IN THE SUPREME COURT OF OHIO

DIAZONIA BENTON	:	S.C. Case Nos.: 08-1946 & 08-1949
Plaintiff-Appellant,	:	C.A. Case No. C070223
v.	:	
HAMILTON COUNTY EDUCATIONAL SERVICE CENTER,	:	
	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
Defendant-Appellee,	:	
And	:	
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION,	:	
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT, DIAZONIA BENTON

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STATEMENT OF FACTS

On March 19, 2003, Plaintiff-Appellant, Diazonia Benton (herein after "Benton") was involved in a motor vehicle accident, while in the course and scope of her employment with Defendant-Appellee, Hamilton County Educational Service Center (herein after "HCESC"). *Benton v. Hamilton County Educ. Svc. Ctr. (1st Dist.), 2008 Ohio App. Lexis 3586, 2008-Ohio-4272.* (Appx. 16.) Benton was assigned claim number 03-889051 by the Ohio Bureau of Workers' Compensation (herein after "BWC") and on March 9, 2005, the BWC issued an Order allowing the Benton's Ohio workers' compensation claim for the conditions of sprain of neck, sprain lumbar and contusion of left elbow. (Appx. 58.) This BWC Order gave either party the right to appeal this Order, within fourteen (14) days of receipt of said Order. (Appx. 59.) HCESC did receive said BWC Order allowing Benton's workers' compensation claim and HCESC *did not* appeal the allowance of the claim. Thereafter, on April 27, 2005, Benton requested that additional conditions be amended into her workers' compensation claim. The Industrial Commission's District and Staff hearings both granted the additional conditions of radiculopathy and L5-S1 herniated disc. (Appx. 53, 56.) HCESC *did not* appeal the Industrial Commission's Staff Hearing Order of January 26, 2006. (Appx. 53.)

On February 3, 2006, HCESC filed a C-86 Motion with the Industrial Commission of Ohio requesting the Industrial Commission exercise continuing jurisdiction and make a determination of fraud, pursuant to R.C. 4123.52. (Appx. 50.) On June 14, 2006, a hearing was held at the District Hearing Level of the Industrial Commission of Ohio and denied

HCESC's request to exercise continuing jurisdiction. (Appx. 47, 48.) HCESC appealed the District Hearing Level Order on July 7, 2006, and on August 29, 2006, the Industrial Commission's Staff Hearing Officer also denied HCESC's motion requesting that the Industrial Commission exercise continuing jurisdiction, and found "absolutely no evidence that the injured worker has misrepresented the purpose of her trip...on March 19, 2003." (Appx. 42, 43, 44.) HCESC appealed this decision on September 15, 2006 and on September 19, 2006, the Industrial Commission of Ohio Staff Hearing Level II did refused the appeal of the HCESC. (Appx. 40, 38.)

Thereafter, on November 07, 2006, HCESC proceeded to file a Notice of Appeal, with the Court of Common Pleas in Hamilton County, Ohio, due to the Industrial Commission's refusal to exercise continuing jurisdiction, pursuant to R.C.4123.52. (Appx. 36.) On January 27, 2007, Benton did file a motion with the Common Pleas Court of Hamilton County on the grounds that the trial court did lack subject matter jurisdiction to hear HCESC's appeal. (Appx. 28.) On February 27, 2007, the trial court granted Benton's Motion to Dismiss for lack of subject matter jurisdiction. (Appx. 27.) Thereafter, HCESC did file a Notice of Appeal to the First District Court of Appeals. (Appx. 25.) The First District Court of Appeals rendered its decision on August 22, 2008, indicating that the trial court erred and that the decision of the Industrial Commission to not exercise jurisdiction was appealable to the Court of Common Pleas under R.C. 4123.512(A). (Appx. 16-24.) Recognizing and referencing a split of authority among appellate districts and noting that the Ohio Supreme Court had not "squarely addressed this issue", regarding whether a right

to participate issue exists, based upon the Industrial Commission of Ohio's refusal to exercise continuing jurisdiction to make a determination of fraud. (Appx. 22,23.)

In response to the First District Court of Appeal's decision, Benton filed a Motion requesting Certification of Conflict with the First District Court of Appeals. (Appx. 10) On September 18, 2008, the First District Appellate Court did certify the conflict and recognized their decision 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. (Appx. 10.) Thereafter, Benton did file a Notice of Certified Conflict with the Ohio Supreme Court on October 09, 2008. (Appx. 2.) By way of Entry filed December 31, 2008, the Ohio Supreme Court did grant Benton and Administrator's, Notice of Certified Conflict. *Benton v. Hamilton County Educ. Svc. Ctr. (2008) 120 Ohio St.3d 1452, 2008-Ohio-1946* (Appx. 1.)

ARGUMENT

Proposition of Law No. I:

The refusal by the Industrial Commission of Ohio to exercise continuing jurisdiction to make a finding of fraud is not a right to participate issue under R.C. 4123.512.

Under the language of R.C. 4123.52, the Industrial Commission of Ohio is vested with continuing jurisdiction over its orders after issuance of a *final* order. However, the jurisdiction of the Industrial Commission to make such modifications with respect to former findings or orders does have limitations. The Ohio Supreme Court, in *State ex rel. Gobich v. Industrial Commission, 103 Ohio State3d 585, 817 N.E.2d 398, citing State ex rel. Nicholls v. Industrial Commission, (1998), 81 Ohio St.3d 454, 459, 692 N.E.2d 188*, opined that the Industrial Commission's "...continuing jurisdiction can be invoked only where one of these preconditions exists: (1) new and changed circumstances, (2) fraud, (3) clear mistake of fact, (4) clear mistake of law, (5) error by an inferior tribunal...." Furthermore, R.C. 4123.512(A) provides that the claimant or employer may appeal an order of the Industrial Commission "...other than a decision as to the extent of disability to the court of common pleas...." However, a court whose jurisdiction has not been properly invoked cannot accept jurisdiction by agreement, acquiescence or consent. *Cunningham v. Young, et al., (1963), 119 Ohio App. 261,263, 193 N.E.2d 924, 926 (Ohio App. 1st Dist. 1963))*.

In Workers' Compensation matters, appeals are taken and an action is initiated by the filing of a Notice of Appeal with the common pleas trial court or by way of Mandamus with the Tenth District Court of Appeals, pursuant to R.C. 4123.512. In Ohio, the rights and duties under the Ohio Workers' Compensation Laws are purely statutory. *State, ex rel. Yaple v. Creamer (1912), 85 Ohio St. 349, 97 N.E.2d 602.* The rights and duties rest exclusively on the grant of legislative authority by the enabling Workers' Compensation Act. *State ex rel. Kroger v. Indus Comm., (1942), 37 Ohio Law Abstract 509, 48 N.E.2d 114.*

Moreover, R.C. 4123.512 provides the exclusive statutory scheme to appeal an Order of the Industrial Commission.

A. There is no automatic right of appeal from an Order of the Industrial Commission to a Court of Common Pleas. If the litigant does not choose the proper avenue of appeal, the reviewing court lacks subject matter jurisdiction.

The Ohio Supreme Court in *Felty v. AT&T Technologies, Inc. (1992), 65 Ohio St.3d 234, 602 N.E.2d 1141* acknowledges that 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. at 239, 1141.* The determination of whether the common pleas court has subject matter jurisdiction depends on the type of decision issued by the Industrial Commission. *Id.* The Supreme Court in *Felty* noted, a direct appeal to common pleas court is the most limited form of judicial review, "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". *(Felty, supra at 237, 1144, citing Cadle v. General Motors Corp. (1976), 45 Ohio St. 2d 28, 33, 340 N.E.2d 403, 406).* Moreover, the *Felty* court indicated that "(t)he courts simply cannot review all the decisions of the commission....", and "(u)nless a narrow reading of R.C. 4123.519 (currently R.C.4123.512) is adhered to, almost every decision of the commission, major or minor, could eventually find its way to common pleas court". *Id. at 238, 1144.* Significantly, a decision by the Industrial Commission does not determine a right-to-participate in the State Insurance Fund, *unless the decision is finalizing an allowance or disallowance of the*

employee's claim. Afrates v. Lorain (1992), 63 Ohio St.3d 22, 27, 584 N.E. 2d 1175, 1179. (See also State, ex rel. Evans, v. Indus. Comm. (1992), 64 Ohio St.3d 236, 238, 594 N.E.2d 609, 610).

In the case at bar, Benton's right to participate in the Ohio Workers' Compensation Fund had been determined and finalized, when the Bureau of Workers' Compensation initial order allowing her claim on March 09, 2005 was not appealed by HCESC. Significantly, this BWC Order did establish Benton's *right-to-participate* in the Workers' Compensation Fund for her industrial injuries. Moreover, the September 19, 2006 decision by the Industrial Commission, to refuse to exercise continuing jurisdiction and make a determination as to fraud, did not finalize Benton's allowance of her claim and significantly did not finalize a disallowance of her claim, as that determination had been made by the March 09, 2005 BWC Order which allowed Benton's claim and which HCESC did not appeal.

Similar to Benton's claim, the employer in *Harper v. Administrator, Bureau of Workers' Compensation (11th District), 1993 Ohio App. Lexis 6068 did not* appeal the initial allowance of the injured workers' compensation claim. Thereafter, the employer filed a C-86 motion asking the Industrial Commission to exercise continuing jurisdiction and make a determination of fraud. The *Harper* Court opined that the employer's remedy lies in Mandamus and that the Court of Common Pleas lacks subject matter jurisdiction to hear the employer's appeal. *Id at 8.* This was so, because the employer did not appeal the initial allowance by the BWC, which allowed the injured workers' claim. *Id at 6.* This is the why

the refusal to exercise continuing jurisdiction in the case at bar does not give rise to a right-to-participate issue under 4123.512(A).

B. In a Right-To-Participate issue under R.C. 4123.512, a difference exists and sound reasoning supports an appeal to the Court of Common Pleas on the denial or discontinuance of an injured worker's claim while denying an employer's appeal of an order of the Industrial Commission which refused to exercise continuing jurisdiction to make a determination as to fraud.

Commenting on R.C.4123.512 appeals, the Ohio Supreme Court in *Felty* understood that a direct appeal to common pleas court is the most limited form of judicial review and that "a litigant has no inherent right of appeal in this area". *Felty v. AT&T Technologies, Inc., supra at 237.* Additionally, the *Felty* Court directed that unless the decision is *finalizing* an allowance or disallowance of an injured worker's claim, a right-to-participate issue *does not* exist. *Id. at 27, 1179.* A distinction exists when an order terminates an injured worker's claim or their right to continue to participate in the Workers' Compensation Fund, as opposed to the denial of a request to *re-open* a matter that has previously been determined. (i.e. a request to exercise continuing jurisdiction).

In the case at bar, the employer, HCESC seeks to stand in the same position, as if they would have appealed the initial BWC Order which allowed Benton's claim on March 09, 2005. Any party to the claim could have pursued an R.C.4123.512 appeal into the court of common pleas on the initial allowance or a subsequent determination of the allowance of additional conditions in a claim. These scenarios are clearly contemplated

when interpreting what right-to-participate means. The directives of the *Afrates* Court are not consistent with and would not permit an R.C.4123.512 appeal to the court of common pleas by an employer on the refusal by the Industrial Commission to exercise continuing jurisdiction to make a determination of fraud.

While this Court has not squarely addressed the exact issue as presented in the case at bar, prior decisions of the Ohio Supreme Court in *Felty, Afrates* provide sound footing and guidance to make the determination that no right-to-participate issue exists for HCESC in Benton's claim. More recently, this Court again reiterated the underlying principle of Workers' Compensation R.C.4123.512 appeals, by opining that only a claimant, whose right-to-participate in the workers' compensation fund has been terminated, may appeal to the court of common pleas, under R.C. 4123.512(D). *White v. Conrad, 102 Ohio St.3d 125, 2004-Ohio-2148, para. 12-14.*

In commenting in dicta on the Fifth and Tenth District decisions, that held that the courts of common pleas have jurisdiction to hear R.C. 4123.512 appeals that pertain to the refusal by the Industrial Commission of Ohio to exercise continuing jurisdiction to make a finding of fraud, the Ohio Supreme Court in *Thomas v. Conrad (1998), 81 Ohio St. 3d 475*, was presented with and addressed a factual scenario different from the *Benton* case. *See Benton, 2008-Ohio-4272 at para 18; Jones v. Massillon Bd. Of Educ. (5th Dist.), 1994 Oho App. Lexis 2891; Moore v. Trimble (10th Dist.), 1993 Ohio App. Lexis 6204.* The injured worker in *Thomas* was a victim of a dog attack *after* she had already submitted a claim for Workers' Compensation benefits as a result of an industrial injury. The employer objected

to the injured worker's right-to-participate in the Workers' Compensation Fund, due to an intervening injury related to the dog attack. The Industrial Commission refused the employer's request and continued the injured worker's compensation. The Supreme Court held that the decision of the Industrial Commission not to discontinue participation in the Fund was *not* a right-to-participate issue but rather a question of the extent of disability. However, the *Thomas* Court then commented on the *Jones* and *Moore* decisions where the employers alleged 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 regards to facts surrounding the respective claimants *initial* claims... Here (the employer) did not raise the issue of fraud or question (the employee's) original claim. *Id at 478-479.*

While commenting and distinguishing the Fifth and Tenth Districts' decisions in dicta, the reasoning in *Thomas* supports Benton's position. The *Thomas* court noted the employer claimed "fraud" and framed its motion in terms of terminating the right-to-participate". The employer claimed that it could appeal to the court of common pleas, pursuant to R.C. 4123.512 because *if* the Industrial Commission had granted its motion, *then* the employer "would have been able to appeal". *Id at 477.* The *Thomas* Court rejected this argument, because the *effect of the Industrial Commission's Order* did not disturb the injured worker's right-to-participate, and therefore rendered its decision that the matter should have been treated as an "extent of disability" issue, which can be appealed by way of Mandamus. *Id at 478.* The same reasoning applies in the case at bar. Diazonia Benton's right-to-participate was determined by the initial BWC Order which HCESC did not

appeal. Moreover, there has been no subsequent Order of the BWC or the Industrial Commission that has terminated her right-to-participate or continue to participate.

It is not how the party frames its argument or writes its motion, requesting that the Industrial Commission exercise continuing jurisdiction and make a determination as to fraud that is determinative. What the reviewing court must look at is; whether the injured worker's right-to-participate or continue to participate has been previously established and did the Order which the employer is attempting to appeal, to the court of common pleas, finalize the allowance or disallowance of the injured worker's right to participate. It is the *effect* that the Industrial Commission's order has on the injured worker's claim not the language used in the motion requesting continuing jurisdiction.

Furthermore, the aggrieved employer is not without a remedy. The employer can file a complaint, in Mandamus in the Tenth District Court of Appeals, seeking relief. Moreover, the *Thomas* Court also opined that no equal protection issue exists, when an adverse Order of the Industrial Commission is issued, as "both the employer and employee have the right to appeal when they are negatively affected". Id at 479. It is not unfair to the employer to hold that once an injured worker's right-to-participate in the Workers' compensation fund has been established, a decision by the Industrial Commission to refuse to exercise continuing jurisdiction to make a determination of fraud, does not equate to a right-to-participate issue because the decision *does not* terminate the injured worker's right–to–participate in the workers' compensation fund. To find otherwise would undermine and redefine the Ohio Supreme Court's decisions in *Afrates* and *Felty*. *Afrates v. Lorain*

(1992), 63 Ohio St.3d 22, 584 N.E. 2d 1175, Felty v. AT&T Technologies, Inc. (1992), 65 Ohio St.3d 234, 602 N.E.2d 1141.

C. An allegation of fraud by a party to a workers' compensation claim does not create an issue that is not already provided for under the laws of workers' compensation.

In issues regarding "fraud"', the Administrator of the Bureau of Workers' Compensation or the Industrial Commission of Ohio has the exclusive authority to determine whether a claimant has committed fraud in his or her receipt of benefits. *Schultz v. Ohio Bur. of Workers' Comp. (2002), 148 Ohio App.3d 310, 722 N.E.2d 1253 (Ohio App. 4th Dist. (2002))*. Additionally, the sole method to challenge a finding by the Industrial Commission in respect to an allegation of fraud, is for the dissatisfied party to file a complaint for a writ of mandamus. *Id. at 314, 1256.* "R.C. 4123.512 excludes all other decisions, including decisions involving fraud, from the common pleas court's jurisdiction." *Id at 313, 1256.*

In the case of *Schultz*, the Industrial Commission determined that the claimant had committed fraud in her receipt of workers' compensation benefits, when it found she had been working part-time while collecting permanent and total disability compensation benefits. *Id. at 312, 1255.* The claimant then filed a complaint in the Scioto County's Court of Common Pleas. *Id.* The Court of Common Pleas dismissed Schultz's complaint based upon lack of subject matter jurisdiction pursuant to R.C.4123.512. *Id. at 312, 1255.* The Court of Appeals affirmed the decision of the Court of Common Pleas, basing its decision on the Supreme Court of Ohio's determination that the jurisdiction conferred upon the

common pleas courts by R.C.4123.512 includes only issues regarding to the-right-to participate. *Id.*

The claimant in *Schultz* argued that the trial court derived its jurisdiction over the Industrial Commission from R.C. 4123.512 and that this section authorizes the trial court to evaluate Industrial Commission determinations of fraud. *Id. at 313, 1255.* However, this argument is misplaced because R.C.4123.512 states that a claimant can only appeal an Industrial Commission determination to the court of common pleas, other than a decision as to the extent of disability. Schultz argued that this limitation did not exclude the Industrial Commission decisions pertaining to fraud, an argument that lacks merit due to the narrow construction of the scope of jurisdiction under R.C. 4123.512 by the Supreme Court of Ohio. The *Schultz* Court did not draw a distinction between types of fraud in Workers' Compensation matters, other than to state that workers' compensation fraud issues are "different from common law actions for fraud" and that in "common law fraud a finding of fraud could result in punitive damages assessed against the debtor". *Schultz at 316, 1257, citing Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.*

Significantly, the Ohio Workers' Compensation Act certainly does not provide a remedy in the form of punitive damages to any party to a workers' compensation claim. The *Schultz* Court further opined that 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. *Id. at 315, 1256.* The rights of employees are not governed by common law, but are conferred by the General Assembly. *Id.* A finding regarding fraud involves a right conferred by the General Assembly, and *no right* to a jury trial exists with

respect to a finding of fraud by the Industrial Commission. *Id. at 316, 1257.* The Court of Appeals in *Schultz* found the plain meaning of the Ohio Supreme Court's holdings to be that R.C.4123.512 confers jurisdiction only upon decisions that involve the right-to-participate, and that the Supreme Court of Ohio has clearly excluded any other decisions, including any that involve fraud, from the jurisdiction of the common pleas court. *Id at 314, 1256.*

The *Schultz Court* did not draw a distinction in the type of fraud alleged or when the fraud was to allegedly have occurred. To do otherwise would open the common pleas court to civil fraud trials under the guise of a right-to-participate issue. There would be no finality in the allowance of a workers' compensation claim and a party could file a motion at the Industrial Commission requesting that the Commission exercise continuing jurisdiction for a finding of fraud, years after the allowance of a claim. Allowing an employer to appeal to the court of common pleas under R. C. 4123.512, years after the allowance of a claim, simply by filing a motion at the Industrial Commission requesting continuing jurisdiction, would place an employer in no worse a position for not having ever contested the initial allowance of the worker's claim.

Furthermore, the finding of the Court in *Schultz* is consistent with the holding of the Court in *LTV Steel Co. V. Gibbs (1996), 109 Ohio App. 3d 272, 671 N.E.2d 1360 (Ohio App. 8th Dist. (1996)).* In *LTV*, the self-insured employer in a Workers' Compensation claim, attempted to file an action in the Court of Common Pleas to recoup an over-payment paid to a Workers' Compensation claimant based upon fraud. The Cuyahoga Common Pleas

Court in *LTV* determined there was no subject matter jurisdiction and dismissed the action, stating:

> Appellant LTV seeks to avoid this jurisdictional limitation by arguing that its claim for recoupment of an overpayment of benefits is based on traditional common law causes of action of which the trial court has original jurisdiction. The Industrial Commission has discretion to determine whether there is evidence of fraud, new or changed circumstances occurring subsequent to an order, or a mistake prejudicing one of the parties, prior to the exercise of its continuing jurisdiction pursuant to R.C. 4123.52 to change an order which has become final. .... LTV must seek redress from the commission and then if dissatisfied, may file a complaint for a writ of mandamus with the Tenth District Court of Appeals. *LTV at 277, 1360, citing Felty, supra, 65 Ohio St.3d at 237, 602 N.E.2d at 1144, State ex rel Cook v. Zimpher (1985), 17 Ohio St.3d 236, 237, 17 OBR 474, 475, 479 N.E.2d 263, 264; State ex rel. Hawley v. Indus. Comm. (1940), 137 Ohio St. 332, 18 O.O. 519, 30 N.E.2d 332 syllabus.*

Moreover, in *Brown v. Thomas Asphalt Paving Co., Inc., et al., (2001), Ohio App. LEXIS 5659 (December 14, 2001), Portage App. No. 2000-P-0098*, the Eleventh District Court of Appeals granted the injured workers' appeal. In *Brown*, as in the case at bar, the claimant's workers' compensation claim was granted and the employer did not appeal the initial allowance of the claim. *Id at* 2. The injured workers' right-to-participate had been established. Three years after the allowance of the claim, the Defendant, Thomas Asphalt filed a motion with the Industrial Commission requesting continuing jurisdiction and sought a finding of fraud and sought to have the claim disallowed after the injured worker's right-to-participate had been established. *Id.* The injured worker, Brown filed a motion to dismiss with the Portage County Common Pleas Court for lack of subject matter jurisdiction. *Id at 4.* The trial court denied Brown's motion and a civil fraud trial was held, with the burden of proof being *placed on the injured worker. Id at 4,5.* A verdict was returned against the

injured worker, finding that the injured worker was not entitled to participate in the workers' compensation fund. *Id.* An Appeal was taken by the injured worker and the Portage Court of Appeals found that "...(t)he Ohio Supreme Court has consistently taken 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 has been determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate are appealable...") *Id at 7.* The *Brown* Court went on to opine that pursuant to *Felty* and *Harper v. Administrator, et al., 1993 Ohio App. LEXIS 6068 (Dec. 17, 1993), Trumball App. No. 93-T-4863*, the injured workers' right-to-participate had been previously approved and not appealed, and "once the Industrial Commission ruled that there was no fraud, the court of common pleas lacked jurisdiction to review the commissions ruling." *Id at 7, 8.* The *effect* of the Industrial Commission order to not exercise continuing jurisdiction *did not* finalize an allowance or a disallowance of the injured worker's claim.

Significantly, no distinction is drawn by the, *Schultz*, *LTV* or *Brown* courts in types of fraud, for purposes of Ohio Workers' Compensation. Workers' Compensation fraud issues are treated similarly by statute and involve the statutory classification of an extent of disability issue under the workers' compensation statutory construction because the *effect* of the Industrial Commissions' decisions *did not* finalize the allowance or disallowance of the injured workers' claims. An employer has no right to appeal into a court of common pleas, under R.C.4123.52 or R.C. 4123.512, an administrative decision that refuses to exercise continuing jurisdiction to make a determination to find fraud.

HCESC's C-86 motion, filed with the Industrial Commission on February 03, 2006, requesting the Industrial Commission to exercise continuing jurisdiction to make a determination of fraud lists and identifies evidence that was readily available at the time of the initial allowance of Benton's claim. (Appx. 50, 51, 52). Time sheets, attendance rosters, the First Report of Injury, traffic crash report, investigation findings, program job descriptions, ect., were or could have been readily been available when Benton's claim was initially allowed by the BWC on March 09, 2005. (Appx. 58). Clearly, it is an attempt by HCESC to circumvent the effect of Res judicata in Benton's workers' compensation claim.

An employer could, without the presentation of any evidence of fraud at the Industrial Commission, as in Benton's claim, after the Industrial Commission refused to exercise jurisdiction to make a determination of fraud, then file a Notice of Appeal in the court of common pleas and request a jury trial alleging a right-to-participate issue exists. Res judicata would be rendered meaningless. If a becomes too expensive, the employer would have an *out* by filing a motion requesting that the Industrial Commission exercise continuing jurisdiction seeking a finding of fraud. The courts of common pleas would become a haven for "second bites" at the proverbial apple. Spoilage of evidence, fading memories, difficulties locating witnesses or documents would result due to the passage of time, from initial allowance of a claim to the open-ended period of time for filing of the Motion requesting the Industrial Commission exercise continuing jurisdiction. Moreover, the burden of proof in a right-to-participate matter lies with the injured worker. It does not stand to reason that the injured worker would have the burden of proof, should a workers'

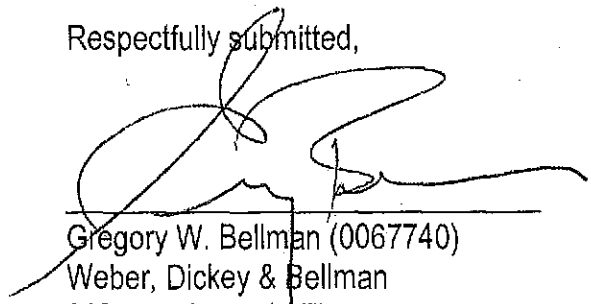
compensation fraud trial be held. Additionally, punitive damages are provided for in a civil fraud action, whereas, the Ohio Workers' Compensation Act provides no such remedy.

There are valid reasons why the Ohio Supreme Court has not dealt with this factual scenario in the past. The *Benton* case does not deal with a right-to participate issue and no right to appeal to the courts of common pleas exists for HCESC. *Benton v. Hamilton County Svc. Ctr., 120 Ohio St.3d 1452, 2008-Ohio-1946.* To hold otherwise would lead to abuses of the workers' compensation system, with the State of Ohio and the Ohio Workers' Compensation Surplus Fund being the likely victim. When a motion is filed at the Industrial Commission requesting continuing jurisdiction to make a determination as to fraud, years after the industrial injury, the likely outcome will be that the injured worker has already received the necessary medical treatment and temporary total and permanent partial compensation would have already been paid out to the injured worker. An allegation of fraud, that would allow an appeal to common pleas court under R.C. 4123.512, at such a late point in time after the industrial injury, would likely find an injured worker indifferent to a challenge to his claim or the injured worker would just not have the financial resources to defend the claim in a civil jury trial. The State of Ohio, through the Attorney General Office, would be left to defend the claim. The use of the State of Ohio's resources in this way would be played out in common pleas courtrooms across the state. If the Ohio Attorney General Office fails to defend the claim and the employer succeeds in its efforts in the court of common pleas, the employer would then ask for repayment of its costs associated with that workers' compensation claim from the Ohio Workers' Compensation Surplus Fund. (i.e. premiums, assessments, litigation costs, ect...).

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Diazonia Benton asks this Court to overrule the First District's decision and find that the refusal by the Industrial Commission of Ohio to exercise continuing jurisdiction to make a finding of fraud was not a right-to-participate issue under R.C. 4123.512.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief on the merits was served by U.S Mail this 2nd day of March, 2009 upon the following counsel:

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The Supreme Court of Ohio

FILED
DEC 31 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Diazonia Benton

v.

Hamilton County Education [sic] Service Center and Administrator, [Ohio] Bureau of Workers' Compensation

Case No. 2008-1949

ENTRY

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Hamilton County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated in the court of appeals' Entry filed September 18, 2008, 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?"

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2008-1946, *Benton v. Hamilton Cty. Educational Serv. Ctr.*

It is further ordered by the Court that the briefing in Case Nos. 2008-1946 and 2008-1949 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

It is further ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County.

(Hamilton County Court of Appeals; No. C070223)

THOMAS J. MOYER
Chief Justice

IN THE
SUPREME COURT OF OHIO

DIAZONIA BENTON, Plaintiff - Appellant, and HAMILTON COUNTY EDUCATIONAL SERVICE CENTER Defendant - Appellee and ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION Defendant - Appellant	:	Case No.: 08-1949 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No.: C-070223

FILED
OCT 09 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT OF PLAINTIFF - APPELLANT, DIAZONIA BENTON

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Notice of Certified Conflict of Appellant, Diazonia Benton

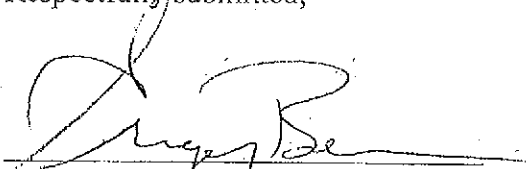
Plaintiff - Appellant, Diazonia Benton hereby gives notice to this Court pursuant to the Supreme Court Rule IV of the Certified Conflict, arising from the August 22, 2008, judgement of the Hamilton Court of Appeals, First Appellate District, entered in Court of Appeals Case No.: C-070223. (Ex.2)

Thereafter, on September 18, 2008, the First District Court of Appeals granted Appellant's Motion to certify a conflict on the issue of: 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? (Ex.1) The First District Appellate Court found that the decisions which were in conflict to be:

The case at bar, *Benton v. Hamilton County Educational Service Center,* Appeal No.: C-070223, 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 a right to participate issue and appealable to the Courts of Common Pleas under 4123.512; and

Brown v. Thomas Asphalt Paving Co., 11th District No.: 2000-P-0098, 2001-Ohio-8720 of (Ex.5); *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); *and Schultz v. Adm'r, Ohio Bur. Of Workers' Comp.*, 148 Ohio App.3d 310, 2002-Ohio-3622 (Ex. 7), all of which found that such decisions were not right to participate issues and were not appealable to the Courts of Common Pleas and that the proper remedy was a mandamus action.

Respectfully submitted,



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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 9th day of October, 2008 upon the following counsel:

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Gregory W. Bellman (0067740)

In the

Supreme Court of Ohio

DIAZONIA BENTON, Plaintiff-Appellant, and ADMINSTRATOR, BUREAU OF WORKERS' COMPENSATION, Defendant-Appellant, v. HAMILTON COUNTY EDUCATIONAL SERVICE CENTER, Defendant-Appellee.	:	Case No. 08-1946 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C070223

FILED
OCT 03 2008
CLERK OF COURT
SUPREME COURT OF OHIO

DEFENDANT ADMINISTRATOR'S NOTICE OF APPEAL

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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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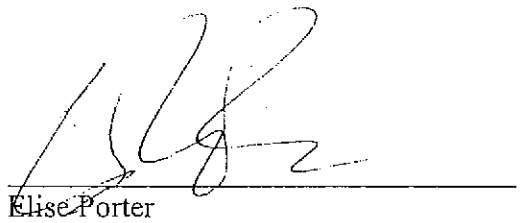
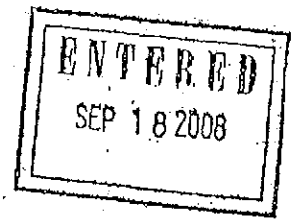


Elise Porter

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



DIAZONIA BENTON,

Appellee,

vs.

HAMILTON COUNTY EDUCATION SERVICE CENTER,

Appellant,

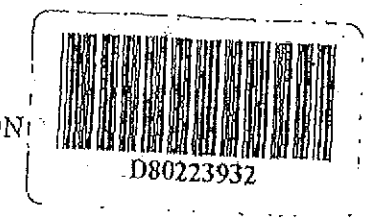
and

ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION,

Appellee.

APPEAL NO. C-070223

ENTRY GRANTING MOTION TO CERTIFY CONFLICT



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
COURT OF APPEALS
SEP 2 2008
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

COURT OF APPEALS
HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

DIAZONIA BENTON	:	APPEAL No.: C070223
Plaintiff-Appellee	:	TRIAL No.: A0609684
v.	:	
HAMILTON COUNTY EDUCATIONAL SERVICE CENTER,	:	
Defendant-Appellant	:	
And	:	
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION,	:	
Defendant-Appellee	:	

PLAINTIFF-APPELLEE, DIAZONIA BENTON'S MOTION FOR AN ORDER CERTIFYING A CONFLICT

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ISSUE:

Plaintiff-Appellee, Diazonia Benton moves this Court for an Order Certifying a Conflict, pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution on the issue of 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.

MEMORANDUM

A. Procedural Posture

The within action originated when Defendant-Appellant Hamilton County Educational Service Center (hereinafter Appellant, Hamilton ESC) filed a Notice of Appeal on November 07, 2006, alleging Civil Fraud in the receipt of workers' compensation benefits and indicating that the Notice of Appeal was filed with the Hamilton County Court of Common Pleas pursuant to jurisdiction granted by R.C. 4123.512. Plaintiff-Appellee, (hereinafter Appellee, Benton), filed a Complaint, pursuant to R.C.4123.512 and in response to the filing of Appellant, Hamilton ESC's Notice of Appeal, on or about November 11, 2006. Thereafter, the Appellant, Hamilton ESC filed an Answer, on or about December 05, 2006. Due to the trial court's lack of subject matter jurisdiction over the pending allegation of Fraud, Appellee, Benton filed a Motion to Dismiss, on January 27, 2007. The trial court granted Appellee, Benton's Motion on February 27, 2007. Appellant, Hamilton ESC filed the instant Notice of Appeal on March 29, 2007. Appellee, Diazonia Benton. On August 22, 2008, this Court rendered a decision finding that the Industrial Commission's refusal to exercise continuing jurisdiction and make a finding of fraud is a right to participate issue pursuant to R.C. 4123.512.

B. Statement of Facts

On March 19, 2003, Plaintiff-Appellee, Daizonia Benton was involved in a motor vehicle accident, while in the course and scope of her employment with Appellant, Hamilton ESC. A workers' compensation First Report of Injury was completed and filed by Appellee, Benton on February 18, 2005 and was assigned claim number 03-889051 by the Ohio Bureau of Workers' Compensation (herein after BWC). On March 9, 2005, the BWC issued an Order allowing the Appellee, Benton's Ohio workers' compensation claim for the conditions of sprain of neck, sprain lumbar and contusion of left elbow. This BWC Order gave the Appellant, Hamilton ESC the right to appeal this Order, within fourteen (14) days of receipt of said Order. Appellant, Hamilton ESC did receive said BWC Order granting Appellee, Benton's claim and Appellant, Hamilton ESC did not appeal the allowance of the claim. Due to Appellant, Hamilton ESC's failure to appeal the BWC Order, this Order has become final and became Res Judicata, as to the allowance of Appellee, Benton's workers' compensation claim. Thereafter, on April 27, 2005, Appellee, requested that additional conditions be amended into her workers' compensation claim. The District and Staff hearings both granted the additional conditions of radiculopathy and L5-S1, herniated disc. The Appellant, Hamilton ESC did not appeal the SHO order of January 26, 2006. The Staff Hearing Order did become final and is Res Judicata.

On February 3, 2006, Appellant, Hamilton ESC filed a Motion requesting the Industrial Commission exercise continuing jurisdiction pursuant to R.C. 4123.52 and requested a finding of fraud. On June 21, 2006, a hearing was held and the District

Hearing Officer denied the Appellant, Hamilton ESC's Motion. The Appellant, Hamilton ESC appealed the DHO Order on July 7, 2006. On August 30, 2006, the Staff Hearing Officer also denied the Appellant's Motion, finding "absolutely no evidence that the injured worker has misrepresented the purpose of her trip...on March 19, 2003." The Appellant, Hamilton ESC appealed this decision on September 18, 2006. On September 19, 2006, the Industrial Commission refused the appeal of the Appellant, Hamilton ESC. The Appellant, Hamilton ESC thereafter proceeded to file a Notice of Appeal alleging jurisdiction pursuant to R.C. 4123.512 with the Court of Common Pleas in Hamilton County, Ohio. Appellee, Benton then filed her Complaint as required under O.R.C. 4123.512.

In the case at bar, the Appellant, Hamilton ESC asserted the issue of common law fraud as a right to participate issue as a basis for the Court's review. However, Appellant, Hamilton, ESC's Notice of Appeal and Answer alleging common law fraud based upon the Industrial Commissions refusal to exercise continuing jurisdiction does not go to the right to participate under R.C. 4123.512. The trial court lacked subject matter jurisdiction necessary to hear the Appellant, Hamilton ESC's appeal.

In this Court's decision at bar, rendered on August 22, 2008, this Court recognized and referenced a split of authority among appellate districts regarding the ability to appeal to the Court of Common Pleas of an Order of the Industrial Commission of Ohio regarding the refusal to exercise continuing jurisdiction to make a determination of fraud and whether the refusal to exercise continuing jurisdiction by the Industrial Commission involved a right to participate issue appealable to the Court of Common Pleas pursuant to R.C. 4123.512.

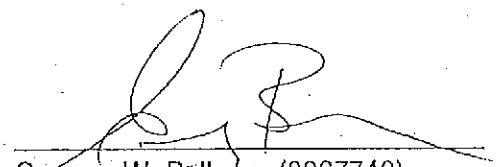
This Court based its decision upon cases from the Fifth and Tenth Appellate Districts while decisions from the Second and Eleventh Appellate Districts found that the refusal to exercise continuing jurisdiction by the Industrial Commission of Ohio did not involve a right to participate issue pursuant to R.C. 4123.512.

In *Jones v. Massillon Board of Education* (June 13, 1994), Fifth District, No. 94 CA 0018 and *Moore v. Trimble*, (December 21, 1993), Tenth District, No. 93 APE08-1084 the Fifth and Tenth Appellate Districts held that Court of Common Pleas had jurisdiction to entertain an employer's appeal regarding the denial of the Industrial Commission to exercise continuing jurisdiction to make a finding of fraud.

Conversely, in *Thomas v. Conrad* (February 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 Second and Eleventh Appellate Courts found that the Court of Common Pleas lacked subject matter jurisdiction under R.C. 4123.512 to entertain an employer's appeal on the issue of fraud.

As this First District Court has recognized in its decision in the case at bar on page 4, paragraph 9, there is a split of authority among Ohio Appellate Districts regarding whether the refusal of the Industrial Commission of Ohio, to exercise continuing jurisdiction and issue a finding of fraud involves a right to participate issue under R.C. 4123.512. Moreover, this Court has recognized that the Ohio Supreme Court has not specifically addressed this issue. Wherefore, Plaintiff-Appellee, Diazonia Benton, moves this Court to issue an Order Certifying a Conflict.

Respectfully submitted,



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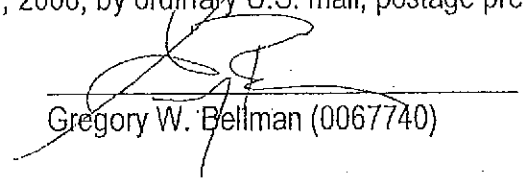
Attorney for Plaintiff-Appellee, Diazonia Benton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Brief was served upon David Lampe, Esq., at 121 West Ninth Street, Cincinnati, Ohio 45202 and James Carroll, Assistant Attorney General, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, this 2nd day of September, 2008, by ordinary U.S. mail, postage prepaid.



Gregory W. Bellman (0067740)

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

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

SUNDERMANN, **Judge.**

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

{¶2} HCESC's appeal to the common pleas court stemmed from injuries plaintiff-appellee Diazonia Benton sustained on March 19, 2003, in a motor vehicle accident. On February 18, 2005, Benton filed an application for workers' compensation benefits in which she claimed that her injuries had occurred in the scope of her employment with HCESC. On March 9, 2005, Benton's workers' compensation claim was allowed for neck sprain, lumbar sprain, and a contusion to her left elbow. HCESC 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. HCESC 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} HCESC 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 "claimaint * * * 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

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

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[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.

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.

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[4] (June 13, 1994), 5th Dist. No. 94CA0018.
[5] (Dec. 21, 1993), 10th Dist. No. 93APE08-1084.

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

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

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

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[6] (Feb. 14, 1997), 2nd Dist. Nos. 15873 and 15898.
[7] 81 Ohio St.3d 475, 692 N.E.2d 205.
[8] Id. at 478-479.
[9] Id.
[10] Id.

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

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

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

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

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[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.

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[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").

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

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

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

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

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

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

To The Clerk:

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

By: _____

Presiding Judge

MAR.29 2007 14:24

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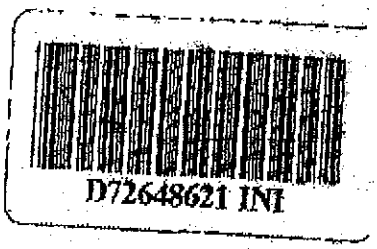


NOTICE OF APPEAL TO THE FIRST DISTRICT COURT OF APPEALS

COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO

C070223

A-1

GOVERNING BOARD OF THE HAMILTON COUNTY EDUCATIONAL SERVICE CENTER,
11083 Hamilton Avenue
Cincinnati, Ohio 45231-1409

Defendant-Appellant,

-vs-

B-1

DAIZONIA BENTON,
943 Waycross Road
Cincinnati, Ohio 45240

Plaintiff-Appellee,

and

E-2

WILLIAM E. MABE,
Administrator, Ohio Bureau of Workers' Compensation
30 West Spring Street
Columbus, Ohio 43266-0581

Defendant-Appellee.

Case No. _____

Trial Court Case No. A0609684

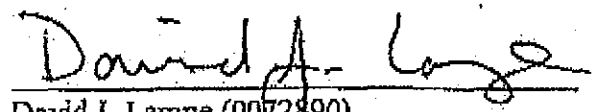
NOTICE OF APPEAL

FILED
2007 MAR 28 P 3:58
GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH.

( ) COMP, PARTIES, SUMMONS
( ) CERT MAIL ( ) SHERIFF ( ) WAVE
( ) PROCESS SERVER ( ) NONE
CLERKS FEES 185.00 TIC
SECURITY FOR COST
DEPOSITED BY 72890
FILING CODE A-101

Notice is hereby given that Defendant-Appellant, Governing Board of Hamilton County Educational Service Center, hereby appeals to the Court of Appeals of Hamilton County, First Appellate District, from the final judgment granting Plaintiff-Appellee's Motion to Dismiss entered in this action on the 1st day of March, 2007.

Respectfully submitted,



David J. Lampe (0072890)
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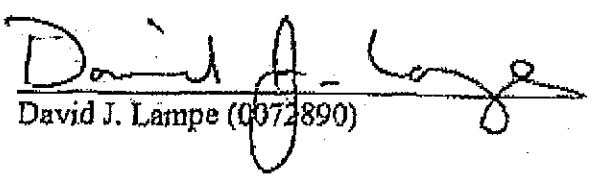
Attorney for Defendant-Appellant, Governing Board of Hamilton County Educational Service Center

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon attorney for Plaintiff-Appellee, Gregory W. Bellman, Sr., Weber Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, and upon attorney for Defendant-Appellee, James M. Carroll, Assistant Ohio Attorney General, 441 Vine Street, Suite 1600, Cincinnati, Ohio 43202-2809, via ordinary U.S. mail, this 28th day of March, 2007.



David J. Lampe (0072890)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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

Copies to:

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121 West Ninth Street
Cincinnati, Ohio 45202

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Assistant Attorney General
441 Vine Street, 1600 Carew Tower
Cincinnati, Ohio 45202

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Hamilton County Educational Service Center 11083 Hamilton Avenue Cincinnati, Ohio 45231 **Defendant - Appellant,**	:	Case No.: A0609684 Judge Robert Winkler BWC No.: 03-889051
William E. Mabe Administrator, Ohio Bureau of Workers' Compensation 30 West Spring Street Columbus, Ohio 43266-0581 **Defendant - Appellee**	:	**PLAINTIFF - APPELLEE, DAIZONIA BENTON'S MOTION TO DISMISS**
and	:	
Daizonia Benton 25 Euclid Avenue Cincinnati, Ohio 45215-4219 **Plaintiff - Appellee**	:	

FILED
2007 JAN 27 P 2:4
CLERK OF COURTS
COMMON PLEAS
HAMILTON COUNTY, OHIO

****

Now comes Plaintiff-Appellee, Daizonia Benton and asks this Court to Dismiss Defendant-Appellant Hamilton County Educational Services' Notice of Appeal filed on or about November 3, 2006, due to this Court's lack of subject matter jurisdiction over the pending Notice of Appeal.

On March 19, 2003, Plaintiff, Daizonia Benton was involved in a motor vehicle accident. A workers' compensation First Report of Injury was completed and filed by the Plaintiff on February 18, 2005, which indicated that the Plaintiff, Daizonia Benton's motor vehicle accident and subsequent injuries occurred in the course and arising out of her employment with the Defendant, Hamilton County Educational Service Center (hereinafter identified as Defendant-

Employer). The claim was assigned claim number 03-889051. On March 9, 2005, the Bureau of Workers' Compensation issued an Order allowing the Plaintiff's Ohio workers' compensation claim for the conditions of sprain of neck, sprain lumbar and contusion of left elbow (attached Exhibit 1). This Bureau of Workers' Compensation Order granted the Defendant, Hamilton County Educational Service Center the right to appeal this Order, within fourteen (14) days of receipt of said Order. The Defendant-Employer did receive said Bureau of Workers' Compensation Order granting Plaintiff, Daizonia Benton's claim and did not appeal the allowance of the claim. Due to the employer's failure to appeal the Bureau of Workers' Compensation Order, this Order has become final and became Res Judicata as to the allowance of Plaintiffs workers' compensation claim. Thereafter, on April 27, 2005, Plaintiff requested that additional conditions be amended into her workers' compensation claim. The Defendant, Hamilton County Educational Service Center elected to have the Plaintiff scheduled for an independent medical exam with Dr. Roger Meyer. Based upon the Plaintiff's medical history and treatment, subsequent to the March 19, 2003 industrial injury, the Defendant's doctor agreed that the requested additional conditions of radiculopathy and L5-S1 herniated disc were related to the March 19, 2003, industrial injury. Despite the Defendant's doctor's recommendation of causal relationship, the Defendant appealed the additional allowance of the DHO on December 30, 2005. A staff level hearing was held on January 26, 2006, which again granted the additional conditions of radiculopathy and L5-S1, herniated disc (attached Exhibit 2). The Defendant-Employer did not appeal the SHO order of January 26, 2006. The staff level hearing Order additionally allowing the workers' compensation claim for herniated disc at L5-S1 and Radiculopathy has become final and is Res Judicata.

On February 3, 2006, Defendant, Employer Hamilton County Educational Service Center filed a Motion requesting the Industrial Commission exercise continuing jurisdiction pursuant to O.R.C. 4123.52 and requested a finding of fraud (attached Exhibit 3). On June 21, 2006, the District Hearing Officer denied the Defendant Employer's Motion. The employer appealed the District Hearing Officer Order on July 7, 2006. On August 30, 2006, the Staff Hearing Officer also denied the Defendant-Employer's Motion finding "absolutely no evidence that the injured

worker has misrepresented the purpose of her trip...on March 19, 2003." The Defendant-Employer appealed this decision on September 18, 2006. On September 19, 2006, the Industrial Commission refused the September 18, 2006, appeal of the Defendant-Employer. The Defendant-Hamilton County Educational Service Center thereafter proceeded to file a Notice of Appeal pursuant to O.R.C. 4123.512 with the Court of Common Pleas in Hamilton County, Ohio (attached Exhibit 4). Plaintiff then filed her Complaint as required under O.R.C. 4123.512.

In this case, the Defendant-Employer asserted the issue of common law fraud as a basis for this Court's review. However, Defendants Notice of Appeal and Answer alleging common law fraud does not go to the right to participate under §4123.512. This Court lacks subject matter jurisdiction necessary to hear the Defendant-Employer's appeal.

II. Argument

In Ohio, the rights and duties under the Ohio Workers' Compensation Law are purely statutory. State, ex rel. Yaple v. Creamer, 85 Ohio St. 349 (1912). The rights and duties rest exclusively on the grant of legislative authority by the enabling Workers' Compensation Act. State, ex rel. Kroger v. Indus Comm., 37 Ohio Law Abstract 509 (1942). (*See also* Fulton, Ohio Workers' Compensation Law, Second Addition, §12.1).

Ohio Revised Code §4123.512 provides the exclusive statutory scheme to appeal an Order of the Industrial Commission. There is no automatic right of appeal from an Order of the Industrial Commission to a Court of Common Pleas. The Ohio Supreme Court in Felty v. AT&T Technologies, Inc. (1992). 65 Ohio St.3d 234, acknowledges this, stating, "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. At 239. Felty also states that a direct appeal to the common pleas court under §4123.512 is the most limited form of review available to Industrial Commission litigants. Id. At 237.

The determination of whether the common pleas court has subject matter jurisdiction

depends on the type of decision issued by the Industrial Commission. Id. As the Felty Court noted, "The Ohio 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 (now known as O.R.C. 4123.512.)" Id. A decision by the Industrial Commission does not determine a right to participate in the State Insurance Fund, unless the decision is finalizing an allowance or disallowance of the employee's claim. Afrates v. Lorain, 63 Ohio St.3d at 27 (1992). (*See also* State, ex rel. Evans, v. Indus. Comm. (1992), 64 Ohio St3d 236 at 238).

Additionally, pursuant to Ohio Revised Code §4123.511 (J)(4) the Administrator or the Industrial Commission has the exclusive authority to determine whether a claimant has committed fraud in his or her receipt of benefits. Jurisdiction to determine whether or not a claimant has committed fraud, in his or her receipt of benefits, lies with the Industrial Commission or the Administrator. Any allegations of fraud must first be heard and determined by the Industrial Commission. Ohio Revised code §4123.511 (J)(4). Schultz v. Ohio Bur. of Workers' Comp., 148 Ohio App.3d310 (2002). Additionally, the sole method to challenge a finding by the Industrial Commission in respect to an allegation of fraud, is for the dissatisfied party to file a complaint for a writ of mandamus.

Defendant's Notice of Appeal of alleging the Industrial Commission's refusal to exercise continuing jurisdiction and find fraud is not a right to participate issue under §4123.512, and thus is outside this Court's jurisdiction. In the case of Schultz, the Industrial Commission determined that the claimant had committed fraud in her receipt of workers' compensation benefits, when it found she had been working part time, while collecting permanent and total disability compensation benefits. Id. at 311-312. The claimant then filed a complaint in the county's Court of Common Pleas. Id. The Court of Common Pleas dismissed her complaint based upon lack of subject matter jurisdiction pursuant to §4123.512. Id. at 312. The Court of Appeals affirmed the decision of the Court of Common Pleas, basing its decision on the Supreme Court of Ohio's determination that the jurisdiction conferred upon the common pleas courts by §4123.512 includes only issues regarding to the right to participate. Id.

The claimant in Schultz argued that the trial court derived its jurisdiction over the Industrial commission from §4123.512 and that section .512 authorizes the trial court to evaluate Industrial Commission determinations of fraud. Id. At 313. However, this argument is misplaced because §4123.512 states that a claimant can only appeal an Industrial Commission determination to the court of common pleas, "other than a decision as to the extent of disability." Schultz argued that this limitation did not exclude the Industrial Commission decisions pertaining to fraud, an argument that lacked merit due to the narrow construction of the scope of jurisdiction under §4123.512 by the Supreme Court of Ohio.

The Schultz court specifically held:

> 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 of 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." Felty, 65 Ohio St.3d at 239, 602 N.E.2d 1141.
>
> Schultz does not contend that the Industrial Commission's decision dealt with her right to participate in the Workers' Compensation program. Instead, Schultz argued that because none of the Ohio Supreme Court cases construing R.C. 4123.512 jurisdiction involves 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. Schultz at paragraphs 13 and 14.

The Court of Appeals in Schultz found the plain meaning of the Ohio Supreme Court's holdings to be that §4123.512 confers jurisdiction only upon decisions that involve the right to participate, and that the Supreme Court of Ohio has clearly excluded any other decisions, including any that involve fraud, from the jurisdiction of the common pleas court. Id. At 314.

The finding of the Court in Schultz is consistent with the holding of the Court in LTV Steel Co. V. Gibbs, 109 Ohio App. 3d 272 (1996). In that case a self-insured employer in a

Workers' Compensation claim attempted to file an action in the Court of Common Pleas to recoup an over payment paid to a Workers' Compensation claimant based on fraud. The Common Pleas Court in that case determined there was no subject matter jurisdiction and dismissed the action, stating:

> The jurisdiction of the court of common pleas in workers' compensation matters is statutory in origin. Breidenbach v. Mayfield (1988), 37 Ohio St.3d 138, 140, 524 N.E.2d 502, 503 ("Courts of Common Pleas do not have inherent jurisdiction in workmen's compensation cases but only such jurisdiction as is conferred on them under the provisions of the Workmen's Compensation Act"). R.C. 4123.519 (now R.C. 4123.512) states that "[t] he claimant or the employer may appeal a decision of the Industrial Commission *** other than a decision as to the extent of disability, to the court of common pleas ***." This has been construed to mean that the appellate jurisdiction of the common pleas court is strictly limited to a determination as to a claimant's right to participate in the fund. Felty v. AT&T Technologies, Inc. (1991), 65 Ohio St.3d 234, 237-238, 602 N.E.2d 1141, 1144-1145; Afrates v. Lorain (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175; paragraph one of the syllabus. Appellant LTV seeks to avoid this jurisdictional limitation by arguing that its claim for recoupment of an overpayment of benefits is based on traditional common law causes of action of which the trial court has original jurisdiction. "The Industrial Commission has discretion to determine whether there is evidence of fraud, new or changed circumstances occurring subsequent to an order, or a mistake prejudicing one of the parties, prior to the exercise of its continuing jurisdiction pursuant to R.C. 4123.52 to change an order which has become final."
>
> The commission has not yet considered, much less determined, whether LTV entitled to recoupment herein.
>
> Since the common pleas jurisdiction is limited to appeals regarding the right to participate in the fund and not the extent of participation, a right to recoup overpayments would not be within the jurisdiction of the Common Pleas Court. LTV must seek redress from the commission and then if dissatisfied, may file a complaint for a writ of mandamus with the Tenth District Court of Appeals. Felty, supra, 65 Ohio St.3d at 237, 602 N.E.2d at 1144: State ex rel. Cook v. Zimpher (1985), 17 Ohio St.3d 236, 237, 17 OBR 474, 475, 479 N.E.2d 263, 264; State ex rel. Hawley v. Indus. Comm. (1940), 137 Ohio St. 332, 18 O.O. 519, 30 N.E.2d 332 syllabus. The trial court properly determined that it was without subject matter jurisdiction to consider whether LTV was entitled to recoupment of an alleged overpayment made to Brown. LTV Steel, at 275-277.

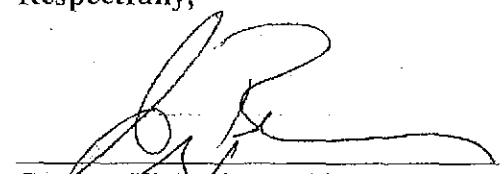
In the present case, Defendant Hamilton County Educational Service Centers filed their Notice of Appeal in the Court of Common Pleas, in Hamilton County Ohio. As stated above, the

Defendant-Employer requested the Industrial Commission to invoke continuing jurisdiction pursuant to 4123.52 on issues that had already been decided and not appealed. The Industrial Commission refused to exercise continuing jurisdiction to find fraud. Continuing jurisdiction issues taken pursuant to 4123.52 for a claim for fraud are not within the jurisdiction of the Court of Common Pleas. It does not fall within the realm of the right to participate under §4123.512. 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. Schultz v. Ohio Bureau of Workers' Comp., 148 Ohio App.3d 310 at 315 (2002). In Schultz, the court found that the rights of employees are not governed by common law, but are conferred by the General Assembly. Id. A finding regarding fraud involves a right conferred by the General Assembly, and can not be heard in the Court of Common Pleas. Id. The claim of fraud is not a decision by the Industrial Commission that is appealable to the Court of Common Pleas level. Id. Therefore, the Defendant's Notice of Appeal must be dismissed, due to a lack of subject matter jurisdiction in the Court of Common Pleas.

CONCLUSION

The Defendant, Hamilton County Educational Service Center is attempting to raise an allegation of the Industrial Commission's refusal to exercise jurisdiction to find fraud before this Court by filing a Notice of Appeal. However, this court does not have jurisdiction to hear a refusal of continuing jurisdiction based upon fraud allegations pertaining to workers' compensation claims. Jurisdiction to hear allegations of the Industrial Commission's refusal to exercise jurisdiction to find fraud is vested solely in the Industrial Commission and the Administrator of the Bureau of Workers' Compensation. Determinations of continuing jurisdiction made by these agencies regarding fraud are reviewable only through the filing of a Complaint seeking a writ of mandamus. For the reasons discussed above, the Plaintiff, Daizonia Benton, respectfully requests this honorable Court grant her Motion to Dismiss the Defendant-Appellant Hamilton County Educational Service's Notice of Appeal and that the Defendant-Appellant be taxed with court costs and that attorney's fees and expenses be awarded to Plaintiff.

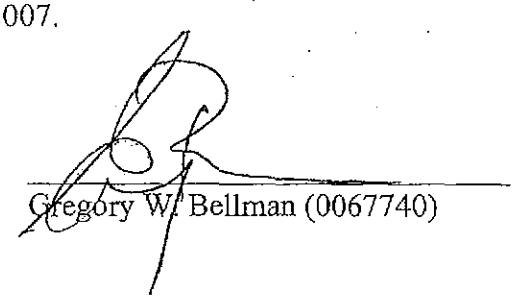
Respectfully,



Gregory W. Bellman (0067740)
813 Broadway, First Floor
Cincinnati, Ohio 45202
(513) 621-2260

CERTIFICATE OF SERVICE

A copy of Plaintiff-Appellee's Motion to Dismiss was sent by regular U.S. mail to David Lampe, Esq, at Ennis, Roberts & Fischer Co., LPA., 121 West Ninth Street, Cincinnati, Ohio 45202 and James Carroll, Assistant Attorney General, 441 Vine Street, 1600 Carew Tower, Cincinnati, Ohio 45202, this 26th day of January, 2007.



Gregory W. Bellman (0067740)

SD
BS

D70748045 INI

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

GREGORY HARTMAN
CLERK OF COURTS
HAMILTON COUNTY

2006 NOV -7 A 11:

FILED

HAMILTON COUNTY EDUCATIONAL SERVICE CENTER 11083 Hamilton Avenue Cincinnati, Ohio 45231,	:	A0609684 Case No. _____
Appellant,	:	BWC NO. 03-889051
-vs-	:	(Judge _____)
DAIZONIA BENTON 25 Euclid Avenue Cincinnati, Ohio 45215-4217	:	NOTICE OF APPEAL
and	:	
WILLIAM E. MABE, ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION 30 West Spring Street Columbus, Ohio 43215-0581,	:	ORIG. COMP. PARTIES, SUMMONS ( ) CERT MAIL ( ) SHERIFF ( ) WAVE ( ) PROCESS SERVER ( ) NONE CLERKS FEES 225 TIC SECURITY FOR COST _____ DEPOSITED BY D-420 FILING CODE 72890
Appellees.	:	

COMES NOW Appellant, Hamilton County Educational Service Center, who hereby serves Notice of its Appeal from the Decision of the Staff Hearing Officer of the Industrial Commission of Ohio dated September 1, 2006 numbered 03-889051. This Order denied Appellant's Motion for a Finding of Fraud, and specifically Appellant's Motion that the Industrial Commission of Ohio exercise its continuing jurisdiction under R.C. 4123.52 and find that Appellee was not within the course and scope of her employment when she was injured in a motor vehicle accident that occurred on or around March 19, 2003.

Said Order was further appealed to the Industrial Commission of Ohio, who refused to hear Appellant's appeal by order dated September 23, 2006. In claim number 03-889051, Daizonia

2

Benton is the claimant-employee and Hamilton County Educational Service Center is the employer.

Said appeal is taken pursuant to Ohio Revised Code 4123.512.

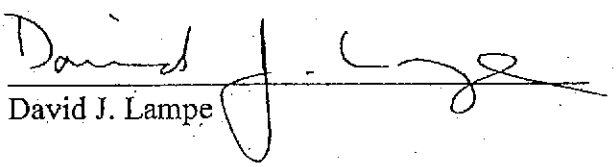
Respectfully submitted,

David J. Lampe (0072890)
ENNIS, ROBERTS & FISCHER CO., LPA
121 West Ninth Street
Cincinnati, Ohio 45202-1904
(513) 421-2540
(513) 562-4986 facsimile
dlampe@erflegal.com

Attorney for Appellant, Hamilton County Educational Service Center

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon Gregory W. Bellman, Sr., Weber Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, attorney for employee, Daizonia Benton, and upon William E. Mabe, Administrator, Ohio Bureau of Workers' Compensation, 30 West Spring Street, Columbus, Ohio 43215, via ordinary U.S. mail, this 3rd day of November, 2006.



David J. Lampe

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 03-889051 LT-ACC-PE-COV
PCN: 2060871 Daizonia N. Benton

Claims Heard: 03-889051

DAIZONIA N. BENTON
25 EUCLID AVE
CINCINNATI OH 45215-4217

Date of Injury: 3/19/2003

Risk Number: 33100051-0

IC-12 Notice Of Appeal filed by Employer on 09/18/2006.
Issue: 1) Fraud

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 09/18/2006 by the Employer from the order issued 09/01/2006 by the Staff Hearing Officer be refused and that copies of this order be mailed to all interested parties.

This appeal was reviewed by two Staff Hearing Officers on behalf of the commission. Both Staff Hearing Officers concur with this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN OHIO REVISED CODE 4123.512.

Date Reviewed: 09/19/2006 (BJ)
Typed By: bb
Date Typed: 09/20/2006
Findings Mailed: 09/23/2006

C. Matthews
Staff Hearing Officer

Electronically signed by
C. Matthews

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

03-889051
Daizonia N. Benton
25 Euclid Ave
Cincinnati OH 45215-4217

ID No: 16150-90
Gregory W Bellman
813 Broadway St 1st Fl
Cincinnati OH 45202

Risk No: 33100051-0
Hamilton County Educational Service
11083 Hamilton Ave
Cincinnati OH 45231-1409

ID No: 10-80
Gates McDonald Company
PO Box 182032
Columbus OH 43218

RECORD OF PROCEEDINGS

Claim Number: 03-889051

ID No: 217682-91
David Lampe, Attorney
121 W 9th St
Cincinnati OH 45202

ID No: 2000-05
***BWC - Special Investigations Uni
30 W Spring St. L-28
Columbus OH 43266-0581

BWC, LAW DIRECTOR

An Equal Opportunity Employer
and Service Provider

Industrial Commission of Ohio

NOTICE OF APPEAL

CLAIM NUMBER: 03-889051

Employee:
Daizonia Benton
707 Burns Avenue, Apt. 7
Cincinnati, Ohio 45216
County:
Telephone:

Employer:
Hamilton County Educational Service Center
11083 Hamilton Avenue
Cincinnati, Ohio 45231
County: Hamilton County, Ohio
Telephone: (513) 674-4200

Claimant Representative's ID:
Gregory W. Bellman, Sr., Esq.
Weber Dickey & Bellman
813 Broadway Street, 1st Floor
Cincinnati, Ohio 45202
Telephone: (513) 621-2260
Fax: (513) 621-2389

Employer Representative's ID:
David J. Lampe
Ennis, Roberts & Fischer Co., L.P.A.
121 W. Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Fax: (513) 562-4986

COMES NOW the employer, Hamilton County Educational Service Center, who hereby appeals the September 1, 2006 Order of the staff hearing officer denying the employer's Motion for a Finding of Fraud. The employer asserts that employee, Daizonia Benton, was not within the course and scope of employment when she was injured in a motor vehicle accident on March 19, 2003. As such, the employee's filing of a claim to participate in the benefits of the Ohio Workers' Compensation Fund for injuries arising out of the March 19, 2003 motor vehicle accident was false and fraudulent.

TRACKED ON IR
MOTION/APPEAL
DATE 9-19
INITIAL
ISSUE

Respectfully submitted,

David J. Lampe (0072890)
ENNIS, ROBERTS & FISCHER, L.P.A.
121 West Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Facsimile: (513) 562-4986
dlampe@erflegal.com

Attorney for Employer, Hamilton County Educational Service Center

Received Sep-15-06 15:38 From-513 562 4986 To-i.c.cintl. hearing a Page 003

03-889051

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served was served upon Gregory W. Bellman, Sr., Weher Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, attorney for employee, Daizonia Benton, and upon Daizonia Benton, 25 Euclid Avenue, Cincinnati, Ohio 45215, via ordinary U.S. mail, this 15 day of September, 2006.

David J. Lampe

David J. Lampe

Received Sep-15-06 15:42 From-513 562 4986 To-i.c.cinti. hearing a Page 001

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 03-889051 Claims Heard: 03-889051
LT-ACC-PE-COV
PCN: 2060871 Daizonia N. Benton

DAIZONIA N. BENTON
25 EUCLID AVE
CINCINNATI OH 45215-4217

Date of Injury: 3/19/2003 Risk Number: 33100051-0

This claim has been previously allowed for: **SPRAIN OF NECK; SPRAIN LUMBAR REGION; CONTUSION OF ELBOW, LEFT; HERNIATED DISC L5-S1; RADICULOPATHY.**

This matter was heard on 08/29/2006 before Staff Hearing Officer Norman W. Litts, Jr. pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

APPEAL of DHO order from the hearing dated 06/14/2006, filed by Employer on 07/07/2006.
Issue: 1) Fraud

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker, Mr. Bellman, Ms. Woods
APPEARANCE FOR THE EMPLOYER: Mr. Lampe, Ms. Myers, Ms. Jones, Ms. Siegel
Mr. Collopy
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the District Hearing Officer, from the hearing dated 06/14/2006, is affirmed with additional reasoning.

The employer's appeal, filed 07/07/2006, is denied.

The employer's C-86 motion, filed 02/03/2006, is denied.

The employer's motion requesting that the Industrial Commission exercise the continuing jurisdiction provisions of ORC 4123.52 and revisit the allowance of this claim on the grounds that the injured worker committed fraud is denied.

This claim is predicated upon a motor vehicle accident which occurred on 03/19/2003 when the injured worker was in route from her office to Group Health Associates in Clifton to pick up a medical form for a child enrolled in a head start program.

The employer acknowledges the fact that a motor vehicle accident involving the injured worker occurred on 03/19/2003. However, the employer alleges that the injured worker has been untruthful, or fraudulent, concerning the purpose of her trip to Clifton. Specifically, the employer argues that the injured worker was not on her way to pick up a child's medical record at the time of the motor vehicle accident. Further, the employer argues that the injured worker fraudulently misrepresented the purpose of her trip in order to secure Workers' Compensation benefits.

The Staff Hearing Officer rejects the employer's argument.

RECORD OF PROCEEDINGS

Claim Number: 03-889051

The Staff Hearing Officer finds that there is absolutely no evidence that the injured worker has misrepresented the purpose of her trip to Group Health Associates on 03/19/2003.

Rather, the testimony of the witnesses at hearing supports the injured worker's position.

Ms. Charm Siegel, the individual in charge of the medical records at Group Health Associates in Clifton, testified that the injured worker's story was plausible. Ms. Siegel stated that it was possible that the injured worker was on her way to retrieve a medical form filled out by a doctor at Group Health Associates. Ms. Siegel further stated that the records department at Group Health Associates would not have a record of a form filled out by a doctor at Group Health Associates if the form was presented directly to the pediatrics department and the doctor signed the form and returned it to the party requesting the doctor's signature.

Ms. Diana Woods was the injured worker's supervisor on 03/19/2003 and Ms. Woods testified that the injured worker's story is plausible. Specifically, Ms. Woods testified that it was in the scope of the injured worker's employment to pick up medical records. Ms. Woods further testified that it was not uncommon for an individual with the injured worker's job to pick up medical records.

Based on the testimony of Ms. Siegel and Ms. Woods, the Staff Hearing Officer concludes that there is no evidence that the injured worker fraudulently misrepresented the purpose of her trip to Clifton on 03/19/2003.

Accordingly, the employer's C-86 motion filed 02/03/2006 is denied.

All evidence on file was reviewed.

This order is based on the testimony of Ms. Woods, Ms. Siegel and the injured worker.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Cincinnati District Office, 125 E. Court St., Suite 600 - 6th Floor, Cincinnati OH 45202.

Typed By: sn
Date Typed: 08/30/2006

Findings Mailed: 09/01/2006

Norman W. Litts, Jr.
Staff Hearing Officer

Electronically signed by
Norman W. Litts, Jr.

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

03-889051
Daizonia N. Benton
25 Euclid Ave
Cincinnati OH 45215-4217

ID No: 16150-90
Gregory W Bellman
813 Broadway St 1st Fl
Cincinnati OH 45202

RECORD OF PROCEEDINGS

Claim Number: 03-889051

Risk No: 33100051-0
Hamilton County Educational Service
11083 Hamilton Ave
Cincinnati OH 45231-1409

ID No: 10-80
Gates McDonald Company
PO Box 182032
Columbus OH 43218

ID No: 217682-91
David Lampe, Attorney
121 W 9th St
Cincinnati OH 45202

ID No: 2000-05
***BWC - Special Investigations Uni
30 W Spring St. L-28
Columbus OH 43266-0581

BWC, LAW DIRECTOR

An Equal Opportunity Employer
and Service Provider

OHIO BUREAU OF WORKERS' COMPENSATION

Injured Worker: Daizonia Benton
2152 Millvale Court
Cincinnati, Ohio 45225-1248

Claim #: 03-889051

Employer: Hamilton County Education Service Center
11083 Hamilton Avenue
Cincinnati, Ohio 45231

INDUSTRIAL COMM. OF OHIO
06 JUL -7 AM 11:59
CINCINNATI DISTRICT OFFICE

NOTICE OF APPEAL

The employer, Hamilton County Educational Service Center, hereby serves notice that it appeals the June 27, 2006 Order of the District Hearing Officer on the employer's C86 Motion to assert its continuing jurisdiction and vacate the Bureau of Workers' Compensation Order dated March 9, 2005 which allowed this claim. The employer contends that at the time of the employee's March 19, 2003 motor vehicle accident, she was not within the course and scope of her employment, and that the employee fraudulently reported her injury as a workplace injury.

Respectfully submitted,

David J. Lampe (0072890)
ENNIS, ROBERTS & FISCHER, L.P.A.
121 West Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Facsimile: (513) 562-4986
dlampe@erflegal.com

Authorized Representative of Employer, Hamilton County Educational Service Center

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Daizonia Benton, 2152 Millvale Court, Cincinnati, Ohio 45225-1248, and upon Gregory W. Bellman, Sr., Weber Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, via ordinary U.S. mail, this 7th day of July, 2006.

David J. Lampe

RECEIVED
06 JUL -7 AM 11:39
CINCINNATI DISTRICT OFFICE

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 03-889051 Claims Heard: 03-889051
LT-ACC-PE-COV
PCN: 2060871 Daizonia N. Benton

DAIZONIA N. BENTON
2152 MILLVALE CT
CINCINNATI OH 45225-1248

FINDINGS MAILED
JUN 27 2006

Date of Injury: 3/19/2003 Risk Number: 33100051-0

This claim has been previously allowed for: SPRAIN OF NECK; SPRAIN LUMBAR REGION; CONTUSION OF ELBOW, LEFT; HERNIATED DISC L5-S1; RADICULOPATHY.

This matter was heard on 06/14/2006 before District Hearing Officer Joseph W. Meyer pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

C-86 Motion filed by Employer on 02/03/2006
Issue: 1) Fraud

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker, G. Bellman
APPEARANCE FOR THE EMPLOYER: M. White, T. Lampe, Ms. Jones, Ms. Gates, Ms. Monroe, Ms. Woods
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the order of the District Hearing Officer that the C-86 Motion filed by Employer on 02/03/2006 is denied.

It is the finding of the District Hearing Officer that the employer of record requested that the Industrial Commission of Ohio assert its continuing jurisdiction and vacate the Bureau of Workers' Compensation order dated 03/09/2005, which allowed the claim. In its motion, the employer alleged that the claim was allowed due to the injured worker's fraudulent activities. Specifically, the employer alleged that the injured worker lied about the fact that she was in the course of and scope of her employment at the time of the motor vehicle accident on 03/19/2003, which is the incident that caused the injured worker's injuries allowed in the claim.

It is the finding of the District Hearing Officer that the employer has not met the burden of proof establishing that the injured worker committed fraud or lied about the reasons she was traveling to a Group Health Associates office on 03/19/2003. Specifically, there is no evidence to support the allegation that the injured worker lied. There is no evidence, either in the claim file or in the testimony presented at hearing, that established that the injured worker lied about the reasons for her travel at the time of the motor vehicle accident on 03/19/2003. Actually, Ms. Diane Woods testified that it was part of the injured worker's job to travel to medical offices to obtain medical records for children participating in head start programs. Ms. Woods testified that due to state audits it was necessary to obtain the medical records in an expedited fashion.

RECORD OF PROCEEDINGS

Claim Number: 03-889051

Therefore, it is hereby the order of the District Hearing Officer that the employer's request for a finding of fraud and order vacating the Bureau of Workers' Compensation order dated 03/09/2005 is denied.

This order is based upon the testimony of Ms. Woods presented at hearing, the testimony of Ms. Jones presented at hearing, the testimony of Ms. Gates presented at hearing, the testimony of Ms. Monroe presented at hearing and the local travel expense report statements filed by the employer of record on 01/24/2006.

All evidence in claim file was reviewed and considered.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Cincinnati District Office, 125 E. Court St., Suite 600 - 6th Floor, Cincinnati OH 45202.

Typed By: sn
Date Typed: 06/21/2006
Date Received: 03/22/2006
Notice of Contested Claim: 03/21/2006
Findings Mailed:

Joseph W. Meyer
District Hearing Officer

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

03-889051
Daizonia N. Benton
2152 Millvale Ct
Cincinnati OH 45225-1248

Risk No: 33100051-0
Hamilton County Educational Service
11083 Hamilton Ave
Cincinnati OH 45231-1409

ID No: 16150-90
Gregory W Bellman
813 Broadway St 1st Fl
Cincinnati OH 45202

ID No: 10-80
Gates McDonald Company
PO Box 182032
Columbus OH 43218

ID No: 217682-91
David Lampe, Attorney
121 W 9th St
Cincinnati OH 45202

ID No: 2000-05
***BWC - Special Investigations Uni
30 W Spring St. L-28
Columbus OH 43266-0581

BWC, LAW DIRECTOR

An Equal Opportunity Employer
and Service Provider

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Daizonia Benton, 2152 Millvale Court, Cincinnati, Ohio 45225-1248, and upon Gregory W. Bellman, Sr., Weber Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, via ordinary U.S. mail, this 7th day of July, 2006.

David J. Lampe

RECEIVED COMM. OF OHIO
06 JUL -7 AM 11:39
CINCINNATI DISTRICT OFFICE

OHIO BUREAU OF WORKERS' COMPENSATION

Injured Worker: Daizonia Benton
2152 Millvale Court
Cincinnati, Ohio 45225-1248

Claim #: 03-889051

Employer: Hamilton County Education Service Center
11083 Hamilton Avenue
Cincinnati, Ohio 45231

C-86 MOTION

Employer, Hamilton County Educational Service Center, hereby moves the Ohio Bureau of Workers' Compensation/Industrial Commission to revoke and/or vacate its decision to allow injured worker, Daizonia Benton, to participate in the workers' compensation fund for the conditions of: sprain of neck; sprain of lumbar region; contusion of left elbow; and additional allowances of spondylolisthesis at L-5; herniated disc at L5-S1; and radiculitis arising out of a March 19, 2003 automobile accident. The basis for Employer's Motion is that the injured worker was not within the course and scope of her employment at the time she was involved in the March 19, 2003 automobile accident which allegedly caused her industrial injury.

Employer will present evidence that the injured worker's stated reasons for traveling to Group Health Associates' Clifton office on March 19, 2003 to obtain medical records for a student and/or client were false and fraudulent and that the injured worker was, in fact, not performing a function of her employment with the Employer at the time of the aforementioned automobile accident.

In support of this Motion, the Employer has previously filed with the Industrial Commission of Ohio the following:

(1) The March 19, 2003 Ohio traffic crash report;

(2) Hamilton County Educational Service Center Head Start local travel expense statements for the injured worker for March of 2003;

(3) Hamilton County Head Start sick leave usage form for employee specifying dates of requested leave of March 20, 2003 through March 28, 2003;

(4) March 14, 2005 correspondence from Karen Monroe at Hamilton County Educational Service Center identifying employee's days missed from work following the March 19, 2003 automobile accident;

(5) Hamilton County Head Start program job description for a family education associate;

(6) February 17, 2005 First Report of Injury or Occupational Disease filed with the Bureau of Worker's Compensation;

(7) May 6, 2002 minutes of meeting defining the job responsibilities of a family education associate;

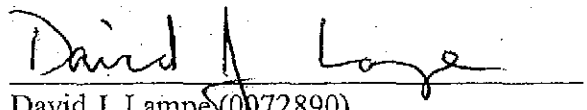
(8) Affidavit of Dianne Woods;

(9) October 27, 2005 deposition transcript of injured worker, Daizonia Benton.

In addition to the previously filed documents, the Employer files, in conjunction with this Motion, monthly attendance rosters for Hamilton County Educational Service Center Head Start for Children's World Forest Park; Scotland CC; and Sharon Hill Forest Park for the month of March, 2003. Employer is continuing to investigate this claim and will supplement this Motion

with additional documents upon receipt. Copies of all additional documents will be served upon counsel for the injured worker.

Respectfully submitted,

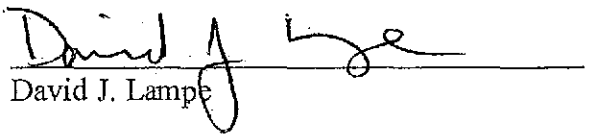


David J. Lampe (0072890)
ENNIS, ROBERTS & FISCHER, L.P.A.
121 West Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Facsimile: (513) 562-4986
dlampe@erflegal.com

Authorized Representative of Employer, Hamilton County Educational Service Center

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon counsel for inured worker, Gregory W. Bellman, Sr., Weber Dickey & Bellman, 813 Broadway Street, 1st Floor, Cincinnati, Ohio 45202, via ordinary U.S. mail, this 1st day of February, 2006.



David J. Lampe

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

FINDINGS MAILED
JAN 28 2006

Claim Number: 03-889051 LT-ACC-PE-COV
PCN: 2051671 Daizonia N. Benton

Claims Heard: 03-889051
03-327870 - Ref

DAIZONIA N. BENTON
2152 MILLVALE CT
CINCINNATI OH 45225-1248

Date of Injury: 3/19/2003 Risk Number: 33100051-0

This claim has been previously allowed for: SPRAIN OF NECK; SPRAIN LUMBAR REGION; CONTUSION OF ELBOW, LEFT; HERNIATED DISC L5-S1; RADICULOPATHY.

This matter was heard on 01/26/2006 before Staff Hearing Officer Christopher M. Kalafut pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

IC-12 Notice Of Appeal of DHO order from the hearing dated 12/12/2005, filed by Employer on 12/30/2005.
Issue: 1) Additional Allowance - SPONDYLOLISTHESIS AT L5
2) Additional Allowance - HERNIATED DISC AT L5-S1
3) Additional Allowance - RADICULITIS

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Bellman
APPEARANCE FOR THE EMPLOYER: Lampe, D. Jones, T. Seta, Collopy
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the District Hearing Officer, from the hearing dated 12/12/2005, is affirmed.

The injured worker's C-86 motion filed 04/27/2005 requesting allowance of the additional conditions of HERNIATED DISC AT L5-S1 AND RADICULOPATHY is granted.

The Hearing Officer finds that the requested conditions are causally related to the 03/19/2003 industrial injury and the allowed conditions in the claim.

Therefore the claim is additionally allowed for the conditions of HERNIATED DISC AT L5-S1 AND RADICULOPATHY.

The portion of the C-86 motion filed 04/27/2005 requesting allowance of the additional condition of spondylolisthesis at L5 is dismissed per the injured worker's representative's withdrawal of that condition at hearing.

The Hearing Officer's decision is based on the report of Dr. J. Eislen dated 04/04/2005 and the report of Dr. Meyer dated 12/01/2005.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Cincinnati District Office, 125 E. Court St., Suite 600 - 6th Floor, Cincinnati OH 45202.

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

FINDINGS MAILED
JAN 28 2006

Claim Number: 03-889051

Typed By: sn
Date Typed: 01/26/2006

Christopher M. Kalafut
Staff Hearing Officer

Findings Mailed:

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

03-889051
Daizonia N. Benton
2152 Millvale Ct
Cincinnati OH 45225-1248

ID No: 16150-90
Gregory W Bellman
813 Broadway St 1st Fl
Cincinnati OH 45202

Risk No: 33100051-0
Hamilton County Educational Service
11083 Hamilton Avenue
Cincinnati OH 45231

ID No: 10-80
Gates McDonald Company
PO Box 182032
Columbus OH 43218

BWC, LAW DIRECTOR

An Equal Opportunity Employer
and Service Provider

C13 Scan1 01/30/2006

Industrial Commission of Ohio

NOTICE OF APPEAL

CLAIM NUMBER: 03-889051

Employee:
Daizonia Benton
707 Burns Avenue, Apt. 7
Cincinnati, Ohio 45216
County:
Telephone:

Employer:
Hamilton County Educational Service Center
11083 Hamilton Avenue
Cincinnati, Ohio 45231
County: Hamilton County, Ohio
Telephone: (513) 674-4200

Claimant Representative's ID:
Gregory W. Bellman, Sr., Esq.
Weber Dickey & Bellman
813 Broadway Street, 1st Floor
Cincinnati, Ohio 45202
Telephone: (513) 621-2260
Fax: (513) 621-2389

Employer Representative's ID:
David J. Lampe
Ennis, Roberts & Fischer Co., L.P.A.
121 W. Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Fax: (513) 562-4986

COMES NOW Employer, Hamilton County Educational Service Center, by and through counsel, and hereby serves notice of its appeal of the decision of the district hearing officer for additional allowances of spondylolisthesis at L5; and additional allowance of herniated disc at L5-S1 as a result of an alleged March 19, 2003 workplace injury. It is the position of the employer that said conditions were not caused by the workplace injury.

TRACKED ON IR
MOTION/APPEAL
DATE 1-3-06
INITIAL
ISSUE

Respectfully submitted,

David J. Lampe (0072890)
ENNIS, ROBERTS & FISCHER, L.P.A.
121 West Ninth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-2540
Facsimile: (513) 562-4986
dlampe@erflegal.com

Attorney for Hamilton County Educational Service Center

INDUSTRIAL COMM. OF OHIO
05 DEC 30 PM 3:55
CINCINNATI DISTRICT OFFICE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served was served upon Claimant's representative and upon Gates McDonald, P.O. Box 182032, Columbus, Ohio 43218, via ordinary U.S. mail, this 30 day of December, 2005.

David J. Lampe

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 03-889051
LT-ACC-PE-COV
PCN: 2051671 Daizonia N. Benton

Claims Heard: 03-889051
03-327870 - Ref

DAIZONIA N. BENTON
2152 MILLVALE CT
CINCINNATI OH 45225-1248

FINDINGS MAILED
DEC 15 2005

Date of Injury: 3/19/2003

Risk Number: 33100051-0

This claim has been previously allowed for: SPRAIN OF NECK; SPRAIN LUMBAR REGION; CONTUSION OF ELBOW, LEFT.

This matter was heard on 12/12/2005 before District Hearing Officer Lisa Grosse pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

C-86 Motion filed by Injured Worker on 04/27/2005
Issue: 1) Additional Allowance - SPONDYLOLISTHESIS AT L5
2) Additional Allowance - HERNIATED DISC AT L5-S1
3) Additional Allowance - RADICULITIS

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: G. Bellman
APPEARANCE FOR THE EMPLOYER: D. Lampek Monroe; D. Jones; M. White
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the order of the District Hearing Officer that the C-86 Motion filed by Injured Worker on 04/27/2005 be granted to the extent of this order.

The District Hearing Officer finds that there is a causal relationship between the requested conditions HERNIATED DISC AT L5-S1 AND RADICULOPATHY and this industrial injury.

Therefore, this claim is additionally allowed for those conditions.

The District Hearing Officer further finds that the Injured Worker's attorney withdrew the request for the additional allowance of the condition SPONDYLOLISTHESIS AT L5. Therefore, that condition is dismissed from consideration.

This order is based on the medical reports of Dr. Jessie Eislen dated 04/04/2005 and Dr. Meyer dated 12/01/2005.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Cincinnati District Office, 125 E. Court St., Suite 600 - 6th Floor, Cincinnati OH 45202.

Lisa Grosse
District Hearing Officer

Typed By: clr
Date Typed: 12/12/2005
Date Received: 06/14/2005
Notice of Contested Claim: 06/10/2005
Findings Mailed:

C1n Scan1 12/15/2005

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 03-889051

FINDINGS MAILED
DEC 15 2005

C.H. Scan 12/15/2005

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

03-889051
Daizonia N. Benton
2152 Millvale Ct
Cincinnati OH 45225-1248

ID No: 16150-90
Gregory W Bellman
813 Broadway St 1st Fl
Cincinnati OH 45202

Risk No: 33100051-0
Hamilton County Educational Service
11083 Hamilton Avenue
Cincinnati OH 45231

ID No: 10-80
Gates McDonald Company
PO Box 182032
Columbus OH 43218

BWC, LAW DIRECTOR

An Equal Opportunity Employer
and Service Provider

Injured worker: DAIZONIA N. BENTON
Service: Correspondence

Claim #: 03-889051
DOI: 03/19/2003

03/09/2005
Date Mailed

#BWNFVSQ
#IW16990429852930#

DAIZONIA N BENTON
943 WAYCROSS RD
CINCINNATI OH 45240-3021

Injured worker:	DAIZONIA N BENTON		
Claim number:	03-889051	Employer's name:	HAMILTON COUNTY EDUCATIONAL S
Injury date:	03/19/2003	Policy number:	33100051-0
Claim type:	Accident	Manual number:	9434

An application for workers' compensation benefits was filed 02/18/2005 on behalf of the injured worker, requesting the allowance of this claim for the following injury description:

"In a motor vehicle accident. Headed to Group Health Associates to pick up medical forms of one clients for Headstart purposes. IW going S. on Vine and other vehicle turned left off vine onto North Bend Rd. and hit iw vehicle on drivers side between lf. front fender and left driver door."

The claim is ALLOWED for the following medical condition(s):

Code	Description	Body Location	Part of Body
847.0	SPRAIN OF NECK		
847.2	SPRAIN LUMBAR REGION		
923.11	CONTUSION OF ELBOW	LEFT	

This decision is based on:
Medical documentation in file reviewed on 3/4/2005 by Judith Wachendorf, M.D.

Medical benefits will be paid in accordance with the Ohio Bureau of Workers' Compensation (BWC) rules and guidelines. The injured worker is encouraged to forward the information above to all health care providers involved in this claim.

BWC will consider compensation benefits based on medical evidence of continued disability and/or wage information.

The injured worker may be eligible for rehabilitation services, which may help him or her return to work more quickly and safely. Please contact either BWC or your managed care organization for more information regarding rehabilitation services.

The Administrator finds there is insufficient evidence to support temporary

total disability from 12/6/2004 and continuing as being related to the 3/19/2003 injury. This is based on surgery on 12/6/2004 for L5-S1 Spondylosis and Sponodylolisthesis which is insufficient to support as part of this claim.

This order is subject to any current family support order(s).

Ohio law requires that BWC allow the injured worker or employer 14 days from

1

BWC Use Only
06/03/04

previous next

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, PORTAGE 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. GRENDELL, J. O'NEILL, P.J., concurs, GRENDELL, 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 rel. 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,

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

CONCUR BY: DIANE V. GRENDELL (In Part)

DISSENT BY: DIANE V. GRENDELL (In Part)

DISSENT

CONCURRING/DISSENTING OPINION

GRENDELL, 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. GRENDELL

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 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, *Felty 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

Farmer, 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.

DISPOSITION: *Judgment affirmed.*

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

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

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

JUDGES: YOUNG, PETREE, BOWMAN

OPINION BY: YOUNG

OPINION

OPINION

YOUNG, J.

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. 1

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

"ISSUE NO. 2

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

"ISSUE NO. 3

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

"ISSUE NO. 4

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

"ISSUE NO. 5

"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. [1] 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.

1 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 General [4] 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. [5]

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 1997 OHIO APP. LEXIS 485

MALINDA THOMAS, Plaintiff-Appellee/ Cross-Appellant v. C. JAMES CONRAD, ADMINISTRATOR BUREAU OF WORKERS' COMPENSATION and THE INDUSTRIAL 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, MONTGOMERY 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

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 appeal. 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, unreported [1], 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.

4123.511 Notice of receipt of claim.

(A) Within seven days after receipt of any claim under this chapter, the bureau of workers' compensation shall notify the claimant and the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of section 4123.84 of the Revised Code. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code, provided that the conditions of division (E) of section 4123.84 of the Revised Code apply to information provided verbally over the telephone. Upon receipt of a claim, the bureau shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. If the bureau determines that a claim is determined to be a compensable lost-time claim, the bureau shall notify the claimant and the employer of the availability of rehabilitation services. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the bureau's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of the claimant's rights under the law.

The administrator of workers' compensation shall assign all claims and investigations to the bureau service office from which investigation and determination may be made most expeditiously.

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

The administrator, with the advice and consent of the bureau of workers' compensation board of directors, may adopt rules that identify specified medical conditions that have a historical record of being allowed whenever included in a claim. The administrator may grant immediate allowance of any medical condition identified in those rules upon the filing of a claim involving that medical condition and may make immediate payment of medical bills for any medical condition identified in those rules that is included in a claim. If an employer contests the allowance of a claim involving any medical condition identified in those rules, and the claim is disallowed, payment for the medical condition included in that claim shall be charged to and paid from the surplus fund created under section 4123.34 of the Revised Code.

(B)(1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days

after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

(2) Notwithstanding the time limitation specified in division (B)(1) of this section for the issuance of an order, if the employer certifies a claim for payment of compensation or benefits, or both, to a claimant, and the administrator has completed the investigation of the claim, the payment of benefits or compensation, or both, as is appropriate, shall commence upon the later of the date of the certification or completion of the investigation and issuance of the order by the administrator, provided that the administrator shall issue the order no later than the time limitation specified in division (B)(1) of this section.

(3) If an appeal is made under division (B)(1) or (2) of this section, the administrator shall forward the claim file to the appropriate district hearing officer within seven days of the appeal. In contested claims other than state fund claims, the administrator shall forward the claim within seven days of the administrator's receipt of the claim to the industrial commission, which shall refer the claim to an appropriate district hearing officer for a hearing in accordance with division (C) of this section.

(C) If an employer or claimant timely appeals the order of the administrator issued under division (B) of this section or in the case of other contested claims other than state fund claims, the commission shall refer the claim to an appropriate district hearing officer according to rules the commission adopts under section 4121.36 of the Revised Code. The district hearing officer shall notify the parties and their respective representatives of the time and place of the hearing.

The district hearing officer shall hold a hearing on a disputed issue or claim within forty-five days after the filing of the appeal under this division and issue a decision within seven days after holding the hearing. The district hearing officer shall notify the parties and their respective representatives in writing of the order. Any party may appeal an order issued under this division pursuant to division (D) of this section within fourteen days after receipt of the order under this division.

(D) Upon the timely filing of an appeal of the order of the district hearing officer issued under division (C) of this section, the commission shall refer the claim file to an appropriate staff hearing officer according to its rules adopted under section 4121.36 of the Revised Code. The staff hearing officer shall hold a hearing within forty-five days after the filing of an appeal under this division and issue a decision within seven days after holding the hearing under this division. The staff hearing officer shall notify the parties and their respective representatives in writing of the staff hearing officer's order. Any party may appeal an order issued under this division pursuant to division (E) of this section within fourteen days after receipt of the order under this division.

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing.

The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the filing of the notice of appeal, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to section 4123.512 of the Revised Code within sixty days after receipt of the order, subject to the limitations contained in that section.

(F) Every notice of an appeal from an order issued under divisions (B), (C), (D), and (E) of this section shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

(G) All of the following apply to the proceedings under divisions (C), (D), and (E) of this section:

(1) The parties shall proceed promptly and without continuances except for good cause;

(2) The parties, in good faith, shall engage in the free exchange of information relevant to the claim prior to the conduct of a hearing according to the rules the commission adopts under section 4121.36 of the Revised Code;

(3) The administrator is a party and may appear and participate at all administrative proceedings on behalf of the state insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under section 4123.343 of the Revised Code, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative.

(H) Except as provided in section 4121.63 of the Revised Code and division (K) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

(1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;

(2) The date when the employer has waived the right to appeal a decision issued under division (B) of this section;

(3) If no appeal of an order has been filed under this section or to a court under section 4123.512 of the Revised Code, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer,

or the industrial commission issued under division (C), (D), or (E) of this section.

(I) Payments of medical benefits payable under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code shall commence upon the earlier of the following:

(1) The date of the issuance of the staff hearing officer's order under division (D) of this section;

(2) The date of the final administrative or judicial determination.

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

(K) Upon the final administrative or judicial determination under this section or section 4123.512 of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled, pursuant to the following criteria:

(1) No withholding for the first twelve weeks of temporary total disability compensation pursuant to section 4123.56 of the Revised Code shall be made;

(2) Forty per cent of all awards of compensation paid pursuant to sections 4123.56 and 4123.57 of the Revised Code, until the amount overpaid is refunded;

(3) Twenty-five per cent of any compensation paid pursuant to section 4123.58 of the Revised Code until the amount overpaid is refunded;

(4) If, pursuant to an appeal under section 4123.512 of the Revised Code, the court of appeals or the supreme court reverses the allowance of the claim, then no amount of any compensation will be withheld.

The administrator and self-insuring employers, as appropriate, are subject to the repayment schedule of this division only with respect to an order to pay compensation that was properly paid under a previous order, but which is subsequently reversed upon an administrative or judicial appeal. The administrator and self-insuring employers are not subject to, but 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 compensation due to fraud as determined by the administrator or the industrial commission.

(L) If a staff hearing officer or the commission fails to issue a decision or the commission fails to refuse to hear an appeal within the time periods required by this section, payments to a claimant shall cease

until the staff hearing officer or commission issues a decision or hears the appeal, unless the failure was due to the fault or neglect of the employer or the employer agrees that the payments should continue for a longer period of time.

(M) Except as otherwise provided in this section or section 4123.522 of the Revised Code, no appeal is timely filed under this section unless the appeal is filed with the time limits set forth in this section.

(N) No person who is not an employee of the bureau or commission or who is not by law given access to the contents of a claims file shall have a file in the person's possession.

(O) Upon application of a party who resides in an area in which an emergency or disaster is declared, the industrial commission and hearing officers of the commission may waive the time frame within which claims and appeals of claims set forth in this section must be filed upon a finding that the applicant was unable to comply with a filing deadline due to an emergency or a disaster.

As used in this division:

(1) "Emergency" means any occasion or instance for which the governor of Ohio or the president of the United States publicly declares an emergency and orders state or federal assistance to save lives and protect property, the public health and safety, or to lessen or avert the threat of a catastrophe.

(2) "Disaster" means any natural catastrophe or fire, flood, or explosion, regardless of the cause, that causes damage of sufficient magnitude that the governor of Ohio or the president of the United States, through a public declaration, orders state or federal assistance to alleviate damage, loss, hardship, or suffering that results from the occurrence.

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4123.512 Appeal to court.

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

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

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to 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 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 and 4123.512 of the Revised Code.

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

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4123.52 Continuing jurisdiction of commission.

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

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