IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST AND OF THE FACTS

The Ohio Association for Justice was founded in 1954 and known as the Ohio Academy of Trial Lawyers. It is an organization of over 1,900 attorneys dedicated to the protection of Ohio's consumers, workers and families. In furtherance of its ideals, the Association has appeared in numerous cases before the Ohio Supreme Court through the submission of *Amicus Curiae* Briefs. Inasmuch as the Association was originally known as the National Association of Claimant's Counsel, Ohio Chapter, it appreciates the opportunity to submit this brief as *amicus curiae*.

The Association files this amicus brief in support of Appellants to ask this Court to reverse the First District Court of Appeals decision and resolve the current conflict among the courts of appeals. The Association asks this Court to find that under R.C. 4123.512 and this Court's case law, an employer in a workers' compensation case may appeal only a right-to-participate determination, and not a decision of the Industrial Commission dealing with the issue of fraud, when an employer claims fraud even after the injured employee's right to participate has been determined and the statute of limitations to challenge that determination has run. The lower courts' interpretation of R.C. 4123.512 is a misreading of the statute and must be corrected.

The Association adopts the statement of facts set forth in Appellants' Merit Briefs.

LAW AND ARGUMENT

PROPOSITION OF LAW

> The Court of Appeals erred when it reversed the trial court decision which dismissed the employer's action for lack of subject matter jurisdiction pursuant to R.C. 4123.512, and when the Court of Appeals found that the courts have jurisdiction to hear the case below when the record clearly shows the decision of the Industrial Commission of Ohio was not an appealable decision under that statute.

The Court of Appeals erred when it found that the lower court did have jurisdiction to hear the "Notice of Appeal" of the employer, Hamilton County Educational Service Center (the employer or HCESC). The decision rendered by the Industrial Commission of Ohio on the motion filed by the employer was not appealable pursuant to R.C. 4123.512. The trial court correctly found that it did not have jurisdiction to consider this workers' compensation matter.

The jurisdiction of the courts of common pleas in workers' compensation matters is purely statutory in origin. *Breidenbach v. Mayfield* (1988), 37 Ohio St. 3d 138, 140, 524 N.E.2d 502 ("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"). See also *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 216 N.E.2d 379. Thus, there is no "right of appeal" to the Court of Common Pleas of a decision of the Industrial Commission of Ohio.

R.C. 4123.512(A) sets forth the very limited times a decision of the Industrial Commission of Ohio is appealable to a Court of Common Pleas:

> 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.

Although not a picture of clarity, the statute allows limited appeals to the Courts of Common Pleas.

Commission decisions which determine a claimant's "extent of disability" are not appealable.

After a period of some confusion, the Supreme Court has now consistently refused to read this statutory provision expansively. "The courts simply cannot review all the decisions of the commission if the commission is to be an effective and independent agency. Unless a narrow reading of R.C. 4123.519 [now 4123.512] is adhered to, almost every decision of the commission, major or minor, could eventually find its way to common pleas court." *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 238, 602 N.E.2d 1141, 1144. Thus, only those decisions which involve the claimant's right to participate in the workers' compensation system are appealable to the Courts of Common Pleas. *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175.

Afrates set forth the "workable" interpretation of R.C. 4123.512. In *Afrates*, the injured worker challenged the appropriateness of relief from a prior order when a party has not received notice of a hearing. In determining that the issue of this "appropriateness" is not an appealable issue, the Supreme Court declared that only those decisions involving the claimant's right to participate in the workers' compensation system are appealable, pursuant to R.C. 4123.512.

Shortly after *Afrates*, the Supreme Court decided *State ex rel. Evans v. Indus. Comm.* (1992), 64 Ohio St.3d 236, 594 N.E.2d 609. *Evans* held that a decision does not "determine an employee's right to participate in the State Insurance Fund unless the decision finalizes the allowance or disallowance of the employee's claim." *Id.* at 238, 594 N.E.2d at 611. The *Evans* Court stressed that "[c]ertain decisions obviously do not involve the claimant's right to participate," citing, specifically, the ruling in *Afrates*, dealing with relief pursuant to R.C. 4123.522.

The *Evans* and *Afrates* decisions were elaborated on by *Felty*, *supra*. *Felty* clarified, once and for all, the issue:

> A "claim" in a workers' compensation case is the basic or underlying request by an employee to participate in the compensation system

> because of a specific work-related injury or disease. A decision by the commission determines the employee's right to participate if it finalizes the allowance or disallowance of an employee's "claim." [Therefore, the] only action by the commission that is appealable under R.C. 4123.519 [now 4123.512] is this essential decision to grant, to deny, or to terminate the employee's participation or continued participation in the system.

Felty, 65 Ohio St.3d at 239, 602 N.E.2d at 1145.

Eight years later, this Court again reiterated the limited nature of an appeal pursuant to R.C. 4123.512. "The only right-to-participate question that is appealable is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St. 3d 276, 279-80, 2000-Ohio-73. *Liposchak* makes it clear that *any* question arising after the original right to participate has been established is considered an extent-of-disability question and is not appealable under R.C. 4123.512.

A Court of Common Pleas' jurisdiction cannot be invoked unless the commission order "finalizes the allowance or disallowance of the employee's claim." Thus, construing *Evans, Afrates, Felty,* and *Liposchak*, it is clear that once the right to participate for a specific condition is determined by the commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to R.C. 4123.512. *Felty*, at paragraph two of the syllabus.

The *Felty* holding could not be more clear. Once a claim is allowed, the only decision which can be appealed is a decision *terminating* the right to participate. This is the law.

Since this Court's precedents unambiguously hold 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 and since, in the present case, the Industrial Commission refused to terminate Mr. Benton's continued participation based on an allegation of fraud, there is no appealable order.

This Court has also consistently refused to allow creative "pleading" to defeat the limited ability to appeal workers' compensation matters pursuant to R.C. 4123.512. For instance, in *State ex rel. Walls v. Indus. Comm.* (2000), 90 Ohio St.3d 192, 736 N.E.2d 458, this Court reviewed the *Afrates*, *Evans* and *Felty* decisions and came to the conclusion that there are very limited cases which may be appealed to the courts of common pleas. Again, relief pursuant to R.C. 4123.522 was not an appealable issue.

Likewise, in *Thomas v. Conrad* (1998), 81 Ohio St.3d 475, 692 N.E.2d 205, this Court chided:

> We could not have been more clear in *Felty* when we repeatedly emphasized the limited form of judicial review of direct appeals under R.C. 4123.512: "The only decisions of the commission that may be appealed to the courts of common pleas * * * are those that are final and that resolve an employee's right to participate or to continue to participate * * *." (Emphasis in original.) *Felty v. AT & Technologies, Inc.*, 65 Ohio St. 3d at 238, 602 N.E.2d at 1145. "The only action by the commission that is appealable * * * is this essential decision to grant, to deny, or to terminate the employee's participation or continued participation in the system." *Id.* at 239, 602 N.E.2d at 1145. Such appeals are limited to "whether an employee is or is not entitled to be compensated for a particular claim." *Id.* "Only those decisions that finalize the allowance or disallowance of a claim * * * are appealable." *Id.* at 240, 602 N.E.2d at 1146.

Thomas, 81 Ohio St.3d at 478, 692 N.E.2d at 208.

Nor is simply "framing" a motion before the Industrial Commission of Ohio sufficient to generate jurisdiction for the Common Pleas Court.

> If we accept NCR's [the employer's] narrow view of this issue, then an employer need only phrase a motion in terms of a request to terminate participation in the workers' compensation system in order to file an R.C. 4123.512 appeal if the request is denied. We must look to the issue before the Industrial Commission and the nature of its order, not how the motion was posited, to determine whether the order is appealable under R.C. 4123.512.

Id. at 479, 692 N.E.2d at 208.

In the instant matter, the issue before the Industrial Commission of Ohio was whether the employer had proved fraud. The commission determined the employer had not. That decision is subject to review only by way of an action in mandamus.

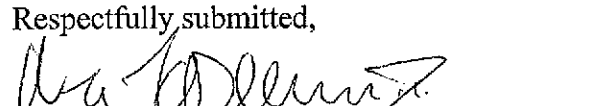
Last, simple logistics reveal that the "appeal" filed by the employer is not an appealable decision pursuant to R.C. 4123.512. Typically, in appeals pursuant to R.C. 4123.512, the injured worker has the burden of proof of going forward with the evidence and the ultimate burden of persuasion. *Swift & Co. v. Wreede* (1959), 100 Ohio App. 252, 12 Ohio Op.2d 240, 168 N.E.2d 757. In those appeals, the question is relatively straightforward: does the injured worker have the right to participate in the state workers' compensation fund for an additional medical condition or on the initial allowance of the claim?

In the instant action, however, the employer's motion to the Industrial Commission of Ohio asked the commission to make a finding of fraud. This motion places the burden of going forward and the burden of proof on the employer. If the employer does not have these burdens, then, an employer need only make an allegation of fraud in order to "re-open" every case previously decided. It matters not what evidence is brought forward by an employer. Once an employer raises the fraud allegation, the independent determinations of the Industrial Commission of Ohio are no longer entitled to any finality. If the commission denies the motion to "decertify" a claim based on fraud, the employer may freely appeal the issue to the Court of Common Pleas, and force an injured worker to "re-try" a case which previously had been afforded a degree of finality and prove that the injured worker did not commit fraud. In effect, the Court of Appeals has allowed the employer to make an allegation which it was not able to prove, in order to attack the finality of an Industrial Commission of Ohio decision. The Court of Appeal's decision denying the directed verdict request was in error and, if the lower.

CONCLUSION

The Court of Appeals erred when it found that the courts do have jurisdiction to hear the appeal of the employer from the decision of the Industrial Commission of Ohio denying the employer's request to "decertify" Mr. Benton's workers' compensation claim. Mr. Benton's claim was allowed by the Bureau. This decision was not appealed and thus became final. Further administrative motions were made asking that additional conditions be added to Mr. Benton's claim. The motions were granted and Mr. Benton's claim was amended for addition medical conditions. These decisions were not appealed and thus became final. HCESC cannot attack the finality of the Industrial Commission of Ohio's decisions by way of a motion to decertify the claim based on "fraud" and appeal to the Court of Common Pleas. There is no automatic "appeal as of right" of a decision of the Industrial Commission of Ohio. Only those decision terminating the injured worker's right to participate in the workers' compensation system can be appealed to the Court of Common Pleas, pursuant to R.C. 4123.512. The employer's motion does not qualify and the Industrial Commission of Ohio decision denying the motion and finding no fraud is not appealable. The Court of Appeals erred in finding otherwise. The motion is not appealable pursuant to R.C. 4123.512. The Court of Appeal's decision must be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing "MERIT BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS," was served upon the following, postage prepaid, by regular U.S. Mail, this 2nd day of March, 2009:

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