

IN THE  
SUPREME COURT OF OHIO

ROBERT THORTON, ) Supreme Court Case No. 2007-1588  
Appellee, )  
)  
-vs- ) ON APPEAL FROM THE  
) GEAUGA COUNTY COURT  
MONTVILLE PLASTICS & RUBBER, INC., ) OF APPEALS, ELEVENTH APPELLATE  
Appellant, ) DISTRICT  
)  
and )  
)  
ADMINISTRATOR OF THE BUREAU )  
OF WORKERS' COMPENSATION, ) Court of Appeals Case No. 2006-G-2744  
Appellee. )

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MOTION FOR RECONSIDERATION OF APPELLANT  
MONTVILLE PLASTICS & RUBBER, INC.

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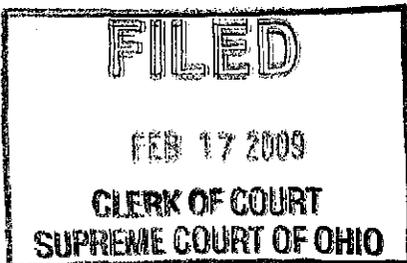
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**MOTION FOR RECONSIDERATION OF APPELLANT  
MONTVILLE PLASTICS & RUBBER, INC.**

Pursuant to Supreme Court Practice Rule XI, Section 2(B)(4), appellant Montville Plastics & Rubber, Inc. (“Montville”), respectfully requests that this Honorable Court reconsider both the merit and interrelated jurisdictional determinations pronounced in its February 5, 2009, opinion and decision in this case and, upon so reconsidering its said February 5 opinion and decision, revise and amend its original holdings therein by determining that:

(A) because the “right” of a claimant-appellee in an employer’s appeal under R.C. §4123.512 to unilaterally dismiss his complaint without prejudice pursuant to Civ. R. 41(A)(1)(a) is *not* “substantive,” but solely “procedural” and “remedial,” in nature, neither Section 28, Article II, of the Constitution of Ohio, nor any other provision of Ohio law, prohibits the so-called “employer’s consent” amendment to R.C. §4123.512(D) from being applied to workers’ compensation cases which were pending upon appeal to the court of common pleas on August 25, 2006, excepting only such cases wherein –

(i) the date of injury in the underlying claim was November 2, 1959,

or earlier, or

(ii) such appeal to the court of common pleas was instituted in said

court on or before January 1, 1986;

(B) in division (II) of R.C. §4123.512, as amended by Am. Sub. S.B. 7 (2006), the General Assembly enacted two provisions which specified those claims and those appeals to the court of common pleas to which the provisions of R.C. §4123.512, as

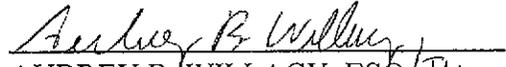
thereby amended, would, and would not, apply – which applicability provisions, respectively, direct (i) that R.C. §4123.512(D)'s “employer’s consent” requirement be applied to all claims filed after November 2, 1959, and (ii) restricted the application of *pre*-amendment provisions to “Any action pending in common pleas court or any other court on January 1, 1986”; and

(C) because R.C. §4123.512(D)'s “employer’s consent” requirement became applicable to appellee-Thorton’s case on August 25, 2006, the trial court’s October 31, 2006, judgment entry approving the “without prejudice” proviso of his October 19, 2006, notice of dismissal, was a final, appealable order within the meaning of R.C. §2505.02.

In support of its foregoing motion Montville respectfully submits that reconsideration and correction of this Court’s February 5, 2009, decision and opinion are warranted because obvious errors contained therein cause that decision and opinion to fall within the intendment of the reconsideration authorization set forth in S.Ct. Prac.R. XI. A memorandum setting forth the bases for Montville’s submissions in this regard is hereto annexed and, by this reference, hereby incorporated herein.

In further support of its foregoing motion Montville notes that this motion has been timely filed, as February 15, 2009 – the tenth day next-following February 5, 2009 – was a Sunday, and Monday, February 16, 2009, was a legal holiday.

Respectfully submitted,

  
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## MEMORANDUM

### I. Introduction

The fundament of this Court's reconsideration jurisprudence is that reconsideration will be granted – and the original decision in a cause will be set aside – when it is shown that the original decision was premised upon this Court's *misclassification of an outcome determinative fact*, thereby producing another of those “decisions which, upon reflection, are deemed to have been made in error.” See, *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, at ¶¶5 and 17 to 21} (misclassification of the time period, March 19, 1992 to June 1995, as being a period for which compensation was due, when it was not); *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, at 541 and 543-545 (misclassification of city council's function of approving a site plan as being legislative, as opposed to administrative); *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, at 383-385 (misclassification of the provisions of Section 9, Article XVIII, Ohio Const., as being “in irreconcilable conflict with” the provisions of Section 14, Article XVIII, Ohio Const.); *State ex rel. Eaton Corp. v. Lancaster* (1989), 44 Ohio St.3d 106. (Misclassification of (i) the legal basis for Eaton's claim for reimbursement of monies unlawfully taken as being governed solely by an Ohio statute, instead of by Fourteenth Amendment Due Process,<sup>1</sup> and (ii) misconstruction of former R.C. §4123.515 as being “limited to those situations such as where the entire claim is disallowed subsequent to a payment of compensation.”) 40 Ohio

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<sup>1</sup> In order to comprehend why reconsideration was granted in *Eaton*, one must carefully read Justice Douglas' dissenting opinion in the original report upon that case. See, 40 Ohio St.3d 404 (1988), at 416 to 417 (section denominated “IV.”) His reference to Due Process was phrased in terms of the majority's original, no reimbursement stance being “contrary to the very basic tenets of law.”

St.3d 404 at 410-411.<sup>2</sup>

Here, as Justices O'Donnell's and Lundberg Stratton's dissenting opinion points out, the majority's February 5 opinion and decision falls into that "*misclassification of an outcome determinative fact*" category in two key respects. *First*, the majority misclassified the nature of the specific "right" in issue – the "right" of a workers' compensation claimant-appellee in a R.C. §4123.512 appeal to voluntarily dismiss his complaint without prejudice – as being a "substantive" right, as opposed to merely being a "procedural" or "remedial" right. See, 2009-Ohio-360 at {¶32}:

\*\*\* the provision of R.C. 4123.512(D) prohibiting the claimant from dismissing the employer's appeal by dismissing the complaint without the employer's consent is procedural, affecting a remedial, rather than a substantive right. It does not affect any right Thorton may have to collect workers' compensation benefits, but changes the procedures available to enforce that right.

*Second*, as the dissenting justices further pointed out in {¶¶27 to 31} of the report, the majority also misclassified R.C. §4123.512 as being a statute which did not contain any special *applicability date* provisions, when it in fact did.

As is demonstrated below, the ultimate result of those two errors by the majority in their classifications of the key facts in this case was a majority decision produced through demonstrably erroneous legal reasoning which, necessarily, yielded an equally erroneous result. Accordingly, correction thereof upon reconsideration is both warranted and required.

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<sup>2</sup> \*\*\*\* Surplus Fund reimbursement is limited to those situations such as where the entire claim is disallowed subsequent to a payment of compensation. This does not include Surplus Fund reimbursement *every time* compensation is awarded and the award is then subsequently overturned." [Emphasis sic.]

## II. Law and Analysis

### A. The Majority's Misclassification of the "Right" in Issue

As the dissenting justices pointed out in {¶26} of the report, the majority's misclassification of the "right" in issue was done sub silentio; inspection of the majority's February 5 opinion and decision disclosing that they neither engaged in nor even *claimed* to have engaged in the:

two-part test to evaluate whether statutes may be applied retroactively. First, the court determines as a threshold matter whether the statute is expressly made retroactive. *Consilio* at ¶ 10, citing *LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶ 14, citing *Van Fossen*, 36 Ohio St.3d 100, 522 N.E.2d 489, at paragraphs one and two of the syllabus. Then, **if the statute is clearly retroactive, the court determines whether it is substantive or remedial in nature.** [Emphasis added.]

As the dissenting justices additionally noted, the *immediate* result of the majority's having leapfrogged over the second aspect of the well-established, two-part test – viz., without first analytically assessing whether the "right" which the "employer's consent" amendment addressed was substantive or remedial – was their *initially* coming to the erroneous conclusion that the "right" which the "employer's consent" provision affected was substantive, when it was not. See, *again*, 2009-Ohio-360 at {¶32}:

**\*\*\* the provision of R.C. 4123.512(D) prohibiting the claimant from dismissing the employer's appeal by dismissing the complaint without the employer's consent is procedural, affecting a remedial, rather than a substantive right. It does not affect any right Thorton may have to collect workers' compensation benefits, but changes the procedures available to enforce that right.** [Emphasis added.]

Because nothing in the majority's opinion addressed that second step of the two-part test, Montville's submission that the majority erroneously *misclassified* the nature of the "right" which the "employer's consent" provision affected as being "substantive" rests upon what the majority did

immediately after they skipped over that aspect of the two-part test – i.e., the pronouncement of their determination that the “employer’s consent” provision could not apply to Thorton’s October 19, 2006, notice of dismissal because: “**Thorton’s claim arose before S.B. 7 became effective** on August 25, 2006[.]” 2009-Ohio-360 at ¶20. [Emphasis added.]

Notably, the dissenting justices’ expressly stated and explained conclusion that R.C. §4123.512(D)’s “employer’s consent” provision was purely remedial and procedural in nature is congruent with that which – at least until the majority’s subject February 5, 2009, decision in this case was released – had been the established and incontrovertible law of this State for the last *one hundred thirty-five years*; i.e., the fundamental point that: “**There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing, only, that in each is preserved the essential elements of protection.**” *Backus v. Fort St. Union Depot Co.* (1898), 169 U.S. 557, 570, 18 S.Ct. 445. Accord, *Slocum v. Mutual Bldg. & Inv. Co.* (1935), 130 Ohio St. 312, 317. Cf., *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 604-606;<sup>3</sup> *Smith v. New York Central R. Co.* (1930), 122 Ohio St. 45, 49-50 [quoting *Terry v. Anderson* (1877), 95 U.S. 628, at 633];<sup>4</sup> *State v. Barlow* (1904), 70 Ohio St. 363, 374-375;<sup>5</sup> *Rairden v. Holden* (1864),

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““The legislature has complete control over the remedies afforded to parties in the courts of Ohio, and it is a fundamental principle of law that an individual may not acquire a vested right in a remedy or any part of it, that is, there is no right in a particular remedy. 10 Ohio Jurisprudence (2d) 616, Section 564. A party has no vested right in the forms of administering justice that precludes the Legislature from altering or modifying them and better adapting them to effect their end and objects.””

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“The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no

(continued...)

15 Ohio St. 207, 211.<sup>6</sup>

As this Court painstakingly explained in *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶9:

¶9 It is well-settled law that statutes are presumed to apply prospectively unless expressly declared to be retroactive. R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489. It is also settled that the General Assembly does not possess an absolute right to adopt retroactive statutes. Section 28, **Article II of the Ohio Constitution prohibits the retroactive impairment of vested substantive rights.** See *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶ 13. **However, the General Assembly may make retroactive any legislation that is merely remedial in nature.** See *State ex rel. Slaughter v.*

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<sup>4</sup>(...continued)

more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and **as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.**" [Emphasis added.]

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[A]s to the matter of remedy it cannot be said that the mere beginning of a suit gives the party a vested right in any special form of remedy or entitles him to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. **The rule is well settled by repeated adjudications that no one has a vested interest in any particular remedy for the enforcement of a right. The remedies which one legislature may have prescribed a subsequent legislature may modify provided a substantial and adequate remedy is left.** [Emphasis added.]

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The statute is purely remedial in its effect, operates on pre-existing legal rights, obligations, duties, and interests, and by avoiding the necessity for multiplicity of suits and the accumulation of costs, will tend to promote the interests of all parties. Laws of this character are not within the mischiefs against which the prohibitory clause of our constitution was intended to guard, and therefore not within a just construction of its terms.

*Indus. Comm.* (1937), 132 Ohio St. 537, 542, 8 O.O. 531, 9 N.E.2d 505. [Emphasis added.]

Here, since appellee-Thorton's supposed "right" to unilaterally dismiss his complaint without prejudice was neither a "*vested*" right prior to August 25, 2006, nor a "*substantive*" right protected by Section 28, Article II, Ohio Const., prior to August 25, 2006, it necessarily follows that when our General Assembly enacted the "employer's consent" provision that body was free to impose conditions and restrictions upon appellee-Thorton's *future* exercise of that procedural "right" and to make such conditions and restrictions apply both to workers' compensation *cases pending in court* on and after the effective date of such amendment and, as well, to workers' compensation *claims* then pending before the administrative agencies and/or the courts on and after that effective date.<sup>7</sup>

Thus, to summarize, to the extent that the majority of this Court premised their February 5 opinion and decision in this case upon the notion that *the date on which appellee-Thorton's alleged industrial "injury" occurred* was an outcome determinative factor – whether in whole or in part – for analytical purposes, their reasoning in that regard was unsupported by, and contrary to, the well-established law of this State. As such, that aspect of the majority's February 5 decision and opinion herein should be reconsidered and, upon reconsideration, vacated and set aside.

#### **B. The Majority's Misclassification of the Statute in Issue**

Montville further submits that the majority's assertion that, in uncodified Section 3 of Am. Sub. S.B. 7, the General Assembly "stat[ed] its intent that, with one exception, all of the bill's

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<sup>7</sup> In this respect, Montville further notes that while all *substantive* rights are also "*substantial* rights" as defined in R.C. §2505.02(A)(1), the converse of that proposition is *not* true; as those "*substantial* rights" which are *purely procedural or remedial* in nature do *not* fall within this Court's definition of *substantive* rights constitutionally protected against retroactive legislation. *Consilio*, supra, at {¶9}.

amendments are prospective in effect” [2009-Ohio-360 at ¶15] constitutes yet a second misclassification error in the majority’s February 5 decision for which correction via reconsideration is warranted.

In this second regard, the majority’s first error appears in the form of their subtle manipulations of the definitions of the terms, “retrospective” and “retroactive”; equally attributing to both the meaning, ““*applic[able] to claims that are pending on the effective date of this act[.]*”” instead of confining their use of the term, “retroactive,” to its established meaning: “applicable to **events which occurred** prior to the effective date of this act.” [Id. at ¶¶15, 16, and 17].]

While the majority’s ascribing equivalent definitions to the terms, “retrospective” and “retroactive” might be analytically harmless if the amendment at issue impacted a *substantive* right, their utilizing those definitions when an amendment which affects only a *procedural* right is in issue is improper and productive of analytical error. This Court itself has carefully explained the distinctions between those two terms of art; confirming that a “retroactive” law is one which alters the result of a fact which occurred *before* that law’s effective date, and that a “retrospective” law is one which alters the effect of a fact which, in the context of a proceeding which was pending when that law became effective, took place *after* the law became effective. See, *Morgan v. Western Electric Company, Inc.* (1982), 69 Ohio St.2d 278, at 282-283:

While finding **retroactive** application of the amended statute permissible its use here is **not retroactive**. Amended R.C. 4123.519 became effective January 1, 1979. As such, it is applicable to all decisions rendered by the Industrial Commission on or after January 1, 1979. Again, quoting from Holdridge, *supra*: “Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.” (Emphasis added.) **Although this cause of action accrued prior to this effective date, the hearing and decision of the Industrial Commission, and the final order from which appellant appeals, occurred months after the**

**amendment.**

Finally, the amended R.C. 4123.519 contains express language commanding that it be applied to “all claims filed” after November 2, 1959. \*\*\* The legislative intent is evident: in controlling all claims filed after November 2, 1959, the statute and all its amendments were “expressly made **retrospective**.” \*\*\* Any contrary result ignores this very intent by imposing an arbitrary cut-off date before which occupational disease claims can not be appealed.

Here, the dissenting justices incorrectly wrote that, “The plain language of R.C. 4123.512 states that it applies retroactively” [2009-Ohio-360 at ¶25] and that, “the language of the statute as codified, \*\*\* plainly calls for retroactive application.” [Id. at ¶31].] In those regards, Montville submits, the dissenting justices were actually commenting upon retrospectivity, rather than retroactivity.

It is only when the subtle distinction between “retroactive” and “retrospective” laws is recognized that the majority’s second misclassification error become evident. That second error lies in the majority’s misclassification of the General Assembly’s expressly declared intent with respect to whether the provisions of R.C. §4123.512(D), as amended in Am. Sub. S.B. 7, were to apply to:

- 1) all acts and events which transpired before, on, and after August 25, 2006;
- 2) only to those acts and events which transpired on or after August 25, 2006, regardless of when the underlying workers’ compensation claim incepted; or
- 3) only to those acts and events which transpired on or after August 25, 2006, *and* only in workers’ compensation claims which incepted on or after that date.

In its briefs and upon oral argument, Montville’s submission was that the General Assembly directed that the second of those three alternatives obtain; citing the applicability provisions which that body placed within R.C. §4123.512(H). Appellees urged that the General Assembly directed that the third such alternative obtain; relying upon the language contained in uncodified Section 3 of Am. Sub. S.B. 7. In this Court’s February 5 report, the majority adopted appellees’ contention

[2006-Ohio-360 at {¶¶15, 16, and 19}], but the dissenting justices adopted Montville’s view. [Id. at {¶¶25, 27, 29, 30, and 31.}]

What is critical, analytically, is that in adopting appellees’ view of what the General Assembly enacted, the majority found it necessary to evade and avoid not only the *existence* of the two applicability provisions upon which Montville and the dissenting justices relied but also the fact that the General Assembly placed those two applicability provisions *within the very same “division (H) of section 4123.512”* which that body specifically *excepted* from its general directive that, “This act applies to all claims \*\*\* arising on and after the effective date of this act[.]” In the undersigned’s thirty-nine years of experience with the courts of this State, it is difficult to imagine a more clear form of judicial confirmation that its judges consciously recognized they were misclassifying the contents of a legislative enactment than the majority’s just-noted, denial of facts which obviously exist.<sup>8</sup> However, closely competing for the same title is the majority’s obfuscatory, off-putting dodge, which further mischaracterized the content of R.C. §4123.512(H), by stating:

[T]he legislature specifically stated that only one section of the amendment, division (H) of R.C. 4123.512, was to be applied retrospectively. *That division, which provides, among other things, that compensation and medical benefits shall continue while the appeal is pending, is not relevant to our resolution of this case.*”

[Id. at {¶16}. Emphasis added.]

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<sup>8</sup> *Query*: When was it that this Court reversed itself on the fundamental point that it first pronounced in *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, at 127, reiterated in *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, later adhered to in *State, ex rel. Sears, Roebuck Co., v. Industrial Commission* (1990), 52 Ohio St.3d 144, 148, and recently found determinative in *State ex rel. Morehead v. Industrial Commission*, 112 Ohio St.3d 27, 2006-Ohio-6364 at {¶15} – i.e., that, “In determining legislative intent **it is the duty of this court** to give effect to the words used, **not to delete words used** or to insert words not used” – and thereby deprived Montville of the right to expect the justices of this Court to comply with that “duty” when deciding this case? [Emphasis added.]

The bottom line on this point – just as the dissenting justices detailed in {¶¶27 through 31} of their opinion – is that in constructing a basis upon which to decide this case, the majority simply misrepresented what the words of the statute in issue actually provided; thereby misclassifying that statute into being one which did not contain any special *applicability date* provisions, when in fact it did.

For this second reason, also, Montville’s instant motion for reconsideration should be granted and the majority’s February 5 decision and opinion in this case vacated and set aside.

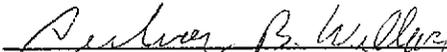
### **C. Regarding the Interconnected Issue of Appellate Jurisdiction**

Finally, insofar as the majority’s conclusion that Montville’s, “appeal should have been dismissed on th[e] basis [that] \*\*\* a dismissal pursuant to Civ.R. 41(A)(1)(a) does not typically operate as an adjudication on the merits \*\*\* [and] is not a final, appealable order \*\*\* rather than on the finding that it was not timely filed” [2009-Ohio-360 at {¶24}], is concerned, Montville respectfully reminds this Court that in the very same paragraph the majority correctly noted that an exception to that general rule exists in those cases where, “plaintiff’s Civ.R. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under Civ.R. 41(A)(1)[.]” As we see it, that exception is applicable to this case, due to the reasons detailed in the foregoing sections of this memorandum and in in Montville’s previously filed merit briefs in this case.

### **III. Conclusion**

For all of the foregoing reasons, Montville’s instant motion for reconsideration should be granted; the majority’s February 5 decision and opinion in this case should be vacated and set aside; and a decision which accurately classifies the determinative facts in this case and correctly applies established principles of law thereto should be issued herein.

Respectfully submitted,

  
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SERVICE

Copies of defendant-appellant Montville Plastics & Rubber, Inc.'s, foregoing Motion for Reconsideration have been served, by ordinary mail, upon Mitchell A. Stern, Esq., 27730 Euclid Avenue, Cleveland, Ohio 44132, counsel for plaintiff-appellee, and upon William P. Marshall, Esq., Solicitor General, Office of the Attorney General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, counsel for defendant-appellee, Administrator of the Bureau of Workers' Compensation, this 13<sup>th</sup> day of February, 2009.

  
AUBREY B. WILLACY, ESQ. <sup>V.172a</sup>

## 2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

R.C. § 4123.512

Baldwin's Ohio Revised Code Annotated Currentness  
Title XLI. Labor and Industry  
Chapter 4123. Workers' Compensation (Refs & Annos)  
Claims and Appeals

→4123.512 Appeal to court of common pleas; venue; notice of appeal;  
petition; costs

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

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

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

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file a notice of appeal under this section.

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

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

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

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

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the

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physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

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

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

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

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation 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

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4123.35 of the Revised Code.

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

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

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

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

(2006 S 7, eff. 6-30-06; 1999 H 180, eff. 8-6-99; 1997 H 361, eff. 12-16-97; 1997 H 363, eff. 9-29-97; 1993 H 107, eff. 10-20-93)