicitly states that it can be applied retroactively, then it is erroneous, as a matter of law, to address the constitutional issue of whether the law affects vested/substantive rights. See *Warren Cty.*, 43 Ohio St.3d at 189-190; *Romans*, at ¶ 12-14. In this case, this Court did not even mention the threshold issue of whether the amendment to Ohio Adm.Code 4123-6-21 states that it is to be applied retroactively. By side-stepping R.C. 1.48, this Court violated its duty to decide cases on statutory grounds rather than constitutional grounds. Reconsideration is necessary to correct this error.

Paragraph eight of this Court's decision in this case proves that this Court misapplied its own retroactive application test. Therein, this Court cited *Bielat* at page 357 and *Van Fossen* at page 106 for the proposition that unlawful retroactivity cannot be claimed unless a vested right is involved. However, any reasonable reading of those

cases shows that this Court had already conducted the R.C. 1.48 test before turning to the vested rights/constitutional issues on pages 357 and 106, respectively.

In *Bielat*, this Court first applied R.C. 1.48 and found that the laws in question clearly stated that they were meant to be applied retroactively. Only then, at page 357, did this Court discuss the issue of vested rights as part of the constitutional inquiry.

Similarly, in *Van Fossen*, on page 106, this Court first found that the law in question passed the R.C. 1.48 test. Only then, as part of constitutional inquiry, did this Court discuss vested rights and provide the definition of retroactive law that this Court quoted in the instant case.

In order for stare decisis to have meaning, this Court must follow controlling precedent. In Mrs. Jordan's case, this Court failed to cite, much less apply, R.C. 1.48. Moreover, the portions of *Bielat* and *Van Fossen* cited by this Court apply to the constitutional inquiry which this Court reached only after first applying R.C. 1.48. This Court has violated its own retroactive law test. It should reconsider its decision and correct the error.

2. **This Court erred by finding that payment for medications in a workers' compensation claim is not a vested right.**

This Court phrased the issue in this case as whether Mrs. Jordan is entitled "to continue to receive payment for brand name drugs" (emphasis supplied). In order for something to continue, it must have been established or vested previously. Indeed, in paragraph twelve of its decision, this Court conceded that Mrs. Jordan was authorized for full payment of brand name drugs in August of 2005 under former Ohio Adm.Code 4123-6-21.

Payment for brand name medications would still be covered under Mrs. Jordan's claim had it not been for the October 2005 amendment to Ohio Adm.Code 4123-6-21. How is it possible that she did not obtain a vested right at the time of such authorization? Prior to October of 2005, payment for brand name medications was covered. After October 2005, such payments were not covered. How can this not be a retroactive application of the law? This Court's finding that Mrs. Jordan did not vest her right to payment for brand name drugs is inconsistent with the facts of this case as well as this Court's prior pronouncement that payment for medical treatment in a workers' compensation claim is a substantive right. See *Indus. Comm. v. Kamrath* (1928), 118 Ohio St. 1, paragraphs two and three of the syllabus, 3-4; *State ex rel. Jeffrey v. Indus. Comm.* (1955), 164 Ohio St. 356, 357.

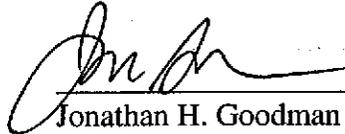
This Court found no vested right because the Industrial Commission order from August of 2005 stated that payment for brand name medications was "subject to BWC rules and regulations". With due respect, it is unclear how a generic reference to BWC rules and regulations changed the August 2005 authorization into a mere expectation. All workers' compensation decisions are "subject to BWC rules and regulations." Does that fact mean that any benefit or compensation that is granted is a mere expectation simply because the law might change at some undetermined time in the future? This Court's decision is dangerous because it can now be argued that any change in the law eliminates previously established rights and turns them into mere expectations. Such an outcome is the very reason that there are both statutory and constitutional protections in place against retroactive application of laws. Reconsideration is warranted in this case.

Conclusion

This Court's decision is contrary to two decades of precedent. R.C. 1.48 is the paramount and initial issue that must be addressed in a retroactive law case. This Court did not even cite R.C. 1.48. Because the October 2005 amendment to Ohio Adm.Code 4123-6-21 did not specify that it was to be applied retroactively, it was error to apply it to Mrs. Jordan's previously established right to payment for brand name medications.

Mrs. Jordan is entitled to protection from improperly retroactive application of the law. She, like all Ohioans, is entitled to consistent application of this Court's prior decisions. Please reconsider the decision rendered on December 3, 2008 in order to protect these interests.

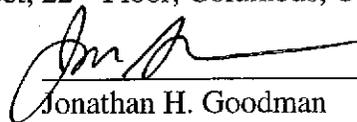
Respectfully submitted,



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

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Motion for Reconsideration was served upon the following by regular U.S. Mail on this 15th day of December, 2008: Stephen D. Plymale, Esq., Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215.



Jonathan H. Goodman (0070978)