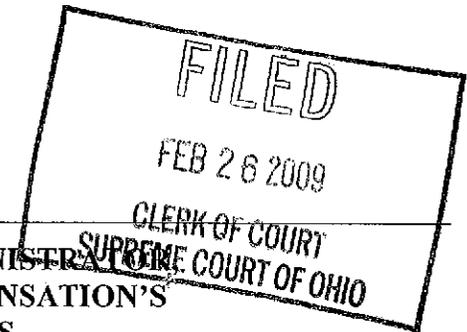


In the
Supreme Court of Ohio

DIAZONIA BENTON, : Case Nos. 2008-1946
: 2008-1949
Plaintiff-Appellee, :
:
and : On Appeal from the
: Hamilton County
ADMINISTRATOR, BUREAU OF : Court of Appeals,
WORKERS' COMPENSATION, : First Appellate District
:
Defendant-Appellant, : Court of Appeals
: Case No. C070223
v. :
:
HAMILTON COUNTY EDUCATIONAL :
SERVICE CENTER, :
:
Defendant-Appellee. :

**DEFENDANT-APPELLANT ADMINISTRATOR
BUREAU OF WORKERS' COMPENSATION'S
BRIEF ON THE MERITS**



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INTRODUCTION

Under R.C. 4123.512 and this Court's case law, an employer in a workers' compensation case may appeal only a right-to-participate determination. The court below deviated from this rule and held that an employer may circumvent R.C. 4123.512's jurisdictional limit by claiming fraud even after the injured employee's right to participate has been determined and the statute of limitations to challenge that determination has run. The lower court's interpretation of R.C. 4123.512 expands the appellate jurisdiction of the courts and disrupts the delicate balance between the Commission and the courts.

This Court has held that a litigant may seek judicial review of an Industrial Commission ruling by three procedural mechanisms: an appeal under R.C. 4123.512, an action for mandamus, or an action for declaratory judgment. *Felty v. AT&T Techs.* (1992), 65 Ohio St. 3d 234, 237. Which mechanism a claimant may use depends on the nature of the Commission's decision, and appeals under R.C. 4123.512 are limited to cases involving one question: "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'n*, 90 Ohio St.3d 276, 279, 2000-Ohio-73.

Here, the employer, Hamilton County Educational Service Center ("Hamilton"), did not challenge the initial allowance of employee Diazonia Benton's worker's compensation claim, nor did Hamilton challenge additional conditions. Instead, Hamilton—after the time for appealing the right-to-participate determination under R.C. 4123.512(A) had expired—argued that Benton's claim should be discontinued because she had allegedly committed fraud. When the Commission declined to terminate Benton's claim based on fraud, Hamilton appealed to the court of common pleas under R.C. 4123.512.

This Court has held that R.C. 4123.512's appellate procedure should be used sparingly, partly to prevent the courts of common pleas from being overburdened with review of every

Commission decision, and partly to allow the Commission to act as an effective and independent agency. Only the threshold question of whether a claimant is entitled to participate in the system is amenable to the formal de novo hearing in an appeal under R.C. 4123.512. Other Commission decisions, including those to continue participation despite a fraud allegation, are more amenable to the flexible and informal administrative hearing, and, if necessary, a streamlined mandamus action.

The limitation on the courts' jurisdiction under R.C. 4123.512 also ensures that the workers' compensation system functions largely outside the courts. And that ability to function is undermined if, after the initial right-to-participate decision, an employer can appeal an allegation of fraud or some other theory of discontinuance to the court of common pleas. Not only might it lead to abuse of the system by employers who already get second and even third bites at the participation apple in the administrative process, but, because the burden of proof is always on the claimant, it forces the claimant to prove his right to participate again and again.

Finally, R.C. 4123.95's the mandate to "liberally construe" workers' compensation laws "in favor of employees" supports allowing a claimant to appeal the discontinuance of a claim, but not allowing the employer to appeal the continuance of a claim. For these reasons, the court below incorrectly allowed Hamilton's appeal under R.C. 4123.512.

STATEMENT OF THE CASE AND FACTS

The claimant, Benton, was injured in a car accident in 2003. *Benton v. Hamilton County Educ. Serv. Ctr.* (1st Dist.), 2008 Ohio App. Lexis 3586, 2008-Ohio-4272, ¶ 2. The Bureau of Workers' Compensation ("Bureau") allowed her workers' compensation claim in 2005, and the Bureau allowed some additional conditions to the claim in 2006. *Id.* at ¶ 3. Benton's employer, 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, Hamilton filed a motion requesting that the Commission exercise continuing jurisdiction and find that Benton had committed fraud in applying for benefits. *Id.* at ¶ 4. Hamilton made no allegation that there was newly discovered evidence. The Commission denied Hamilton's motion, finding no evidence that Benton had committed fraud. *Id.* at ¶ 5. Hamilton then appealed the denial of the fraud motion under R.C. 4123.512 to the Hamilton County Court of Common Pleas. *Id.*

Benton and the Bureau moved to dismiss for lack of subject matter jurisdiction, arguing that Hamilton could not appeal under R.C. 4123.512. *Id.* 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 the Commission's denial of an employer's fraud allegations. The trial court agreed and granted the motions. *Id.*

Hamilton appealed to the First District, which reversed and remanded. The appeals court held that a motion for fraud directly asks whether the injury occurred in the course of, or arose out of, the claimant's employment. *Id.* at ¶ 16.

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. In addition, the Bureau filed a notice of appeal and memorandum in support of jurisdiction. This Court accepted the certified conflict and granted jurisdiction on December 31, 2008. *Benton v. Hamilton County Educ. Serv. Ctr.* (2008), 120 Ohio St. 3d 1452, 2008-Ohio-1946.

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). R.C. 4123.512(A) defines the jurisdiction of common pleas courts in appeals from decisions of the Commission: "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." This Court has repeatedly interpreted R.C. 4123.512 narrowly and has 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." *Liposchak*, 90 Ohio St. 3d at 279; see also *Felty*, 65 Ohio St. 3d at 238.

As explained below, allowing an employer to claim fraud and appeal under R.C. 4123.512 after a right to participate has been established on the original claim undermines both the letter and the spirit of the statute.

A. A litigant seeking judicial review of an Industrial Commission order has a choice of three causes of action, each strictly limited; if the litigant does not make the proper choice, the reviewing court lacks subject matter jurisdiction.

This case concerns the most basic, and in many ways the most important, decision a workers' compensation litigant must make: whether she can appeal an order of the Commission to the common pleas court under R.C. 4123.512, or whether she must use some other mechanism to challenge the order. In *Felty*, the Court recognized the three ways a litigant may challenge a

Commission ruling: (1) By directly appealing to the courts of common pleas under R.C. 4123.512; (2) by filing a mandamus petition under R.C. Chapter 2731; or (3) by filing an action for declaratory judgment under R.C. Chapter 2721. 65 Ohio St. 3d at 240. The Court also made clear that each mechanism is strictly limited, and “if the litigant . . . does not make the proper choice, the reviewing court will not have subject matter jurisdiction and the case must be dismissed.” *Id.*

Thus, in this case, because Hamilton’s challenge to the Commission’s order is not appealable under R.C. 4123.512, the court of common pleas has no jurisdiction to hear the case.

B. A court of common pleas has jurisdiction to review an Industrial Commission order under R.C. 4123.512 only if the issue under review is the claimant’s right to participate.

The Court in *Felty* explained that the limited nature of appellate proceedings under R.C. guarantees that the workers’ compensation system will function largely outside of the courts. 65 Ohio St. 3d at 238. The purpose of the limit is partly to allow the Commission to be independent, without excessive interference by the courts, and partly to prevent courts of common pleas from being overburdened by administrative appeals. “The courts simply cannot review all the decisions of the commission if the commission is to be an effective and independent agency.” *Id.* In other words, “[u]nless a narrow reading of R.C. 4123.512 is adhered to, almost every decision of the commission, major or minor, could eventually find its way to the common pleas court.” *Id.* Thus, this Court has consistently held that for the Commission to remain effective, it must be free to make most of its decisions independent of the court system.

The Industrial Commission retains independence in two ways. First, R.C. 4123.512 prohibits a litigant from appealing an extent-of-disability issue. Second, this Court has interpreted extent of disability to mean *any* question other than the initial right to participate:

“The only right-to-participate question that is appealable is whether an employee’s injury, disease, or death occurred in the course of and arising out of his or her employment.” *Liposchak*, 90 Ohio St. 3d at 279-80. Thus, under *Liposchak*, any question arising after the original right to participate has been established is considered an extent-of-disability question and is not appealable under R.C. 4123.512.

The *Liposchak* right-to-participate versus extent-of-disability dichotomy makes sense. By its very nature, the right-to-participate question requires finality for the claimant, the employer, the Bureau, and the Commission. The extent-of-disability question, by contrast, requires flexibility on the part of these entities.

Only *final* decisions are appealable under R.C. 4123.512. See *Felty*, 65 Ohio St. 3d at 240 (“[O]nly those decisions that finalize the allowance or disallowance of a claim . . . are appealable.”). And a right-to-participate decision is a final either/or determination that a court of law is well-suited to review. Moreover, an R.C. 4123.512 appeal results in a *de novo* hearing, with all the time and expense required of a trial on the merits. See *Ward v. Kroger Co.*, 106 Ohio St. 3d 35, 2005-Ohio-3560, ¶ 7 (“[A]n R.C. 4123.512 appeal is a *de novo* determination of fact and law . . .”). Thus, because of the resources expended, the use of R.C. 4123.512 should bring with it some finality—and not simply be an intermediate step in an ongoing process. Moreover, under R.C. 4123.512(A) an appeal must be brought within 60 days of the Commission’s final order. If the General Assembly wanted parties to litigate and re-litigate a final right-to-participate decision, it would not have placed a statute of limitations on R.C. 4123.512 appeals.

On the other hand, most extent-of-disability questions are on-going and require flexibility from all parties. After an injury, it might not initially be clear for what compensation the injured

worker will be eligible. The injury might eventually heal completely, or the worker might always carry some disability. Different injuries require different amounts of time to heal, and complications from an injury might persist for years. In addition, a claimant's work situation might change. And new or additional evidence of any of these issues might be discovered. All of these factors require adjustments to the amount and type of a claimant's compensation, and all of them require that the claimant or employer be able to challenge administratively a Bureau or Commission decision.

For example, if a claimant applies for temporary total compensation ("TT") on the basis of an allowed claim and is denied, the claimant may apply again once his circumstances have changed, or once he can provide additional medical evidence. Likewise, if a claimant is awarded TT, the employer may challenge the allowance administratively, and may also later apply to have the TT discontinued if circumstances change. Thus, disputes over extent of disability are fluid and will change based on numerous factors, including the claimant's rehabilitation from the injury, his employment circumstances, and the medical and other evidence available at the time.

The administrative setting is ideal for the flexibility required for extent-of-disability determinations, because the agency experts can make adjustments as facts and circumstances change. In addition, extent-of-disability questions, when they are challenged in court, are usually challenged through an action for a writ of mandamus to the Court of Appeals for Franklin County. *Felty*, 65 Ohio St. 3d at 237. Mandamus has no statute of limitations, and its standard of review is deferential to the Commission's orders. The Tenth District Court of Appeals has a streamlined system in which magistrates with expertise in this area initially handle these cases, often with only paper hearings. See, e.g., *State ex rel. Pierron v. Indus. Comm'n*, 120 Ohio St. 3d 40, 2008-Ohio-5245. Indeed, a mandamus proceeding, unlike an R.C. 4123.512

appeal, does not require a de novo hearing. Thus, the majority of extent-of-disability questions are usually handled in a streamlined, deferential manner by the courts, supporting the flexibility necessary to decide these issues.

In short, administrative and judicial mechanisms are logically set up in the workers' compensation system to support the different natures of right-to-participate and extent-of-disability inquiries. As explained below, an allegation of fraud after a claimant's right to participate has been decided fits more logically into the extent-of-disability category than into the right-to-participate category and therefore should not be appealable under R.C. 4123.512.

C. Revised Code 4123.512 appeals are limited to guarantee that the workers' compensation system functions largely outside the courts, and that function is undermined if an employer appeals after the right to participate is established.

Here, Hamilton wants to re-litigate the right-to-participate question by appealing the Commission's refusal to discontinue Benton's claim on the basis of its fraud allegations. For at least three reasons, Hamilton and similar employers should not be allowed to appeal the Commission's refusal to discontinue a claim.

First, a request to discontinue a claim based on a later allegation of fraud fits more logically into the category of an extent-of-disability question rather than as a right-to-participate question. As explained above, the right-to-participate question is intended as a threshold; once it is decided, all following decisions are extent-of-disability questions. See *Liposchak*, 90 Ohio St. 3d at 279-280 ("The only right-to-participate question that is appealable is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment."). Once an employee has established her right to participate, she has "cleared the first hurdle, and then may attempt to establish his or her extent of disability." *Id.* at 279. Here, the threshold has already been met: Benton's claim was allowed. Hamilton did not challenge the Commission's initial determination, and Hamilton's allegation of fraud is not based on any

evidence that came to light after the original claim was allowed. The claimant, the Bureau, and the Commission, as well as the employer, have taken numerous actions based on the finality of the decision allowing Benton's claim. For example, the Bureau has paid Benton's medical expenses, and Benton has relied on the Commission's determination that she is eligible to receive workers' compensation. Because of these many already-taken actions, an allegation of fraud after the threshold right-to-participate question has been decided is more logically handled in the flexible extent-of-disability universe, rather than in the right-to-participate universe.

Second, as explained above, an R.C. 4123.512 appeal requires a full, de novo hearing on the merits in the common pleas court—a disruptive and resource-intensive process. If Hamilton is allowed to appeal here, any employer could use a request to discontinue a claim to abuse the system. For example, an employer, after failing to appeal or losing an appeal of the original allowance of a claim, could claim fraud or some other theory to discontinue or eliminate the original claim. If one theory is unsuccessful, the employer could try another, getting yet another chance to eliminate the claim. This would lead to many more employer appeals, as they would not be limited to the original claim but would be able to try out any later theories that might discredit the original claim. Moreover, if an employer may continually challenge the right-to-participate determination, R.C. 4123.512's statute of limitations is meaningless.

Third, if the employer were allowed multiple appeals of the right-to-participate question, it would undermine the sound policy reasons behind the narrow limits of R.C. 4123.152. A claimant could never rely on a right-to-participate decision in seeking the various forms of compensation open to her once her claim is allowed. The Commission and Bureau, as well as the claimant, would be forced to re-litigate the initial claim each time the employer wants

another bite at the apple. And the courts would expend resources again and again to decide the same right-to-participate question.

Put simply, the important policies articulated in *Felty* are undermined if an employer is allowed to appeal an order denying a request to discontinue a claim.

D. Sound reasons support the claimant's right to appeal the discontinuance of a claim, while disallowing an employer the right to appeal the continuance of an injured worker's claim.

The fact that R.C. 4123.512 allows a claimant to appeal a ruling that terminates her right to participate is consistent with the principles explained above. In *State ex rel. Evans v. Industrial Commission* (1992), 64 Ohio St. 3d 236, the Court held that a claimant could appeal a Commission decision permanently foreclosing him from receiving any further benefits. This does not mean, however, that an employer may also appeal a refusal to discontinue a claim. As the *Felty* Court put it:

Once 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. 4123.51[2].

65 Ohio St. 3d at 240. Thus, either a claimant or an employer can appeal the initial order regarding a claimant's right to participate, but, after that, the only order that may be appealed under R.C. 4123.512 is a ruling "terminating the right to participate." More recently, the Court reiterated the principle, 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, 2004-Ohio-2148, ¶¶ 12-14.

The Court has not directly addressed the exact question here: whether an employer may appeal the Commission's refusal to terminate a claim. And the intermediate appellate courts are divided on the issue. 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 Dist.), 2001 Ohio App. Lexis 5659, 2001-Ohio-8720; *Harper v. Adm'r, Bur. of Workers' Comp.* (11th Dist.), 1993 Ohio App. Lexis 6068; *Schultz v. Adm'r, Ohio Bur. of Workers' Comp.* (4th Dist.), 148 Ohio App. 3d 310, 2002-Ohio-3622. On the other 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*, 2008-Ohio-4272 at ¶ 18; *Jones v. Massillon Bd. of Educ.* (5th Dist.), 1994 Ohio App. Lexis 2891; *Moore v. Trimble* (10th Dist.), 1993 Ohio App. Lexis 6204.

In *Thomas v. Conrad* (1998), 81 Ohio St. 3d 475, the Court addressed a slightly different fact situation than this case presents. The claimant in *Thomas* was attacked by a dog after she submitted a workers' compensation claim. The employer objected to her right to participate 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 Commission's decision not to discontinue participation was a question of extent of disability, rather than right to participate.

The Court then commented on the Fifth and Tenth Districts' treatment of the issue here, that is, where the employer alleges fraud:

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.

Id. at 478-79. Thus, while commenting on and distinguishing the Fifth and Tenth Districts' interpretations in dicta, the Court has not directly decided the precise issue presented here, where an employer has appealed the Commission's order to continue participation despite an allegation of fraud by the claimant with regard to her initial claim.

Nonetheless, *Thomas*'s holding and reasoning applies here and supports the Administrator's argument. In *Thomas*, the employer claimed that because it "framed its motion in terms of terminating the right to participate," it could appeal under R.C. 4123.512 because, "had the Industrial Commission granted the motion, [the employer] would have been able to appeal." *Id.* at 477. The Court rejected this argument. Because the employee's right-to-participate determination remained undisturbed, the Court treated the claim as an extent-of-disability question. *Id.* at 478. The same reasoning applies here. Benton's initial right-to-participate determination remains undisturbed regardless of how Hamilton frames its claim. Thus, the Commission's refusal to terminate Benton's claim is an extent-of-disability issue.

Moreover, it is not unfair to employers to hold that a decision to continue participation, as opposed to a decision to terminate it, is not appealable under R.C. 4123.512. Cf. *Thomas*, 81 Ohio St. 3d at 479 (rejecting equal protection argument because "both the employer and employee have the right to appeal when they are negatively affected"). First, an appeal under R.C. 4123.512, as explained above, involves a de novo hearing, in which the *claimant* always has the burden of proof, even when the claimant has prevailed administratively and the employer has filed the appeal. Thus, allowing an appeal from a continuance of a claim would give the employer a powerful and disruptive weapon against a claimant, when the employee's claim has already been allowed. The claimant should not have the burden of proving again and again that her claim should be allowed. Second, the employer is not precluded from further actions challenging the claim; the employer can file an action in mandamus or re-apply for a discontinuance of the claim using additional evidence or an alternative theory. Finally, this interpretation accords with the general statutory mandate to "liberally construe" the workers' compensation laws "in favor of employees." R.C. 4123.95.

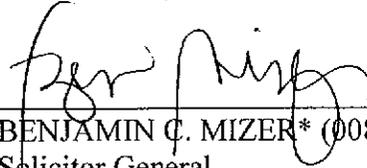
In short, there are sound reasons to treat differently an order discontinuing an injured worker's claim, which this Court has held appealable, and an order continuing a claim, which this Court should not hold appealable.

CONCLUSION

For the above reasons, the Administrator respectfully asks the Court to overrule the court below.

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CERTIFICATE OF SERVICE

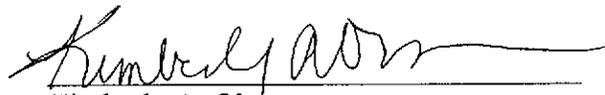
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In the
Supreme Court of Ohio 08-1949

DIAZONIA BENTON,	:	Case No. _____
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
and	:	Hamilton County
	:	Court of Appeals,
ADMINSTRATOR, BUREAU OF	:	First Appellate District
WORKERS' COMPENSATION,	:	
	:	
Defendant-Appellant,	:	Court of Appeals
	:	Case No. C070223
	:	
v.	:	
	:	
HAMILTON COUNTY EDUCATIONAL	:	
SERVICE CENTER,	:	
	:	
Defendant-Appellee.	:	

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**DEFENDANT ADMINISTRATOR'S
 NOTICE OF CERTIFIED CONFLICT**

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

NOTICE OF CERTIFIED CONFLICT

The Defendant-Appellant, Administrator of the Bureau of Workers' Compensation (Administrator) hereby notifies the Court, pursuant to S. Ct. Rule IV, that the First District Court of Appeals has certified a conflict. See Journal Entry September 18, 2008, in *Benton v. Hamilton County Educational Service Center*, Appeal No. C-070223 (Ex. 1). The First District certified a conflict between its initial decision (Ex. 2) together with decisions from the Tenth and Fifth district courts of appeals, and decisions in the Eleventh and Fourth districts. The certified issue is:

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. 1. The decisions specifically found in conflict are:

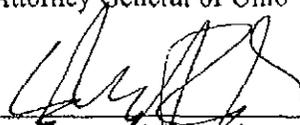
The case at issue here, *Benton v. Hamilton County Educational Service Center*, Appeal No. C-070223 (Ex. 2), as well as *Jones v. Massillon Bd. of Educ.*, 1994 Ohio App. LEXIS 2891 (June 13, 1994), Stark App. No. 94CA0018, unreported (Ex. 3), and *Moore v. Trimble*, 1993 Ohio App. LEXIS 6204 (Dec. 21, 1993), Franklin App. No. 93APE08-1084, unreported (Ex. 4), all of which found such a decision appealable under 4123.512; and

Brown v. Thomas Asphalt Paving Co., 11th District No. 2000-P-0098, 2001-Ohio-8720 (Ex. 5); and *Harper v. Adm'r, Bur. of Workers' Comp.*, 1993 Ohio App. LEXIS 6068 (Dec. 17, 1993), 11th District No. 93-T-4863, unreported (Ex. 6); *Schultz v. Adm'r, Ohio Bur. of Workers' Comp.*, 148 Ohio App.3d 310, 2002-Ohio-3622 (Ex. 7), all of which found such a decision not appealable.

Appellant has also filed a discretionary appeal in this case. The Entry certifying the conflict, as well as copies of all cited conflict cases, are appended.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio



BENJAMIN MIZER* (0083089)

Solicitor General

** Counsel of Record*

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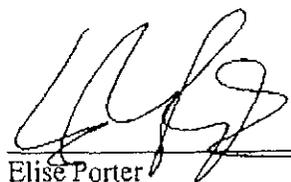
Counsel for Defendant-Appellant
Administrator, Bureau of Workers'
Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendant Administrator's Notice of Certified Conflict was served by U.S. mail this 31st 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

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



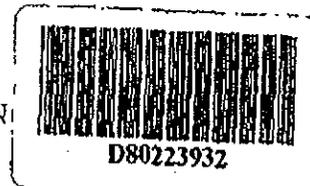
DIAZONIA BENTON,

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.

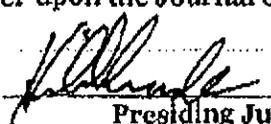
This appeal is certified to the Ohio Supreme Court as being in conflict with *Thomas v. Conrad* (Feb.14, 1997) Second District Nos. 15873 and 15898, and *Brown v. Thomas Asphalt Paving Co.*, Eleventh District, No. 2000-P-0098, 2001-Ohio-8720

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)

EXHIBIT 1

FILED

IN THE COURT OF APPEALS

2008 AUG 22 FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

FILED
COURT OF APPEALS
AUG 22 2008
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

DIAZONIA BENTON,

Plaintiff-Appellee,

vs.

HAMILTON COUNTY EDUCATIONAL
SERVICE CENTER,

Defendant-Appellant,

and

ADMINISTRATOR, OHIO BUREAU
OF WORKERS' COMPENSATION,

Defendant-Appellee.

APPEAL NO. C-070223

TRIAL NO. A-0609684

DECISION.



PRESENTED TO THE CLERK
OF COURTS FOR FILING

AUG 22 2008

COURT OF APPEALS

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.

EXHIBIT 2

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 Diazonía 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

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.¹ 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.

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").

LEXSEE 1994 OHIO APP. LEXIS 2891

**TERRY W. JONES, Plaintiff-Appellee v. MASSILLON BOARD OF EDUCATION
WESLEY TRIMBLE, ADMINISTRATOR OHIO BUREAU OF WORKER'S
COMPENSATION AND INDUSTRIAL COMMISSION OF OHIO, Defendant-
Appellants**

Case No. 94CA0018

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK
COUNTY**

1994 Ohio App. LEXIS 2891

June 13, 1994, Filed

NOTICE:

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

PRIOR HISTORY: CHARACTER OF PROCEEDING: Administrative Appeal from the Stark County Court of Common Pleas, Case No. 1993CV00643

DISPOSITION: JUDGMENT: Reversed and Remanded.

COUNSEL: For Plaintiff-Appellee: GEOFFREY J. SHAPIRO, 614 W. Superior Ave., 1st Fl., Cleveland, OH 44113-1899.

For Defendant-Appellees: DAVID J. KOVACH, 615 W. Superior Ave., 12th Fl., Cleveland, Oh 44113-1899.

For Defendant-Appellant: DEBORAH SESEK, ROBERT C. MEYER, P.O. Box 1500, Akron, OH 44309.

JUDGES: Hon. W. Scott Gwin, P.J., Hon. Irene B. Smart, J., Hon. Sheila G. Farmer, J.

OPINION BY: W. SCOTT GWIN

OPINION

OPINION

Gwin, P.J.

Massillon Board of Education (employer) appeals from the judgment entered in the Stark County Court of Common Pleas dismissing its R.C. § 4123.519 appeal of a decision by the Industrial Commission of Ohio denying employer's motion to disallow the Workers' Compensation claim of Terry W. Jones (claimant). The Common Pleas Court ruled that the Industrial Commission's decision not to decertify claimant's right to participate in the State Insurance Fund was not an appealable order under R.C. [*2] § 4123.519. Employer assigns as error:

ASSIGNMENT OF ERROR NO. 1

DEFENDANT-APPELLEES WES TRIMBLE, ADMINISTRATOR, AND THE INDUSTRIAL COMMISSION OF OHIO LACK STANDING TO SEEK DISMISSAL OF DEFENDANT-APPELLANT'S APPEAL UNDER R.C. 4123.519.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AS A MATTER OF LAW BY DISMISSING DEFENDANT-APPELLANT'S APPEAL FOR LACK OF JURISDICTION UNDER R.C. 4123.519.

By Application for Payment of Compensation and Medical Benefits filed with the Administrator of the Bureau of Workers' Compensation, claimant alleged that he sustained an injury to his right knee in the course of and



arising out of his employment as a custodian for employer on July 22, 1991. Employer apparently certified the claim and claimant began to receive compensation and other benefits from the State Insurance Fund.

On December 13, 1991, employer filed a motion with Industrial Commission of Ohio seeking to decertify and/or disallow the within claim. Employer maintained that it had newly discovered evidence that established claimant's alleged work injury was actually the result of a non-occupational recreational sports injury occurring two years prior to [*3] the alleged employment injury. Employer asserted that it "now rejects the claim based on medical evidence which establishes the cause of injury and disability to be outside the scope of employment."

The matter proceeded to the District Hearing Officer of the Industrial Commission wherein the Hearing Officer found "insufficient evidence to warrant a decertification of the instant claim." It was therefore ordered that the claim remain allowed for "torn ligament, right knee" with appropriate compensation and benefits payable. The Hearing Officer's decision was administratively upheld by the Canton Regional Board of Review and the Industrial Commission of Ohio.

As noted above, the common pleas court dismissed employer's appeal of the Industrial Commission's decision on the basis that it was not appealable under *R.C. § 4123.519*.

I

Through its first assignment, employer maintains Wes Trimble, Administrator of the Bureau of Workers' Compensation and the Industrial Commission of Ohio lacked standing to seek dismissal of its appeal pursuant to *R.C. § 4123.519*. We find no merit in this claim. Employer itself named the two entities as party defendants in the instant action and it cannot [*4] now claim that they have no interest in this matter.

Accordingly, we overrule employer's first assigned error.

II

Through its second assignment, employer maintains the common pleas court erred as a matter of law in dismissing its appeal for want of jurisdiction pursuant to *R.C. § 4123.519*. We agree.

The Ohio Supreme Court has definitively held that an Industrial Commission's decision involving a claimant's right to continue to participate in the State Insurance Fund is appealable to the Common Pleas Court pursuant to *R.C. § 4123.519*. *Afrates v. Lorain* (1992), 63 Ohio St. 3d 22, 584 N.E.2d 1175, paragraph one of the syllabus. See, also, *Fely v. AT&T Technologies, Inc.* (1992), 65 Ohio St. 3d 234, 602 N.E.2d 1141. Setting aside semantics, it is clear from the facts of this case that employer sought to discontinue claimant's right to participate in the State Insurance Fund. As such, the Industrial Commission's decision involving the claimant's right to continue to participate in the fund is appealable under *R.C. § 4123.519*.

Accordingly, we sustain employer's second assigned error, reverse the judgment entered in the Stark County Court of Common Pleas, Ohio, and remand [*5] this cause to that court for further proceedings according to law.

By Gwin, P.J.,

Smart, J., and

Farner, J., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment entered in the Stark County Court of Common Pleas, Ohio, is reversed and this cause is remanded to that court for further proceedings according to law.

W. Scott Gwin

Irene Balogh Smart

Sheila G. Farmer

JUDGES

LEXSEE 1993 OHIO APP. LEXIS 6204

Kirby J. Moore, Appellee-Appellee, v. Wes Trimble, Administrator Bureau of Workers' Compensation et al., Appellees-Appellees, Rusty's Towing Service, Inc., Appellant-Appellant.

No. 93APE08-1084, (REGULAR CALENDAR)

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1993 Ohio App. LEXIS 6204

December 21, 1993, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

"Whether the decision of February 26, 1993, which was never appealed was in fact the final order of the Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Fullerton Law Offices, and Dwight L. Fullerton, for appellee-appellee Kirby J. Moore.

"ISSUE NO. 2

Lee Fisher, Attorney General, and Dennis L. Hufstader, for appellees-appellees Wes Trimble, Administrator Bureau of Workers' Compensation et al.

"Whether the Rule 60(B) Motion filed by the Assistant Attorney [*2] General was properly filed and served.

Ed Malek & Associates, Edwin L. Malek and Bernard M. Floetker, for appellant-appellant Rusty's Towing Service, Inc.

"ISSUE NO. 3

JUDGES: YOUNG, PETREE, BOWMAN

"What is the effective date of the filing of the Motion for Rule 60(B) Relief by the Assistant Attorney General.

OPINION BY: YOUNG

OPINION

"ISSUE NO. 4

OPINION

YOUNG, J.

"Whether a Motion for Relief Pursuant to Ohio Rules of Civil Procedure Rule 60(B) is appropriate under the circumstances.

This matter is before this court upon the appeal of Rusty's Towing Service, Inc., appellant, from the July 9, 1993 entry of the Franklin County Court of Common Pleas which denied appellant's motion for relief from judgment. Despite appellant's failure to provide this court with assignments of error, as required by App.R. 12, we will consider the "issues" set forth in appellant's brief as follows:

"ISSUE NO. 5

"ISSUE NO. 1

"Whether or not there was subject matter jurisdiction in the Franklin County Court to hear the employer's appeal."



The history of this case is as follows: employee-claimant, Kirby J. Moore, filed a claim with the Industrial Commission of Ohio and his claim was recognized for "extruded L4-5 disc with paraparesis." The workers' compensation claim was allowed by the commission on March 23, 1990, and findings were mailed on April 4, 1990. Appellant-employer did not appeal the decision at the time of the allowance of the claim. However, on August 1, 1990, appellant filed a C-86 motion, based upon its alleged discovery that the employee had committed fraud upon the Industrial Commission and the appellant-employer. This C-86 motion requested that the continuing jurisdiction of the Industrial Commission [*3] be invoked pursuant to *R.C. 4123.52*. It further stated that this motion was "based upon newly discovered evidence that the claimant has admitted to a variety of people that he was injured when he lifted his motorcycle at home." Attached to the C-86 motion, was an affidavit of a co-worker of the employee-claimant, wherein the affiant stated that the employee-claimant had told him (the affiant) that he (the employee-claimant) had hurt his back by lifting a motorcycle.

It is undisputed that appellant did not appeal the original allowance to the district hearing officer, within the time allotted for appeal. However, there is also nothing in the record to reflect that appellee objected to the DHO's hearing of appellant's C-86 motion, even though the time for appeal had passed. Appellant continued to appeal, first to the CRBR, then to the staff hearing officers of the Industrial Commission, and finally to the court of common pleas. Again, appellee failed to raise the issue of the timeliness/untimeliness of appellant's various appeals. Thus, appellee is deemed to have waived this issue and will not be heard for the first time, on appeal to this court. See *Shover v. Cordis (1991)*, 61 Ohio St.3d 213, 574 N.E.2d 457. Furthermore, the Industrial Commission has continuing jurisdiction pursuant to *R.C. 4123.52* and clearly could exercise that jurisdiction in cases of fraud, even if the fraud was discovered after the time for appeal had passed. See *State ex rel. Kilgore v. Indus. Comm. (1931)*, 123 Ohio St. 164, 174 N.E. 345.

[*4] On January 8, 1991, the district hearing officer heard the employer's C-86 motion and affirmed the allowance. The district hearing officer (DHO) stated that there was nothing presented that could not have been discovered, and presented, earlier at the allowance hearing on March 23, 1990. The district hearing officer's findings were mailed on January 29, 1991. The employer-appellant then appealed the DHO's decision to the

Columbus Regional Board of Review (CRBR). The CRBR held a hearing on June 4, 1991 and affirmed the DHO's findings/order/decision. The CRBR's findings were mailed on July 24, 1991. The employer-appellant then appealed to staff hearing officers of the Industrial Commission. On July 6, 1992, the staff hearing officers (SHO) affirmed the CRBR. Attached to the SHO decision was a notice stating that an appeal could be filed in the court of common pleas within sixty days, pursuant to *R.C. 4123.519*.

This court must first address appellant's fifth issue, for the remaining issues will be determined, in part, on whether or not the court of common pleas had jurisdiction over this action. Appellee argues that appellant did not have a right to appeal to the court of common pleas [*5] pursuant to *R.C. 4123.519*. We disagree and hold that the appellant-employer's appeal to the court of common pleas was proper and the court of common pleas had subject matter jurisdiction in this case. *R.C. 4123.519* provides in pertinent part:

"(A) The claimant or the employer may appeal a decision of the industrial commission or of its staff hearing officer made pursuant to division (B)(6) of section 4121.35 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted ***" (Emphasis added.)

The Supreme Court of Ohio, in a series of decisions, has narrowly construed this statute to mean that one can only appeal to the court of common pleas if the decision of the Industrial Commission, or its staff hearing officers, is one that finalizes the allowance or disallowance of the employee's claim. *Afrates v. Lorain (1992)*, 63 Ohio St.3d 22, 584 N.E.2d 1175; *State ex rel. Evans v. Indus. Comm. (1992)*, 64 Ohio St.3d 236, 594 N.E.2d 609; and *Felty v. AT&T Technologies, Inc. (1992)*, 65 Ohio St.3d 234, 602 N.E.2d 1141. As stated [*6] by the court in *Afrates*:

"The only decisions reviewable pursuant to *R.C. 4123.519* are those decisions involving a claimant's right to participate or to continue to participate in the fund." *Id. at 26.*

In *Felty*, the court again stated that only decisions reaching an employee's right to participate were appealable under *R.C. 4123.519*. The court further stated that:

"Once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that *terminates* the right to participate, are appealable pursuant to *R.C. 4123.519*." *Id.* at 234. (Emphasis added.)

As stated before, appellant's C-86 motion clearly requested a vacation of the allowance based upon newly discovered evidence that the claimant had been injured at home, lifting a motorcycle, and not at the work place. In addition, the employee-claimant's own complaint stated:

"The District Hearing Officer's Order of January 8, 1991 denied the employer's motion filed August 1, 1990 (*requesting that the Industrial Commission assert continuing jurisdiction under Ohio Revised Code 4123.52 and vacate the allowance [*7] of this claim*) ***." *Id.* at paragraph 5 of the complaint. (Emphasis added.)

In its brief, appellee argues that the court of common pleas did not have jurisdiction to hear the instant action because the appellant-employer's C-86 motion and subsequent appeals did not involve the employee-claimant's right to participate or continue to participate in the workers' compensation fund. Rather, appellee argues that appellant-employer's action involved an appeal of the Industrial Commission's refusal to exercise its continuing jurisdiction, and this is not an appealable order for purposes of an appeal to the common pleas court pursuant to *R.C. 4123.519*.² However, a careful review of the record, and the employee-claimant's own complaint, clearly demonstrate that appellant was attempting to persuade the Industrial Commission to vacate the allowance of the claim. Thus, this action clearly involves the employee's right to continue to participate, insofar as the appellant-employer was attempting to terminate the employee's right to participate, based upon the alleged fraud of the employee-claimant. Thus, appellant-employer's appeal to the court of common pleas fell within the [*8] purview of *R.C. 4123.519* and the court of common pleas therefore had jurisdiction to hear the appellant-employer's appeal. Accordingly, appellant's fifth issue must be answered in the affirmative.

2 Other issues, such as the amount of the average weekly wage to be set, were also considered by the Industrial Commission.

Because this court has found that the appeal to the court of common pleas was proper, we must next address

the procedural aspects of this case in the court of common pleas. On October 26, 1992, the employee-claimant filed a complaint in the court of common pleas, alleging that there were no appealable issues involved in the SHO's order and therefore the court of common pleas lacked subject-matter jurisdiction.³ In an answer filed November 6, 1992, the Attorney General⁴ admitted all of the allegations contained in the employer-claimant's complaint. However, as stated previously, this court finds that the court of common pleas had subject-matter jurisdiction to hear the appellant-employer's [*9] appeal.

3 This court notes that the employee-claimant did not file a motion for summary judgment nor did the employee-claimant file a motion to dismiss.

4 The Attorney General represents the Administrator of the Bureau of Workers' Compensation in this case. Thus, for purposes of this opinion, we may refer to actions taken by the Attorney General on behalf of the Industrial Commission, or we may refer to actions taken by the Industrial Commission itself.

On November 6, 1992, appellant filed a request for admissions. Appellant never received any response from the employee-claimant. On December 8, 1992, appellant-employer answered the employee's complaint and denied that the court lacked subject-matter jurisdiction. On December 28, 1992, appellant-employer filed a motion for summary judgment. Again, no response from either the assistant Attorney General or the employee-claimant was ever filed. Accordingly, on February 9, 1993, the trial court granted appellant's motion for summary judgment. In its decision, [*10] the court noted that the admissions were deemed admitted as the employee-claimant had never responded. The court also noted that there had been no response filed to the appellant-employer's motion for summary judgment. An entry journalizing this decision was filed on February 26, 1993. On March 12, 1993, the Attorney General filed a *Civ.R. 60(B)* motion for relief, arguing that the court of common pleas did not have jurisdiction and therefore, relief from judgment should be granted pursuant to *Civ.R. 60(B)(5)*. The court of common pleas agreed and granted the Attorney General's motion for relief from judgment in a decision dated April 29, 1993. It is crucial to note that no entry journalizing this decision was ever filed.

Issues two through four are interrelated and thus will be addressed together. In its fourth issue, or assignment of error, appellant-employer questions whether or not the Attorney General's motion for relief from judgment was appropriate.

Ohio case law clearly holds that a *Civ.R. 60(B)* motion may not be used as a substitute for a timely appeal.

See *Bosco v. Euclid* (1974), 38 Ohio App.2d 40, 311 N.E.2d 870; *Town & Country Drive-In Shopping Centers Inc. v. Abraham* [*11] (1975), 46 Ohio App.2d 262, 348 N.E.2d 741; *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478, 442 N.E.2d 1313. The United States Supreme Court has also held that no issue that can properly be raised on appeal can be used as the basis for a Fed.R.Civ.P. 60(B) motion. See *Standard Oil Co. of California v. United States* (1976), 429 U.S. 17, 97 S.Ct. 31, 50 L. Ed. 2d 21. The same is true in Ohio in that a motion for relief from judgment can not be used as a substitute for appeal. See *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 416 N.E.2d 605. See, also, Whiteside, Ohio Appellate Practice, at section 1.09(C). Accordingly, appellee's motion for relief from judgment was not appropriate under the circumstances, as appellee should have appealed the decision and entry which granted appellant-employer's motion for summary judgment. Thus, appellant's fourth issue must be answered in the negative. As a result of our disposition of appellant's fourth issue, this court need not address issues two and three as they are rendered moot by our treatment of issue four. See *App.R. 12*.

However, the trial court granted appellee's motion for relief in a decision dated April 29, 1993. [*12] This decision was never journalized in an entry. On May 12, 1993, appellant filed a Civ.R. 60(B) motion seeking relief from the April 29, 1993 decision which granted the Attorney General's Civ.R. 60(B) motion. On July 9, 1993, the court denied the employer-appellant's motion and put on an entry to that effect. It is from this entry that appellant appealed to this court. We would initially note that appellant's Civ.R. 60(B) motion should be treated as a motion for reconsideration. This is because appellee's Civ.R. 60(B) motion, which was granted in a decision on April 29, 1993, was never journalized in an entry. Without an entry, there is no final judgment. It is axiomatic that appellant cannot file a Civ.R. 60(B) motion asking for relief from a judgment that simply does not exist. As stated by Judge Whiteside, in his treatise on Ohio Appellate Practice, at section 2.02:

"For purposes of the Civil Rules, the term 'judgment' also means the decree as well as any order from which an appeal lies. The rule does not define what constitutes a judgment or decree, although a judgment traditionally and customarily means final entry determining the rights of the parties from a law [*13] suit, and a decree is the equivalent in equity to a judgment at law. A judgment must admit any recital of pleadings, reports of referees, and record of prior proceedings, and becomes effective when signed by the

judge and entered by the clerk." (Emphasis added.) (Footnotes omitted.)

Thus, appellant-employer's motion for relief can only be construed as a motion for reconsideration, and the court's denial of appellant's motion is therefore interlocutory in nature and is not a final judgment from which an appeal will lie. R.C. 2501.02 provides that the courts of appeal have jurisdiction:

"Upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district *** ." (Emphasis added.)

Accordingly, appellant's appeal is not properly before this court as no final appealable order exists.

This brings us to appellant-employer's first issue, that is, whether or not the entry of February 26, 1993, granting summary judgment to appellant, was, in fact, the final order of the court of common pleas. We hold that this entry does constitute the final order [*14] of the court of common pleas. The entry of February 26, 1993, granting summary judgment, was never appealed. Rather, a Civ.R. 60(B) motion was filed by the Attorney General. As discussed earlier, a Civ.R. 60(B) motion may not be used as a substitute for an appeal. *Bosco, supra*; *Town & Country, supra*; *Brick Processors, supra*. In addition, the court of common pleas erred in its holding that it did not have subject-matter jurisdiction. The court of common pleas had jurisdiction to grant or deny appellant's motion for summary judgment. It granted summary judgment and its decision was properly journalized as an entry.

Accordingly, this court finds that the court of common pleas erred in granting the Attorney General's Civ.R. 60(B) motion based upon its mistaken belief that it lacked subject-matter jurisdiction; that this decision was never journalized, so therefore, appellant's Civ.R. 60(B) motion was truly a motion for reconsideration; a motion for reconsideration is interlocutory in nature and is not a final appealable order which may be appealed to this court; and the order granting summary judgment still stands as a valid judgment. 3

5 Now that the time for appeal has elapsed, appellee may properly move for Civ.R. 60(B) relief, but must comply with the mandates of *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113.

[*15] Based on the foregoing, we dismiss appellant's appeal for lack of a final appealable order, and the judgment of the Franklin County Court of Common Pleas awarding summary judgment in favor of the appellant-employer is affirmed.

Judgment affirmed.

PETREE, J., concurs.

BOWMAN, J., dissents.

DISSENT BY: BOWMAN

DISSENT

BOWMAN, J., dissenting.

Being unable to agree with the majority, I must respectfully dissent. Pursuant to *R.C. 2505.02*, this court only has jurisdiction to review final orders. I agree with the majority's conclusion that the order which appellant is attempting to appeal, the decision of the trial court overruling appellant's motion for relief from judgment pursuant to *Civ.R. 60(B)*, is not a final appealable order. Inasmuch as the order, which is the subject of the appeal, is not a final appealable order, this court has no jurisdiction to address the issues raised in the appeal and the appeal must be dismissed. Any other discussion in the opinion is at best dicta.

LEXSEE 2001 OHIO 8720

**THERESA A. BROWN, Appellant, - vs - THOMAS ASPHALT PAVING CO., INC.,
Appellee, JAMES CONRAD, ADMINISTRATOR, BUREAU OF WORKERS'
COMPENSATION, Appellant.**

CASE NO. 2000-P-0098

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, PORT-
AGE COUNTY

2001 Ohio 8720; 2001 Ohio App. LEXIS 5659

December 14, 2001, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Administrative Appeal from the Court of Common Pleas. Case No. 98 CV 0649.

DISPOSITION: Trial court's judgment was reversed and judgment was entered for appellant.

COUNSEL: ATTY. WILLIAM A. THORMAN, III, Columbus, OH, (For Appellant, Theresa A. Brown).

ATTY. ELEANOR J. TSCHUGUNOV, Akron, OH, (For Appellee).

BETTY D. MONTGOMERY, OHIO ATTORNEY GENERAL, JAMES P. MANCINO, ASSISTANT ATTORNEY GENERAL, Cleveland, OH, (For Appellant, James Conrad).

JUDGES: HON. WILLIAM M. O'NEILL, P.J., HON. ROBERT A. NADER, J., HON. DIANE V. GRENDALL, J. O'NEILL, P.J., concurs, GRENDALL, J., concurs in part and dissents in part with concurring and dissenting opinion.

OPINION BY: ROBERT A. NADER

OPINION

NADER, J.

Appellants, Theresa A. Brown ("Brown") and Administrator, Bureau of Workers' Compensation ("BWC") appeal from the judgment of the Portage County Court of Common Pleas terminating Brown's right to participate in the workers' compensation system.

On November 12, 1990, Brown filed an application for workers' compensation benefits wherein she stated

that, on November 2, 1990, while working as a flag person for appellee, Thomas Asphalt Paving Co. ("Thomas Asphalt"), she was struck by a car and sustained physical [*2] injuries. Appellee certified appellant's claim and the Industrial Commission of Ohio ("Industrial Commission") permitted Brown's claim for contusions to her left and right legs, contusion to her chest area, and chondromalacia of the left patella; appellee did not appeal from the findings and orders of the Industrial Commission.

On July 23, 1993, appellee filed a motion with the Industrial Commission alleging fraud and seeking to disallow Brown's claim. The Industrial Commission construed appellee's motion as a request for relief and to exercise its continuing jurisdiction, pursuant to R.C. 4123.52. After a hearing, a district hearing officer found: "that the Employer [had] presented insufficient evidence to make a finding of fraud and disallowed this claim" and denied appellee's motion. On appeal, a staff hearing officer affirmed the district hearing officer's order. Appellee again appealed, but the Industrial Commission refused his appeal on September 7, 1995.

Subsequently, Thomas Asphalt filed a notice of appeal in the court of common pleas. Pursuant to R.C. 4123.512(D), Brown filed a complaint asserting her right to participate [*3] in the workers' compensation fund and setting forth the facts supporting her position. Appellee filed an answer and asserted the affirmative defense of fraud. On January 12, 2000, Brown filed a motion to dismiss, pursuant to Civ.R. 12(B)(1), alleging that the court of common pleas did not have jurisdiction to hear the matter. Brown filed a motion to clarify the issues and moved the court to impose the burden of proving the elements of fraud upon appellee. The court denied Brown's motions.



1 While it is not disputed that Thomas Asphalt commenced an appeal in the court of common pleas, Thomas Asphalt's notice of appeal is not contained in the file. The record begins with the complaint filed by Brown in the Portage County Court of Common Pleas. Additionally, the record contains the decisions of the Industrial Commission, but does not include the motions of the parties or a transcript of the hearings.

On July 28, 2000, the BWC also filed a motion to dismiss, arguing that the lower court lacked jurisdiction. On August 8, 2000, the [*4] trial court overruled both motions to dismiss, relying on *Thomas v. Conrad* (1998), 81 Ohio St. 3d 475, 692 N.E.2d 205. A jury trial commenced on August 8, 2000. Prior to beginning her case in chief, Brown moved for a directed verdict, arguing that appellee had not carried its burden. Her motion was overruled. At the close of Brown's case, she moved for a directed verdict and appellee moved for a directed verdict as to Brown's claims for injuries to her chest. The court overruled Brown's motion, but granted appellee's motion. After the parties had rested, Brown and the BWC moved for a directed verdict, arguing that appellee had not proven the elements of fraud. Despite finding that appellee had not established the elements of fraud, the court denied appellant's motion for a directed verdict.

The jury returned a verdict against Brown, finding that she was not entitled to participate in the workers' compensation fund for injuries sustained on November 2, 1990. From this judgment, appellant presents the following assignment of error:

"[1.] The trial court erred when it overruled appellant's motions to dismiss for lack of subject matter jurisdiction pursuant to R.C. 4123.512.

[*5] "[2.] If the trial court had jurisdiction to hear the employer's appeal, the trial court erred when it placed the burden of proof and the burden of going forward on the injured worker."

In support of their first assignment of error, appellants argue that the decision of the Industrial Commission did not terminate Brown's right to participate in the workers' compensation fund, and thus, was not appealable to the trial court. *Felty v. AT&T Technologies, Inc.*, 65 Ohio St. 3d 234, 602 N.E.2d 1141, paragraph two of the syllabus. Instead, they contend that the appropriate remedy is an action in mandamus. In response, appellee contends that the controlling law is set forth in *Thomas v. Conrad*, *supra*, wherein the Supreme Court of Ohio explained that the trial court has subject matter jurisdiction when an employer questions the claimant's right to continue to participate by alleging fraud surrounding the claimant's initial application. The crux of this appeal concerns which decisions of the Industrial Commission

may be appealed to the court of common pleas pursuant to R.C. 4123.512. Judicial review of Industrial Commission rulings [*6] may be sought in three ways: by direct appeal, by filing a mandamus petition, or by an action for declaratory judgment, pursuant to R.C. 2721. *Felty*, 65 Ohio St. 3d at 237. "Which procedural mechanism a litigant may choose depends entirely on the nature of the decision issued by the commission. Each of the three avenues is strictly limited; if the litigant seeking judicial review does not make the proper choice, the reviewing court will not have subject matter jurisdiction and the case must be dismissed." *Id.*

While direct appeal may be taken to the court of common pleas where, as in the instant case, the Industrial Commission refuses to hear an appeal, the trial court's jurisdiction in workers' compensation matters is limited. See R.C. 4123.512(A). "Under R.C. 4123.512, claimants and employers can appeal Industrial Commission orders to a common pleas court only when the order grants or denies the claimant's right to participate." *State ex re. Liposchak et al. v. Industrial Commission of Ohio* (2000), 90 Ohio St. 3d 276, 278-279, 737 N.E.2d 519. The Supreme Court of Ohio has consistently taken [*7] a narrow approach in interpreting R.C. 4123.512, formerly R.C. 4123.519. See, e.g., *Felty*, *supra*, at paragraph two of the syllabus (holding that "once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable ***.")

This court has previously taken a similar view in *Harper v. Administrator, Bureau of Workers' Compensation* 1993 Ohio App. LEXIS 6068 (Dec. 17, 1993), Trumbull App. No. 93-T-4863, unreported, wherein we held that the court of appeals did not have subject matter jurisdiction to hear an appeal of the commission's refusal to vacate its previous order which did not relate to the right to participate in the Workers' Compensation Fund. We are not persuaded by appellee's argument that *Thomas*, *supra*, is controlling.

In *Thomas*, *supra*, the Supreme Court of Ohio explained that "its opinion did not change the reasoning in *Moore v. Trimble* 1993 Ohio App. LEXIS 6204 (Dec. 21, 1993), Franklin App. No. 93APE08-1084, unreported, [*8] and *Jones v. Massillon Bd. of Edn.*, 1994 Ohio App. LEXIS 2891 (June 13, 1994), Stark App. No. 94CA0018, unreported in which the "employers *** questioned the claimants' right to continue to participate in the fund, alleging fraud with regard to facts surrounding the respective claimants' initial claims." *Thomas*, 81 Ohio St. 3d at 478-479. However, the court's explanation was *dicta* and, thus, not binding. Therefore we conclude that *Harper* is controlling in the instant case; the court of

common pleas lacked subject matter jurisdiction. Appellant's first assignment of error has merit.

While our conclusion as to appellant's assignment of error renders her second assignment moot, we note that the court erroneously placed the burden of proof on Brown. On appeal to the Common Pleas Court from an order of the Industrial Commission under *R.C. 4123.512*, "it must be presumed that the issue decided adversely *** is the only issue before the court." *Brennan v. Young* (1996), 6 Ohio App. 2d 175, 217 N.E.2d 247. Thus, the scope of appellee's appeal would have been limited to the ultimate issue decided adversely by the Industrial Commission: [*9] whether the appellee had sufficiently proven the elements of fraud.

Pursuant to the decisions in *Felty*, *supra* and *Harper*, *supra*, 1993 Ohio App. LEXIS 6068 once the Industrial Commission ruled that there was no fraud, the court of common pleas lacked jurisdiction to review the commission's ruling. Appellant had three options regarding judicial review of the industrial commission's decision: "by direct appeal to the courts of common pleas under *R.C. 4123.512*], by filing a mandamus petition in the Ohio Supreme Court or in the Franklin County Court of Appeals, or by an action for declaratory judgment pursuant to *R.C. Chapter 2721*." *Felty*, *supra*, at 237. Review of the record reveals that in the instant case appellant did not make the proper choice. Thus, the Lake County Court of Common Pleas did not have subject matter jurisdiction and the case should have been dismissed.

Fraud is an affirmative defense upon which the defendant has the burden of proof, pursuant to *Civ.R. 8(C)*. An administrative finding of fraud will be made only if the *prima facie* elements of the civil tort of fraud are established, as set forth in *Burr v. Board of County Comm'rs of Stark County* (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, [*10] paragraph two of the syllabus. Since appellee had the burden of proving fraud to the Industrial Commission, it follows that at a *de novo* trial in the court of common pleas pursuant to *R.C. 4123.512*, appellee also had the burden of proving fraud.

Based on the foregoing analysis, the court of common pleas lacked subject matter jurisdiction and its

judgment must be reversed and judgment entered for appellant.

JUDGE ROBERT A. NADER

O'NEILL, P.J., concurs,

GRENDALL, J., concurs in part and dissents in part with concurring and dissenting opinion.

CONCUR BY: DIANE V. GRENDALL (In Part)

DISSENT BY: DIANE V. GRENDALL (In Part)

DISSENT

CONCURRING/DISSENTING OPINION

GRENDALL, J.

I concur in the majority's reversal of the lower court's decision in this case because I agree, with respect to appellants' second assignment of error, that the trial court erred when it placed the burden of proof on appellant Brown.

However, I do not agree with the majority's ruling on appellants' first assignment of error. The lower court did have subject matter jurisdiction in this case. *Thomas v. Conrad* (1998), 81 Ohio St. 3d 475, 692 N.E.2d 205; [*11] *Moore v. Trimble* (Dec. 21, 1993), Franklin App. No. 93APE08-1084 unreported, 1993 Ohio App. LEXIS 6204; *Jones v. Massillon Bd. of Edn.* (June 14, 1994), Stark App. No. 94 CA0018, 1994 Ohio App. LEXIS 2891. I believe that the reasoning of the Tenth Appellate District in *Moore* and the Fifth Appellate District in *Jones* is more persuasive than our holding in *Harper v. Administrator, Bureau of Workers' Compensation* (Dec. 17, 1993), Trumbull App. No. 93-T-4863, unreported, 1993 Ohio App. LEXIS 6068.

While appellants' first assignment of error is without merit, I concur in the reversal of the lower court's ruling on the basis of appellants' second assignment of error. This matter should be remanded to the trial court for further proceedings, applying the proper burden of proof standards.

JUDGE DIANE V. GRENDALL

LEXSEE 1993 OHIO APP. LEXIS 6068

WAYNE HARPER, Plaintiff-Appellee, v. ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, et al., Defendants-Appellants, GENERAL MOTORS CORPORATION, B.O.C. GROUP, Defendant-Appellee.

ACCELERATED CASE NO. 93-T-4863

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY

1993 Ohio App. LEXIS 6068

December 17, 1993, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas. Case No. 90 CV 1728

DISPOSITION: JUDGMENT: Reversed and judgment entered in favor of appellants.

COUNSEL: ATTY. JAMES M. CUTTER, 85 East Gay Street, #500, Columbus, OH 43215, For Plaintiff-Appellee.

LEE FISHER, ATTORNEY GENERAL, DIANE J. KARPINSKI, ASSISTANT ATTORNEY GENERAL, State Office Building, 12th Floor, 615 Superior Avenue, Cleveland, OH 44113-1899, For Defendants-Appellants.

ATTY. EDWARD L. LAVELLE, ATTY. LYNN B. GRIFFITH, III, P.O. Box 151, Warren, OH 44482-0151, For Defendants-Appellee, General Motor Corporation, B.O.C. Group.

JUDGES: HON. DONALD R. FORD, P.J., HON. JUDITH A. CHRISTLEY, J., HON. ROBERT A. NADER, J.

OPINION BY: DONALD R. FORD

OPINION

OPINION

FORD, P.J.

This accelerated calendar appeal has been submitted on the briefs of the parties.

The instant appeal arises out of the Trumbull County Common Pleas Court. Appellants, Administrator, Bureau

of Workers' Compensation, and The Industrial Commission of Ohio, appeal from the denial of their motion to vacate the trial court's order for lack of subject matter jurisdiction.

Appellee, Wayne Harper, contracted occupational diseases described as flexor [*2] tenosynovitis of the left ring and middle fingers, and left carpal tunnel syndrome. These claims were allowed and never appealed. Mr. Harper thereafter applied to participate for the additional condition of left shoulder impingement syndrome. The district hearing officer granted him the right to participate for this condition, which decision the regional board affirmed. In an October 5, 1987 order, the Industrial Commission refused appellee-employer's, General Motors Corporation (GM), appeal of this award. GM did not appeal this award beyond the administrative level to the court of common pleas.

Mr. Harper was awarded temporary total compensation on April 6, 1989, and his disability was found to be permanent as of October 22, 1988. The regional board affirmed this order on August 9, 1989.

On October 17, 1989, pursuant to R.C. 4123.52, GM filed a motion with the Industrial Commission requesting that it set aside entirely the allowed shoulder claim. Apparently, GM had obtained new evidence from one of Mr. Harper's former physicians indicating that at the time Mr. Harper's claim was allowed, GM had relied upon misrepresentations regarding an undisclosed preexisting shoulder condition. [*3] GM thus requested the commission to vacate its award of compensation on the basis that the commission has inherent power, through continuing jurisdiction under R.C. 4123.52, to vacate its prior orders upon the ground of fraud in their procurement.



After a hearing on July 3, 1990, the deputies of the commission denied GM's C-86 motion to vacate because GM had failed to prove the existence of any actual intent to commit fraud on the part of Mr. Harper, and because the issue of preexistence was argued at the district hearing.

It is this order of the commission denying GM's request to set aside the allowance of Mr. Harper's shoulder claim that GM appealed to the Trumbull County Court of Common Pleas on October 9, 1990.

Even though GM had been informed that Mr. Harper could not be located to inform him of his scheduled deposition, GM chose to proceed, and filed a motion requesting an order that Mr. Harper be denied the right to participate in the Workers' Compensation Fund because of his failure to attend a deposition and answer interrogatories.

On February 27, 1992, the court granted GM's motion for judgment and sanctions, and decided that Mr. Harper did not have the right to participate [*4] for left shoulder impingement syndrome for failure to prosecute his claim. Both the bureau and the commission alleged that they never received copies of this entry.

On March 20, 1992, unaware that the court had granted GM's motion for judgment and sanctions, Mr. Harper's counsel drafted an entry dismissing the matter without prejudice, which the court signed on March 23, 1992. However, on April 22, 1992, the court ruled the entry stricken "as having been improvidently entered as it is moot" in light of the February 27, 1992 entry, which denied Mr. Harper the right to participate.

On June 30, 1992, appellants filed a motion to vacate the February 27, 1992 entry for the reason that the court lacked subject matter jurisdiction, and that the entry had never been served on appellants. On March 10, 1993, the trial court denied appellants' motion and ordered that since *Civ.R. 58* was not complied with, the appeal period would commence upon service of the entry. Appellants filed a notice of appeal on April 9, 1993.

"1. The common pleas court lacked subject matter jurisdiction to hear the employer's appeal from a commission order refusing to set aside a final order that had previously [*5] allowed claimant Wayne Harper to participate in the workers' compensation fund for an injury to his left shoulder, because the order which the employer appealed to court was not appealable pursuant to *R.C. 4123.519*."

In their sole assignment of error, appellants assert that the trial court did not have subject matter jurisdiction to hear GM's appeal from the order of the Commission refusing to set aside its earlier decision allowing Mr. Harper to participate in the Worker's Compensation Fund. They therefore contend that the appropriate remedy is a mandamus action. Appellees, however maintain that the order appealed from involved Mr. Harper's right to participate in the Worker's Compensation Fund, and is, therefore, appealable to the Court of Common Pleas under *R.C. 4123.519*.

In support of their contention, appellants argue that what GM actually filed with the trial court was an appeal from an order *refusing to set aside a final order*, which did not relate to Mr. Harper's actual right to participate in Workers' Compensation, and which was, therefore, "outside the normal appellate route." We agree.

R.C. 4123.519 provides in pertinent part as follows:

"The claimant [*6] or the employer may appeal a decision of the industrial commission * * * in any injury or occupation 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 * * *."

Notice of appeal from a decision of the Industrial Commission or of its staff hearing officer to the court of common pleas must be filed by appellant within sixty days after the date of receipt of the decision appealed from, or the date of receipt of the order of the Industrial Commission refusing to permit an appeal from a regional board of review. *R.C. 4123.519*. Further, the finality of a commission determination, provided it is one from which an appeal is permitted, attaches *upon the lapse of the appeal period*, which as stated, is sixty days. *Pierce v. Sommer (1974), 37 Ohio St.2d 133, 135, 308 N.E.2d 748*.

In *Sommer*, the order of the administrator disallowing the applicant's claim for injuries was received by the applicant on January 9, 1970, and no appeal was taken from that order. The court held that:

"[b]ecause appellee did not appeal from the order of the administrator disallowing his original claim, [*7] the Court of Common Pleas lacked jurisdiction of the subject matter of the appeal." *Id.*

GM, employer in the instant case, did not appeal the regional board's original allowance of Mr. Harper's claim

within the mandated sixty days after the commission refused GM's appeal of the award. Accordingly, the court of common pleas lacked subject matter jurisdiction over the appeal.

In further support of their argument, appellants cite *State ex rel. Board of Education v. Johnston* (1979), 58 Ohio St. 2d 132, 388 N.E.2d 1383. The factual scenario in the instant case nearly parrots that of *Johnston*. In *Johnston*, a claim was allowed and the employer's counsel, some three years later, filed a motion with the commission to vacate an award of permanent total disability benefits on the ground that the prior order was entered without knowledge of prior injuries. The commission refused to exercise jurisdiction for the reason that there had been no showing of fraud, error, or new and changed circumstances. The employer then filed an action in mandamus in the court of appeals praying that a writ issue ordering the commission to vacate its original orders. The court agreed that the commission [*8] did not

have jurisdiction to vacate its prior order because employer's motion did not allege any new and changed circumstances. *Id. at 136.*

Based on the foregoing, we conclude that appellants' sole assignment of error has merit, and that the trial court did not have subject matter jurisdiction to hear GM's appeal from the commission's refusal to vacate its October, 1987 award of Worker's Compensation benefits to Mr. Harper. The appropriate remedy for GM lies in mandamus. The judgment of the lower court is reversed, and judgment is entered in favor of appellants.

PRESIDING JUDGE DONALD R. FORD

CHRISTLEY, J.,

NADER, J.,

Concur.

LEXSEE 2002 OHIO 3622

Elizabeth B. Schultz, Plaintiff-Appellant, v. Administrator, Ohio Bureau of Workers' Compensation, et al., Defendants-Appellees.

Case No. 01CA2809

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, SCIOTO COUNTY

148 Ohio App. 3d 310; 2002 Ohio 3622; 772 N.E.2d 1253; 2002 Ohio App. LEXIS 3703

July 9, 2002, Filed

DISPOSITION: Trial court's judgment was affirmed.

COUNSEL: Angela D. Marinakis, Columbus, Ohio, for appellant.

Jacob Dobres, Assistant Attorney General, Columbus, Ohio, for appellee Administrator, Ohio Bureau of Workers' Compensation.

Jeffrey B. Hartranft and Daniel M. Hall, Assistant Attorneys General, Columbus, Ohio, for appellee Industrial Commission of Ohio.

JUDGES: Roger L. Kline, Judge. Abele, P.J., concurs in judgment and opinion. Evans, J., dissents.

OPINION BY: Roger L. Kline

OPINION

[1254] [*311] DECISION AND JUDGMENT ENTRY**

Kline, J.:

[**P1] The Industrial Commission of Ohio determined that Elizabeth B. Schultz committed fraud in her receipt of Workers' Compensation benefits. Schultz filed a complaint seeking a jury determination of fraud in the Scioto County Court of Common Pleas. The court dismissed her complaint based upon [*312] lack of subject matter jurisdiction pursuant to R.C. 4123.512. Schultz appeals, asserting that the issue of whether she committed fraud in the receipt of her Workers' Compensation benefits is not an "extent of disability" issue, and therefore the trial court possessed jurisdiction to consider the matter. Because the Supreme Court of Ohio has narrowly construed the jurisdiction conferred upon the common pleas courts by R.C. 4123.512 to include only issues re-

garding the right of participation, we disagree. Schultz further alleges that mandamus is an inadequate remedy in this case and that she possesses a constitutional right to a jury trial. Because the determination of fraud in a Workers' Compensation matter is wholly statutory, legislatively created remedies are adequate and no constitutional right to a jury trial exists. Accordingly, we overrule each of Schultz's assignments of error and we affirm the judgment of the trial court.

I.

[**P2] In 1978, Schultz suffered an injury during the course of her employment and filed a claim that was recognized by the Bureau of Workers' Compensation. In 1986, Schultz applied for permanent total disability (PTD) benefits, and the Industrial Commission granted her application.

[**P3] In 1999, the Administrator of the Bureau of Workers' Compensation filed a motion to terminate Schultz's PTD benefits and declare an overpayment after it learned that Schultz had been working [***1255] part-time while collecting PTD benefits. The Staff Hearing Officer ("SHO") terminated Schultz's PTD benefits, found overpayment for the period from 1994 through 1999, and ordered Schultz to repay pursuant to the repayment schedule of R.C. 4123.511(J). Schultz appealed that ruling in mandamus.

I Although the Administrator also sought a finding that Schultz committed fraud, the Administrator's motion did not properly raise the issue of fraud, and Schultz refused to waive notice of the issue. Therefore, the Staff Hearing Officer did not rule on the issue of fraud.

[**P4] The Administrator filed a second motion in 2000 in which he sought a finding that Schultz committed fraud by collecting PTD benefits while engaging in

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part-time work. The Industrial Commission held a hearing, considered evidence, and found that Schultz committed fraud in collecting PTD benefits. The Industrial Commission therefore ordered that the Administrator be granted permission to utilize "any other lawful means," in addition to the repayment schedule of *R.C. 4123.511(J)*, in order to recoup the overpayment to Schultz for the period from 1994 through 1999.

[**P5] Schultz filed a complaint in the trial court, ostensibly pursuant to *R.C. 4123.512*, wherein she sought to invoke the trial court's jurisdiction to review the Industrial Commission's finding of fraud. The trial court dismissed Schultz's [*313] complaint, finding that it does not possess subject matter jurisdiction over the Industrial Commission's finding of fraud pursuant to *R.C. 4123.512*.

[**P6] Schultz timely appeals, asserting the following assignments of error:

[**P7] I. The Common Pleas Court erred in dismissing Appellant's case as no other remedy exists to Appellant for a determination of fraud by the Industrial Commission.

[**P8] II. The Lower Court erred in dismissing Plaintiff's appeal as the Ohio Constitution guarantees the right to trial by jury to a party to an action for fraud.

II.

[**P9] In her first assignment of error, Schultz asserts that the trial court's determination that it does not possess subject-matter jurisdiction constitutes error because no other remedy exists by which Schultz may appeal a determination of fraud by the Industrial Commission. In support of her assignment of error, Schultz acknowledges that the trial court derives its jurisdiction over Industrial Commission decisions from *R.C. 4123.512*, and argues that *R.C. 4123.512* authorizes the trial court to consider Industrial Commission determinations of fraud.

[**P10] *R.C. 4123.512* provides that a claimant or employer may appeal an Industrial Commission decision to the court of common pleas, "other than a decision as to the extent of disability." Contrary to Schultz's assertion that this limitation does not exclude Industrial Commission decisions regarding fraud, the Supreme Court of Ohio has narrowly construed the scope of *R.C. 4123.512* jurisdiction.

[**P11] A direct appeal to the common pleas court pursuant to *R.C. 4123.512* is the most limited of the three forms of review available to Industrial Commission litigants. *Felty v. AT&T Technologies, Inc. (1992)*, 65 Ohio St.3d 234, 237, 602 N.E.2d 1141. Whether this procedural mechanism is available to a litigant, and hence

whether the common pleas court possesses subject matter jurisdiction, depends upon the nature of the decision issued by the Commission. *Id.* The Ohio [***1256] Supreme Court has limited the statutory language of *R.C. 4123.512* so that "only decisions reaching an employee's right to participate in the workers' compensation system because of a specific injury or occupational disease are appealable under *R.C. 4123.519*." *Id.* at paragraph one of the syllabus; *Afrates v. Lorain (1992)*, 63 Ohio St.3d 22, 584 N.E.2d 1175, paragraph one of the syllabus; *Zavatsky v. Strtnger (1978)*, 56 Ohio St.2d 386, 10 Ohio Op. 3d 503, 384 N.E.2d 693, paragraph one of the syllabus.

[*314] [**P12] A decision of the Industrial Commission "does not determine an employee's right to participate in the State Insurance Fund unless the decision finalizes the allowance or disallowance of the employee's claim." *State ex rel. Evans v. Indus. Comm. (1992)*, 64 Ohio St.3d 236, 594 N.E.2d 609, paragraph one of the syllabus. Thus, litigants may only appeal decisions of the Industrial Commission that determine "whether an employee is or is not entitled to be compensated for a particular claim." *Id.*

[**P13] In this case, Schultz does not contend that the Industrial Commission's decision dealt with her right to participate in the Workers' Compensation program. Instead, Schultz argues that because none of the Ohio Supreme Court cases construing *R.C. 4123.512* jurisdiction involve fraud, those cases do not restrict a trial court from reviewing a finding of fraud. We find that Schultz's argument ignores the clear, plain meaning of the Ohio Supreme Court's holdings. In stating that *R.C. 4123.512* confers jurisdiction "only" upon decisions involving the right to participate, the Court has clearly excluded all other decisions, including decisions involving fraud, from the common pleas courts' jurisdiction.

[**P14] Schultz also contends that the trial court should have exercised jurisdiction in this case because a jury trial is the only adequate remedy available to her in this case. Specifically, Schultz asserts that since mandamus will not require adherence to the Rules of Evidence, it is not an adequate remedy. However, Schultz's argument overlooks the fact that the trial court is without power to determine its own jurisdiction. *Section 4(B), Article IV of the Ohio Constitution* states that "the courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." Thus, a court has no power to expand its jurisdiction beyond that conferred by the Ohio Constitution and the General Assembly, regardless of how persuasive the reasons for doing so may be. *Springfield City Sch. Support Personnel v. State Emp. Relations Bd. (1992)*, 84 Ohio App.3d 294, 298, 616 N.E.2d 983. Therefore, the trial court had no choice but to dismiss

this case despite Schultz's assertion that she has no other adequate remedy available to her.

[**P15] Accordingly, we overrule Schultz's first assignment of error.

III.

[**P16] In her second assignment of error, Schultz contends that the trial court erred in dismissing this case because the Ohio Constitution guarantees the right to a trial by jury to parties in an action for fraud.

[*315] [**P17] Pursuant to *R.C. 4123.511(J)(4)*, the Administrator or the Industrial Commission may determine whether a claimant has committed fraud in his or her receipt of benefits. Thus, Schultz's assertion that the Industrial Commission's finding of fraud deprives her of her constitutional right to a trial by jury [***1257] amounts to a constitutional challenge to *R.C. 4123.511(J)(4)*.

[**P18] All legislative enactments enjoy a presumption of constitutionality. *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1998), 81 Ohio St.3d 480, 481, 692 N.E.2d 560; *Sachdeva v. Conrad* (Nov. 1, 2001), Franklin App. No. 01 AP406, 2001 Ohio 4055, 2001 Ohio App. LEXIS 4842. We may not declare a legislative enactment to be unconstitutional unless it appears beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Sachdeva*, citing *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570, certiorari denied (1999), 525 U.S. 1182, 143 L. Ed. 2d 116, 119 S. Ct. 1122.

[**P19] *Article I, Section 5 of the Ohio Constitution* provides for the right of trial by jury in causes of action wherein the right existed at common law at the time the Ohio Constitution was adopted. *Sarrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, citing *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 8 Ohio Law Abs. 28, 169 N.E. 301, paragraph one of the syllabus. There is no right to jury trial "unless that right is extended by statute or existed at common law prior to the adoption of our state Constitution." *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743; *Sachdeva, supra*, 2001 Ohio App. LEXIS 4842.

[**P20] Schultz contends that because the common law action for fraud was in existence before the Ohio Constitution was adopted (see *Chapman v. Lee* (1887), 45 Ohio St. 356, 13 N.E. 736), she has a right to a trial by jury on the Industrial Commission's finding that she committed fraud by collecting PTD benefits. The Industrial Commission and the Bureau argue that because the workers' compensation system, wherein an injured worker can initiate a claim against his employer without regard to fault, did not exist at common law, any claim

involving workers' compensation benefits is wholly statutory and not subject to the right of trial by jury.

Workmen's Compensation Law [**P21] It has long been determined in this state that "the rights of employees and their dependents in the are not governed by common law, but are only such as may be conferred by the General Assembly." *Westenberger v. Indus. Comm.* (1939), 135 Ohio St. 211, 212, 20 N.E.2d 252, *Sachdeva, supra*. Thus, a finding regarding whether Schultz had a right to her PTD benefits, or instead fraudulently obtained them, involves a right conferred by the General Assembly.

[**P22] Additionally, *R.C. 4123.511(J)(4)* provides that the Administrator "may utilize, the repayment schedule of this division, or any other lawful means, to collect payment of compensation made to a person who was not entitled to the [*316] compensation due to fraud as determined by the administrator or the industrial commission." Thus, while the Administrator is generally limited to the repayment schedule set forth in *R.C. 4123.511* to recoup an overpayment, a finding of fraud simply empowers the Administrator to use any other lawful means, as would be available to any other creditor, in order to recoup the overpayment. In this manner, the type of "fraud" that is contemplated by *R.C. 4123.511* is different from common law actions for fraud. While *R.C. 4123.511* simply empowers the Administrator to act as any other creditor, in common law a finding of fraud could result in punitive damages assessed against the debtor. See *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.

[**P23] Thus, we find that no right to a trial by jury exists with respect to an Industrial Commission finding of fraud under [***1258] *R.C. 4123.511(J)*. Accordingly, we overrule Schultz's second assignment of error, and we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

148 Ohio App. 3d 310, *; 2002 Ohio 3622, **;
772 N.E.2d 1253, ***; 2002 Ohio App. LEXIS 3703

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 for the Rules of Appellate Procedure.

Exceptions.

For the Court

BY: Roger L. Kline, Judge

Abele, P.J., concurs in judgment and opinion.

Evans, J., dissents.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

LEXSEE 1997 OHIO APP. LEXIS 485

MALINDA THOMAS, Plaintiff-Appellee/ Cross-Appellant v. C. JAMES CONRAD,
ADMINISTRATOR BUREAU OF WORKERS' COMPENSATION and THE IN-
DUSTRIAL COMMISSION OF OHIO and NCR CORPORATION FKA AT&T
GLOBAL INFORMATION SOLUTIONS, Defendant-Appellant and Cross-Appellee

C.A. Case Nos. 15873/ 15898

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONT-
GOMERY COUNTY

1997 Ohio App. LEXIS 485

February 14, 1997, Rendered

NOTICE:

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

PRIOR HISTORY: T.C. Case No. 95-3663.

DISPOSITION: Reverse and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer sought review of the judgment from the Montgomery County Common Pleas Court (Ohio), which granted plaintiff employee's motion to dismiss the employer's appeal pursuant to *Ohio Rev. Code Ann. § 4123.512(A)* on the ground that the trial court had no subject matter jurisdiction. The employee had sought review of the trial court's denial of her motion for attorney's fees under § 4123.512(F).

OVERVIEW: The employee suffered a non-work-related injury subsequent to sustaining a work-related injury. The employer filed a motion with the industrial commission seeking to be relieved of its obligation to compensate the employee because the injury was an intervening one. The hearing officer disagreed. The commission refused to hear the employer's appeal. The employer filed a notice of appeal with the trial court. The employer alleged that because the issue before the commission involved the employee's right to continue participating in the workers' compensation system, the trial court had jurisdiction. On appeal, the court held that pursuant to *Ohio Rev. Code Ann. § 4123.519*, the only subsequent ruling of the commission that was appealable

was one that terminated the right to participate. The court found that the commission's order involved the extent of the employee's injuries and was thus not appealable. Regarding the employee's claim for attorney's fees under *Ohio Rev. Code Ann. § 4123.512(F)*, the court held that the legal proceedings contemplated by § 4123.512(F) was the appeal itself. The employee was entitled to them although the appeal was dismissed.

OUTCOME: The court reversed the trial court's judgment, which had denied the employee's request for attorney's fees, and remanded the action for a determination as to the proper amount of attorney's fees. The court affirmed the trial court's dismissal of the employer's appeal.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > Questions of Law

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

[HN1] The only Industrial Commission rulings appealable to a common pleas court are those involving a claimant's right to participate or to continue to participate in the workers' compensation fund.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

[HN2] Once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the

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right to participate, are appealable pursuant to *Ohio Rev. Code Ann. § 4123.519*.

Governments > Courts > Judicial Precedents

[HN3] The syllabus of a Supreme Court of Ohio opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the court for adjudication. Furthermore, matter outside the syllabus is not regarded as a decision.

Constitutional Law > Substantive Due Process > Scope of Protection

Governments > Legislation > Statutory Remedies & Rights

Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview

[HN4] Once a right to participation in the system is determined no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to *Ohio Rev. Code Ann. § 4123.512* There is a rational basis for such a distinction--the orderly and efficient operation of the system. Because the workers' compensation system was designed to give employees an exclusive statutory remedy for work-related injuries, a litigant has no inherent right of appeal in this area. Therefore, a party's right to appeal workers' compensation decisions to the courts is conferred solely by statute.

Workers' Compensation & SSDI > Administrative Proceedings > Costs & Attorney Fees

[HN5] *Ohio Rev. Code Ann. § 4123.512(F)* provides as follows: The cost of any legal proceedings authorized by *§ 4123.512(F)*, 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 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 \$ 2,500.

COUNSEL: JOSEPH R. EBENGER, 1100 Miami Valley Tower, 40 West Fourth Street, Dayton, Ohio 45402, Atty. Reg. # 0014390, Attorney for Plaintiff-Appellee/Cross-Appellant.

GARY T. BRINSFIELD, Atty. Reg. # 0014646 and D. PATRICK KASSON, Atty. Reg. # 0055570, One Citizens Federal Centre, 110 N. Main Street, Suite 1000, Dayton, Ohio 45402, Attorneys for Defendant-Appellant/Cross-Appellee.

MAXINE YOUNG ASMAH, Assistant Attorney General, Workers' Compensation Section, 1700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, Attorney for Defendant-Appellant/Cross-Appellee.

JUDGES: BROGAN, J., WOLFF, J., and GRADY, J., concur.

OPINION BY: BROGAN

OPINION

OPINION

BROGAN, J.

This action involves consolidated appeals by NCR Corporation ("NCR") and Malinda Thomas. The parties each challenge the Montgomery County Common Pleas Court's April 9, 1996, decision and order granting Thomas' motion to dismiss and denying her request for attorney's fees.

NCR advances one assignment of error in case number CA-15873. Specifically, NCR contends the trial [*2] court erred by ruling that it lacked subject matter jurisdiction to hear NCR's appeal from an Industrial Commission order. Likewise, Thomas advances one assignment of error in case number CA-15898. She claims the trial court erred by denying her request for attorney's fees. On June 24, 1996, this court granted the parties' agreed motion to consolidate the two cases for appeal.

The two consolidated appeals stem from a work-related injury Thomas sustained on October 1, 1987. As a result of her accident, workers' compensation claim number 961227-22 was allowed for a psychogenic pain disorder as well as injuries to Thomas' ribs, left hip, left leg, and back. Thereafter, on February 28, 1992, a non-work-related guard dog attack caused Thomas to fall, resulting in injuries to her wrists, arms, and back. NCR subsequently filed a motion with the Industrial Commission on July 12, 1994, seeking to eliminate its further responsibility for compensation to Thomas under claim number 961227-22. In support of its motion, NCR contended the dog attack caused an intervening injury sufficient to terminate Thomas' right to receive any further compensation for her work-related injury.

A district hearing [*3] officer denied NCR's motion on June 29, 1995, finding in part that "the self-insured employer failed to timely investigate the issue of an intervening injury after receipt of notice by claimant." NCR appealed that ruling, and a staff hearing officer denied the appeal. The staff hearing officer also modified the district hearing officer's order as follows:

"It is the finding of the District Hearing Officer that the incident occurring on 2-28-92, did not constitute an intervening injury to the body parts and conditions recognized in this claim. Claimant suffered injuries to her wrists and arms and a mild temporary exacerbation of her allowed back condition. Medical expenses related to the temporary exacerbation are not payable nor are the services related to the arm and wrist injury.

"In all other respects the District Hearing Officer's order is affirmed."

NCR appealed the foregoing order to the Industrial Commission on August 30, 1995, but the commission refused to hear the appeal. Consequently, NCR then filed a timely notice of appeal with the Montgomery County Common Pleas Court pursuant to *R.C. 4123.512(A)*. In response, Thomas filed a complaint alleging that the Industrial Commission's [*4] proceedings concerned solely the *extent* of her injury, a subject not properly appealable to the common pleas court pursuant to *R.C. 4123.512(A)*. Thomas then filed a motion to dismiss NCR's appeal on January 16, 1996, contending that the common pleas court lacked subject matter jurisdiction to review the matter. Thomas also sought attorney's fees under *R.C. 4123.512(F)*.

In an April 9, 1996, decision and order, the trial court granted Thomas' motion to dismiss but denied her request for attorney's fees. NCR subsequently appealed the trial court's dismissal of its appeal on April 29, 1996. Likewise, Thomas appealed the trial court's denial of attorney's fees on May 9, 1996. This court then consolidated the appeals pursuant to an agreed motion submitted by the parties.

In its assignment of error, NCR contends the trial court erred by dismissing its appeal from the Industrial Commission's order. Specifically, NCR claims the issue confronting the Industrial Commission (as well as the district hearing officer and staff hearing officer) was whether Thomas had a right to continue participating in the workers' compensation system in light of the "intervening" dog-attack injuries she sustained. [*5] NCR then argues that its appeal to the common pleas court was proper because its motion and the industrial commission's ruling both addressed Thomas' right to participate rather than the extent of her injury.

Conversely, Thomas asserts that the Industrial Commission's order concerned only the extent of her disability. Thomas then stresses that an original action in mandamus, and not an appeal to the common pleas court, is the proper method to challenge Industrial Commission orders relating to the extent of a claimant's disability.

The trial court agreed with Thomas' argument in its April 9, 1996, decision and order dismissing NCR's ap-

peal. In support of its conclusion, the trial court correctly recognized that [HN1] the only Industrial Commission rulings appealable to a common pleas court are those "involving a claimant's right to participate or to continue to participate in the [workers' compensation] fund." *Afrates v. Lorain* (1992), 63 Ohio St. 3d 22, 584 N.E.2d 1175, at paragraph one of the syllabus.

The trial court also acknowledged that the Industrial Commission's decision allowing Thomas to continue participating in the workers' compensation system despite her dog attack could be construed [*6] as being appealable, pursuant to *Afrates, supra*, because it seemingly involved a "right to participate" issue. The trial court rejected this argument, however, stating in relevant part:

"In this case before the Court, the Industrial Commission determined that Plaintiff could continue to participate in the fund. Such a determination does not directly affect her *right* to participate in the fund because that right had been previously recognized and has continued. The Staff Hearing Officer's Decision, modifying the Decision of the District Hearing Officer, excepted from coverage certain specific injuries resulting from a fall Plaintiff incurred while being chased by a dog. Therefore, the final administrative decision denying Defendant-Employee's request to discontinue paying compensation and benefits to Plaintiff concerned the extent Plaintiff's participation in the fund, not her right to participate in the fund."

The trial court also relied heavily upon *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St. 3d 234, 602 N.E.2d 1141, at paragraph two of the syllabus, in which the Ohio Supreme Court held that [HN2] "once the right of participation for a specific condition is determined by the Industrial [*7] Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to *R.C. 4123.519*."

Since Thomas already had been granted the right to receive workers' compensation as a result of her work-related accident, and the Industrial Commission's ruling did not terminate that right, the trial court, relying upon *Felty* and *Bishop v. Thomas Steel Strip Corp.* (1995), 101 Ohio App. 3d 522, 655 N.E.2d 1370, concluded that it lacked subject-matter jurisdiction to hear NCR's appeal. Consequently, the court reasoned that a writ of mandamus was the proper mechanism to challenge the Industrial Commission's ruling.

In *Bishop, supra*, the Trumbull County Court of Appeals considered an appeal factually similar to the present case. The appellee in *Bishop* suffered a work-related accident in January 1987 and received workers' compensation for an injury to his left knee. Appellant Thomas

Steel subsequently asked the Industrial Commission in 1992 to terminate the appellee's benefits because of a non-work-related intervening and more severe December 1987 injury to the appellee's knee. The Industrial Commission ultimately rejected Thomas Steel's request, [*8] concluding that the corporation failed to demonstrate that Bishop's "recognized disability was worsened or aggravated by the undisputed fall of December 2, 1987."

Thereafter, Thomas Steel sought to appeal the Industrial Commission's ruling into the common pleas court pursuant to R.C. 4123.512. The trial court dismissed Thomas Steel's appeal, however, finding that it lacked subject matter jurisdiction over the appeal because the Industrial Commission's order pertained to the extent of Bishop's injury rather than his right to participate in the compensation fund. Thomas Steel appealed that ruling to the Trumbull County Court of Appeals, which affirmed the trial court's dismissal.

Finding the trial court's ruling proper, the appellate court relied upon the syllabus of *Felty, supra*, which states that "once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable [to the common pleas court]." Relying upon this language and *Medve v. Thomas Steel Strip Corp. (June 18, 1993), 1993 Ohio App. LEXIS 3083*, Trumbull App. No. 92-T-4791, unreported¹, an earlier Trumbull [*9] County Court of Appeals case construing *Felty*, the *Bishop* court reasoned:

1 In *Medve*, the Trumbull County Court of Appeals cited *Felty, supra*, and concluded: "In the present case, appellee was already receiving worker's compensation. Appellant sought to terminate appellee's temporary total disability based on two subsequent falls. The commission specifically found that the two falls in 1990 did not constitute separate intervening incidents, and did not worsen appellee's condition. Since the commission's order did not terminate appellee's right to participate and went to the extent of his disability, there was no jurisdiction to appeal."

" * * * In the instant case, appellee's right to participate was determined by the commission's orders of March 20, 1989, and October 18, 1991. Appellant subsequently moved the commission to reconsider whether appellee should remain eligible for temporary total benefits as a result of the alleged intervening incident occurring on December 2, 1987. As in [*10] *Medve*, the commission determined that appellee's non-work-related fall did not worsen or aggravate his previously recognized disability, and therefore appellee remained eligible for temporary total disability benefits.

We conclude that the commission's order of August 2, 1993, involved the extent of appellee's disability. Since the commission's order did not terminate appellee's right to participate, the trial court did not err in granting appellee's motion to dismiss for lack of subject matter jurisdiction."

101 Ohio App. 3d at 526.

Significantly, however, the *Bishop* court also acknowledged the existence of other appellate decisions construing *Felty, supra*, more broadly than the Eleventh District did in *Bishop*. The *Bishop* court then reasoned that "this is an issue for the Supreme Court of Ohio to resolve."

In its brief to this court, NCR relies upon these other rulings to support its argument that its motion and the Industrial Commission's ruling concerned a "right to participate" issue rather than an "extent of disability" question. In particular, NCR cites *Flora v. Cincinnati Milacron, Inc. (1993), 88 Ohio App. 3d 306, 623 N.E.2d 1279, Moore v. Trimble (Dec. 21, 1993), [*11] 1993 Ohio App. LEXIS 6204*, Franklin App. No. 93APE08-1084, unreported, and *Jones v. Massillon Bd. of Edn. (June 13, 1994), 1994 Ohio App. LEXIS 2891*, Stark App. No. 94 CA0018, unreported.

In *Flora, supra*, the claimant sustained a back injury while working for Cincinnati Milacron in 1988. The claimant received workers' compensation for his injury. Thereafter, the claimant sought to reactivate his claim in 1989 after injuring his back while mowing his lawn. At each level of administrative review, the Industrial Commission rejected the claimant's application for reactivation, finding that the second injury was "more than a mere aggravation" of the work-related injury. The claimant then filed an appeal with the common pleas court, and Cincinnati Milacron filed a motion to dismiss or, alternatively, a motion for summary judgment. The trial court ultimately granted Cincinnati Milacron's summary judgment motion.

The Clermont County Court of Appeals then reversed the common pleas court, stating:

"In the case at bar, we find that the commission's decision reached the right of appellant to participate in the workers' compensation system. The commission found that appellant's September 1989 injury was caused by an intervening, non-work-related [*12] accident that was more than a mere aggravation of his prior condition. As such, the commission made a factual determination that appellant did not sustain the disability as a result of the work-related accident. Such a finding goes to appellant's right to participate in the system and it is therefore appealable to the common pleas court pursuant to R.C. 4123.519 See *Felty, supra*, 65 Ohio St. 3d at 239, 602

N.E.2d at 1145, citing *Keels v. Chapin & Chapin, Inc.* (1966), 5 *Ohio St. 2d* 112, 34 *Ohio Op. 2d* 249, 214 *N.E.2d* 428.

88 *Ohio App. 3d* at 309.

In *Moore, supra*, the Industrial Commission allowed the claimant's workers' compensation claim for a work-related injury on March 23, 1990. Thereafter, on August 1, 1990, the employer-appellant filed a motion to terminate the claimant's participation in the workers' compensation fund. The employer based its motion upon alleged evidence that the employee had committed fraud. Specifically, the motion alleged that the employee injured himself while lifting a motorcycle at home rather than at work.

At each level of administrative review, the Industrial Commission rejected the employer's motion to terminate the claimant's participation [*13] in the fund. As a result, the employer filed an appeal in the common pleas court and, ultimately, in the Franklin County Court of Appeals. Finding an appeal to the common pleas court proper, the appellate court cited *Afrates v. Lorain* (1992), 63 *Ohio St. 3d* 22, 584 *N.E.2d* 1175, *State ex rel. Evans v. Indus. Comm.* (1992) 64 *Ohio St. 3d* 236, 594 *N.E.2d* 609 and *Felty, supra*, for the proposition that "one can only appeal to the court of common pleas if the decision of the Industrial Commission, or its staff hearing officers, is one that finalizes the allowance or disallowance of the employee's claim." Furthermore, the *Moore* court quoted language in *Afrates* stating that "the only decisions reviewable [in the common pleas court] are those decisions involving a claimant's right to participate or to continue to participate in the fund." *Moore, supra*, quoting *Afrates, supra*, at 26.

Curiously, the *Moore* court then quoted the following language from *Felty*, which the trial court relied upon in the present case: "Once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to [*14] participate, are appealable [into the common pleas court] pursuant to *R.C. 4123.519*." *Moore, supra*, quoting *Felty, supra*, at paragraph two of the syllabus.

In *Moore*, as in the present case, the Industrial Commission's ruling *did not* terminate the claimant's right to participate. Without explaining why the foregoing rule expressed in the syllabus of *Felty* did not preclude the employer's appeal, however, the *Moore* court then determined that:

"this action clearly involves the employee's right to continue to participate, insofar as the appellant-employer was attempting to terminate the employee's right to participate, based upon the alleged fraud of the employee-

claimant. Thus, appellant-employer's appeal to the court of common pleas fell within the purview of *R.C. 4123.519* and the court of common pleas therefore had jurisdiction to hear the appellant-employer's appeal."

Finally, in *Jones, supra*, the Stark County Court of Appeals also reviewed an employer's attempt to terminate a claimant's participation in the workers' compensation fund due to fraud. Specifically, the employer had alleged before the Industrial Commission that it possessed evidence [*15] establishing that the claimant's purported work-related injury actually resulted from a non-work-related sports accident. At each level of administrative review, the Industrial Commission rejected the employer's attempt to terminate the claimant's participation in the workers' compensation fund. The common pleas court subsequently determined that it lacked subject matter jurisdiction to hear the employer's appeal.

Reversing the trial court's judgment, the Stark County Court of Appeals first cited *Afrates, supra*, and *Felty, supra*, and noted that "the Ohio Supreme Court has definitively held that an Industrial Commission's decision involving a claimant's right to continue to participate in the State Insurance Fund is appealable to the Common Pleas Court pursuant to *R.C. section 4123.519*." The court then reasoned that "setting aside semantics, it is clear from the facts of this case that the employer sought to discontinue claimant's right to participate in the State Insurance Fund. As such, the Industrial Commission's decision involving the claimant's right to continue to participate in the fund is appealable under *R.C. section 4123.519*." Significantly, the *Jones* [*16] court also failed to address or distinguish the language in *Felty's* syllabus stating that only Industrial Commission rulings *terminating* a claimant's right to participate in the workers' compensation fund are appealable to the common pleas court.

In our view, the confusion about whether an employer may appeal in the common pleas court from an administrative denial of its request to terminate an employee's workers' compensation claim stems from seemingly conflicting language in *Felty, supra*. As we explained above, paragraph two of *Felty's* syllabus states: "Once the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to *R.C. 4123.519*." This language unambiguously supports Thomas' argument that the commission's *refusal* to terminate her participation in the workers' compensation system must be appealed through mandamus rather than an appeal to the common pleas court. Clearly, the commission's ruling *did not* terminate her right to participate.

NCR, however, relies upon the following language from *Felty, supra*, [*17] at 239: "A decision by the commission determines the employee's right to participate if it finalizes the allowance or disallowance of an employee's 'claim.' The only action by the commission that is appealable under R.C. 4123.519 is this essential decision to grant, to deny, or to terminate the employee's participation or continued participation in the system." NCR then contends the Industrial Commission's refusal to terminate Thomas' participation necessarily granted her continued participation. Pursuant to *Felty*, NCR claims, the commission's decision to grant participation or continued participation is appealable to the common pleas court.

Although we find NCR's argument well-reasoned, we also recognize that the syllabus of an Ohio Supreme Court opinion states the law in Ohio. *State v. Boggs* (1993), 89 Ohio App. 3d 206, 212, 624 N.E.2d 204. [HN3] "The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." *Collins v. Swackhamer* (1991), 75 Ohio App. 3d 831, 834, 600 N.E.2d 1079, quoting Sup.Ct.Rep.Ops.R. 1(B). Furthermore, "matter outside the syllabus is not regarded as [*18] a decision." *Williams v. Ward* (1969), 18 Ohio App. 2d 37, 39, 246 N.E.2d 780, at footnote one, quoting *Haas v. State* (1921), 103 Ohio St. 1, 132 N.E. 158.

As both the trial court and the Eleventh District Court of Appeals in *Bishop* recognized, the syllabus of *Felty, supra*, unambiguously states that once a claimant is granted the right to participate in the workers' compensation, no subsequent Industrial Commission ruling, except a ruling terminating that right, may be appealed to the common pleas court. In the present case, the Industrial Commission refused to terminate Thomas' continued participation. Accordingly, pursuant to the syllabus of *Felty, supra*, the commission's ruling was not appealable to the court of common pleas.

In opposition to this conclusion, NCR raises an equal protection argument, contenting that the trial court's ruling deprives it of equal access to the courts and the right to a jury trial. NCR complains that if the trial court had ruled against Thomas and terminated her participation, she would have enjoyed the ability to appeal to the common pleas court. Such an appeal includes *de novo* review and a right to a jury trial. Conversely, NCR contends that [*19] forcing it to pursue a mandamus action simply because the trial court ruled in favor of Thomas deprives it of the right to a jury trial on the same issue. Furthermore, NCR argues that the standard of review in a mandamus action makes it much less likely that an appeal will succeed.

The *Bishop* court rejected a similar argument, however, stating:

"Appellant's constitutional argument is without merit. One goal of the workers' compensation system is that it operate largely outside the courts. *Felty, 65 Ohio St. 3d at 238, 602 N.E.2d at 1144-1145*. To this end, the General Assembly has restricted the right of litigants to appeal decisions of the commission to those decisions involving an employee's right to participation in the system.

[HN4] "Once such a right is determined 'no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to R.C. [4123.512].' (Emphasis added.) *Felty at 240, 602 N.E.2d at 1146*. There is a rational basis for such a distinction--the orderly and efficient operation of the system.

"As the *Felty* court observed:

" * * * Because the workers' compensation system was designed to give employees an exclusive [*20] statutory remedy for work-related injuries, 'a litigant has no inherent right of appeal in this area * * *.' *Cadle v. Gen. Motors Corp. [1976], 45 Ohio St. 2d 28, 33, 74 Ohio Op. 2d 50, 52, 340 N.E.2d 403, 406*. Therefore, a party's right to appeal workers' compensation decisions to the courts is conferred solely by statute.' *Felty at 237, 602 N.E.2d at 1144*."

We find the *Bishop* court's constitutional analysis persuasive and equally applicable to NCR's claims. Accordingly, we overrule NCR's assignment of error in case number CA-15873 and affirm the trial court's decision granting Thomas' motion to dismiss.

In her sole assignment of error in case number CA-15898, Thomas contends the trial court erred by refusing to award her attorney's fees. The trial court's April 9, 1996, decision and order construed R.C. 4123.512(F) as allowing a claimant to recover attorney's fees after receiving a favorable judgment only if the Industrial Commission or the administrator appealed to the common pleas court. In the present case, the employer, NCR, appealed from the Industrial Commission's ruling. Consequently, the trial court found attorney's fees improper.

Thomas argues, and NCR agrees, [*21] however, that the trial court misread [HN5] R.C. 4123.512(F), which provides as follows:

"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 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 twenty-five hundred dollars."

R.C. 4123.512(F) (Emphasis added.).

NCR concedes that the trial court misquoted *R.C. 4123.512(F)* in its decision and order. We agree. The foregoing passage clearly allows the trial court to tax attorney's fees against the employer.

The trial court also found attorney's fees improper for a second reason, however. In particular, the trial court concluded that because it dismissed NCR's action, Thomas' right to continue to participate in the fund was not established upon its final determination of the appeal.

Thomas argues that the trial court erred [*22] in reaching this conclusion, and, once again, NCR agrees.

In light of the Ohio Supreme Court's ruling in *Hospitality Motor Inns v. Gillespie* (1981), 66 Ohio St. 2d 206, 421 N.E.2d 134, we also conclude that the trial court erred by failing to award Thomas attorney's fees. In *Hospitality Motor Inns*, the court determined that the "legal proceedings" contemplated by *R.C. 4123.51.9* [now 4123.512(F)] is the appeal itself. Once such an appeal is perfected, the common pleas court may award attorney's fees to the claimant even though the employer's appeal subsequently is dismissed for lack of jurisdiction. *Id.* Accordingly, we sustain Thomas' assignment of error in case number CA-15898, reverse the trial court's judgment, and remand this cause for an evidentiary hearing to determine the proper amount of attorney's fees to be taxed against NCR.

WOLFF, J., and GRADY, J., concur.

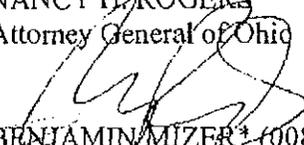
NOTICE OF APPEAL

The Defendant-Appellant, Administrator of the Bureau of Workers' Compensation (Administrator) gives notice of her discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3) and Rule III, Section 1, from a decision of the Hamilton County Court of Appeals, First Appellate District, journalized in Case No. C-070223, decided on August 22, 2008. Date-stamped copies of the First District's Judgment Entry and Decision are attached as Exhibits 1 and 2, respectively, to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest. In addition, the First District Court of Appeals has granted a motion to certify a conflict regarding the issue in this appeal, and notice of the certification has been filed by the Administrator.

Respectfully submitted,

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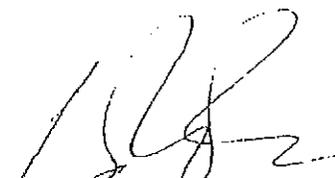
Counsel for Administrator,
Bureau of Workers' Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendant Administrator's Notice of Appeal was served by U.S. mail this 3rd day of October, 2008 upon the following counsel:

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Elise Porter

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.	:	DECISION.
HAMILTON COUNTY EDUCATIONAL	:	
SERVICE CENTER,	:	
Defendant-Appellant,	:	PRESENTED TO THE CLERK
and	:	OF COURTS FOR FILING
ADMINISTRATOR, OHIO BUREAU	:	AUG 22 2008
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 Diazonía 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.

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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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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), end 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.

OHIO FIRST DISTRICT COURT OF APPEALS

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. 99-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").

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

HAMILTON COUNTY EDUCATIONAL SERVICE CENTER	:	Case No. A0609684
	:	
Defendant-Appellant,	:	Judge Robert C. Winkler
	:	
-v-	:	<u>ENTRY GRANTING</u>
	:	<u>PLAINTIFF'S MOTION TO</u>
DAIZONIA BENTON, et al.	:	<u>DISMISS</u>
	:	
Plaintiff-Appellee.	:	

This matter came before the Court for hearing on Plaintiff-Appellee, Daizonia Benton's, Motion to Dismiss. The Court has reviewed said motion and response thereto and being fully apprised in the premises hereby GRANTS same.

IT IS SO ORDERED.

COPY
 Original signed for filing.
Judge Robert C. Winkler
Judge Robert C. Winkler

Authority:

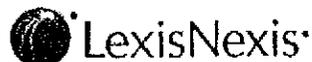
Schultz v. Ohio Bureau of Workers' Compensation, 148 Ohio App.3d 310, (2002).
Felty v. AT&T Technologies, Inc., 65 Ohio St.3d 234, (1992).

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1 of 1 DOCUMENT

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH FEBRUARY 18, 2009 ***
 *** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2009 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 1, 2009 ***

TITLE 41. LABOR AND INDUSTRY
 CHAPTER 4123. WORKERS' COMPENSATION
 JURISDICTION OF COMMISSION

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ORC Ann. 4123.512 (2009)

§ 4123.512. Appeal to court of common pleas; costs; fees

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of *section 4123.511 [4123.51.1] 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 [4123.51.1] 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 [4123.51.1] 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 [4123.52.2] 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 [4123.52.2] of the Revised Code*, the party granted the relief has sixty days from receipt of the order under *section 4123.522 [4123.52.2] of the Revised Code* to file a notice of appeal under this section.

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

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in

Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

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

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

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

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

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

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

(H) An appeal from an order issued under division (E) of *section 4123.511 [4123.51.1] of the Revised Code* or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (A) of *section 4123.34 of the Revised Code*. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of *section 4123.35 of the Revised Code*.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next

six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

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

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by *sections 4123.511 [4123.51.1] and 4123.512 [4123.51.2] 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 [4123.51.4], 4123.515 [4123.51.5], 4123.516 [4123.51.6], and 4123.519 [4123.51.9] and section 4123.522 [4123.52.2] of the Revised Code.*