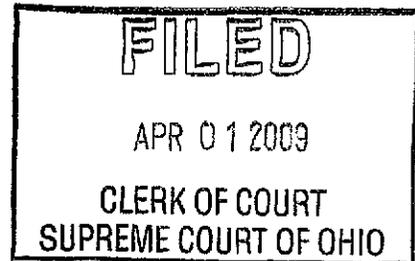


**In the
Supreme Court of Ohio**

DAIZONIA BENTON,	:	Case No. 08-1946 08-1949
Plaintiff-Appellant,	:	
and	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION	:	
Defendant-Appellant,	:	Court of Appeals Case No. C070223
-vs-	:	
HAMILTON COUNTY EDUCATIONAL SERVICE CENTER,	:	
Defendant-Appellee.	:	



**DEFENDANT-APPELLEE, THE GOVERNING BOARD OF THE
HAMILTON COUNTY EDUCATIONAL SERVICE CENTER'S,
BRIEF ON THE MERITS**

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I. STATEMENT OF THE CASE

A. STATEMENT OF CASE

This Court is asked to decide whether a common pleas court has subject matter jurisdiction under R.C. 4123.512 to hear an employer's appeal of an Industrial Commission order denying its motion to terminate a claimant's participation in the Workers' Compensation Fund ("Fund") based upon fraud in the initial claim to participate. Since the Industrial Commission order at issue did not involve the extent of the claimant's disability, the First District Court of Appeals correctly held that the common pleas court had subject matter jurisdiction to hear the employer's appeal.

B. FACTS & PROCEDURAL HISTORY

On March 19, 2003, claimant, Diazonia Benton, was employed by the Governing Board of the Hamilton County Educational Service Center ("Hamilton ESC") in its Headstart Program. (Complaint at ¶3). On this day, Benton was involved in a motor vehicle accident. (Hamilton ESC notice of appeal to common pleas court, ¶1). Approximately 23 months later, on February 18, 2005, Benton filed a first report of injury with the Bureau of Workers' Compensation alleging that she was "in motor vehicle accident coming from office and heading to Group Health Associates to pick up medical forms of one of clients for Headstart purposes." (Hamilton ESC C-86 motion at p. 2).¹ The BWC granted the claim and allowed Benton to participate in the Fund. (March 9, 2005 Industrial Commission Order).²

On February 3, 2006, Hamilton ESC filed a C-86 motion with the Industrial Commission asking it to exercise continuing jurisdiction under R.C. 4123.52 to find fraud. Specifically, Hamilton ESC's motion requested the Industrial Commission find that: (1) Benton's reasons for

¹ A copy of the C-86 motion was filed with the common pleas court as Exhibit 3 to Benton's Motion to Dismiss.

² A copy of this Order was attached to Benton's Motion to Dismiss as Exhibit 1.

traveling to Group Health Associates on March 19, 2003 were false and fraudulent; and (2) Benton was not performing a function of her employment at the time of the automobile accident. In conjunction with finding fraud, the motion asked the Industrial Commission to terminate Benton's participation in the Fund.³

Hamilton ESC's motion was denied by the Industrial Commission at both the district hearing officer and staff hearing officer levels. On September 19, 2006, the Industrial Commission refused to hear Hamilton ESC's further appeal of the denial of its motion. (Complaint at ¶5).

On November 7, 2006, Hamilton ESC filed a notice of appeal under R.C. 4123.512 with the Hamilton County Court of Common Pleas of the Industrial Commission's order denying its motion. On January 27, 2007, Benton filed a motion to dismiss Hamilton ESC's appeal for lack of subject matter jurisdiction. On February 27, 2007, the common pleas court granted Benton's motion and dismissed Hamilton ESC's appeal.

On March 28, 2007, Hamilton ESC appealed the dismissal to the First District Court of Appeals. The First District Court of Appeals reversed the decision of the common pleas court on August 22, 2008, finding it proper for Hamilton ESC to have appealed the Industrial Commission order to the common pleas court under R.C. 4123.512.

On September 18, 2008, the First District Court of Appeals certified that its decision, together with decisions from the Tenth and Fifth District Courts of Appeals, conflicted with decisions from Eleventh and Fourth Districts. This Court certified the conflict and granted jurisdiction over the appeal on December 31, 2008.

³ A true and accurate copy of the C-86 motion was filed with the common pleas court as Exhibit 3 to Benton's Motion to Dismiss.

II. LEGAL ARGUMENT

Proposition of Law:

A common pleas court has jurisdiction under R.C. 4123.512 to hear an appeal of an Industrial Commission order deciding an employer's motion to terminate a claimant's initial right to participate in the Worker's Compensation Fund based on fraud.

A. R.C. 4123.512 provides Hamilton ESC the right to appeal the Industrial Commission's order since the Commission's decision did not involve the extent of Benton's disability.

An employee may recover workers' compensation benefits only for injuries, disease or death "received in the course of, and arising out of, the injured employee's employment."⁴ Hamilton ESC's motion to terminate Benton's participation in the Fund based on Benton committing fraud in filing her initial claim challenged whether Benton's injuries were received in the course of and arising out of her employment. The Industrial Commission order on this motion involved Benton's initial right to participate in the Fund. As explained below, Hamilton ESC may appeal this order onto the common pleas court under R.C. 4123.512.

A party's right to appeal a decision of the Industrial Commission onto the common pleas court is conferred solely by statute.⁵ R.C. 4123.512 defines the scope of a common pleas court's jurisdiction over appeals from the Industrial Commission, and states, in relevant part:

"(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 exposure occurred outside the state. . . ."

The language of the statute allows an employer to appeal an Industrial Commission order in an injury case, other than a decision as to extent of disability, onto the court of common pleas.

⁴ R.C. §4123.01(C).

⁵ *Cadle v. Gen. Motors Corp.* (1976), 45 Ohio St.2d 28, 33.

However, subsequent rulings by this Court have refined the scope of appeal under R.C. 4123.512 to decisions of the Industrial Commission that are final and that resolve an employee's right to participate or continue to participate in the State Insurance Fund."⁶

In *State ex rel. Evans v. Indus. Comm.*, this Court held, "[a]n Industrial Commission 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."⁷ The September 19, 2006 decision of the Industrial Commission refusing Hamilton ESC's appeal was a final, appealable order.⁸ The Commission's decision was a final, appealable order determining the rights of the parties in response to Hamilton ESC's motion to terminate Benton's initial claim for participation in the Fund based on fraud.⁹

The Court in *Felty v. AT&T Technologies, Inc.* further clarified the aforementioned holding in *Evans* to mean, "[t]he only action by the commission that is appealable under [R.C. 4123.512] is this essential decision to grant, to deny, or to terminate the employee's participation or continued participation in the system. . . [A]n appeal to the common pleas court is limited to one decision: whether an employee is or is not entitled to be compensated for a particular claim."¹⁰

In this case, the Industrial Commission's decision involved Benton's initial right to participate in the Fund rather than the extent of her disabilities. The Court in *Thomas v. Conrad* distinguished between an Industrial Commission order involving the extent of a claimant's

⁶ *Felty v. AT&T Technologies, Inc* (1992) 65 Ohio St.3d 234 citing to *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, paragraph one of syllabus.

⁷ 64 Ohio St.3d 236, 241 (1992).

⁸ See September 23, 2006 Industrial Commission Record of Proceedings.

⁹ See *State ex rel. Hinds v. Indus. Comm.* (1999), 84 Ohio St.3d 424 (a decision that further participation in the workers' compensation system is barred by a statute of limitations must be challenged by appeal).

¹⁰ *Felty* at 239 referencing former R.C. 4123.519, which has been recodified to R.C. 4123.512.

disability versus a claimant's right to continue to participate in the Fund.¹¹ The claimant in *Thomas* had established her right to participate in the Fund. Thereafter, the claimant was injured in a dog attack. The employer moved the Industrial Commission to find fraud and terminate the claimant's continued participation in the Fund based on this intervening injury. The Industrial Commission found the intervening injury did not break the causal connection between the claimant's current complaints and her work-related injury, and denied the employer's motion.¹²

The *Thomas* Court found that the Industrial Commission order involved the extent of the claimant's disability. Even had the employer successfully moved the Industrial Commission to find fraud and terminate the claimant's continued participation in the Fund from the date of the dog attack on forward, the claimant's *initial* right to participate in the Fund up until the dog attack would have remained undisturbed. Therefore, regardless of the outcome, the employer in *Thomas* did not seek to terminate the claimant's *initial* right to participate in the Fund.

This key difference is what makes this case a right to participate case versus an extent of disability case. Unlike the employer in *Thomas*, Hamilton ESC asked the Industrial Commission to find fraud in Benton's *initial* claim to participate in the Fund, and sought to terminate Benton's participation in the Fund based on this fraud. Hamilton ESC did not challenge the extent of Benton's disability. It did not seek to stop Benton's participation in the Fund "mid-stream" like the employer in *Thomas*. Rather, Hamilton ESC sought a finding that Benton committed fraud in her initial claim for participation.

The Court in *State ex rel. Liposchak v. Indus. Comm'n* further defined the "extent of disability" in R.C. 4123.512 by holding, "[t]he only right-to-participate question that is appealable is whether an employee's injury, disease or death occurred in the course of and

¹¹ 81 Ohio St.3d 475 (1998).

¹² *Id.* at 477-478.

arising out of his or her employment . . . When the answer is ‘yes,’ the claimant has cleared the first hurdle, and then may attempt to establish his or her extent of disability. . .[T]he issue [then] is no longer whether the commission has jurisdiction to award benefits in the employee’s case; the question instead becomes how much the system must pay.”¹³

Hamilton ESC’s motion for a finding of fraud challenged whether Benton’s injuries occurred in the course of and arising out of her employment. It asked the Industrial Commission to exercise continuing jurisdiction to find fraud and terminate Benton’s initial right to participate. Hamilton ESC did not challenge how much the system must pay on Benton’s approved claim. Rather, it challenged Benton’s initial right to participate in the Fund based upon the injuries sustained in the March 19, 2003 motor vehicle accident.

Defendant-Appellant, Administrator of the Bureau of Workers’ Compensation, misinterprets *Liposchak* through its overbroad conclusion 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.”¹⁴ However, R.C. 4123.52 provides the Industrial Commission with continuing jurisdiction over each case, “. . . 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.” The Industrial Commission’s continuing jurisdiction can be invoked based on allegations of fraud.¹⁵

Thus, R.C. 4123.52 provides the Industrial Commission with continuing jurisdiction to terminate a claimant’s initial claim to participate in the Fund based on fraud. The statute allows the Industrial Commission to modify or change “. . . any finding or award in respect of any claim . . . with respect to disability, compensation, dependency, or benefits, after five years from the

¹³ 90 Ohio St.3d 276, 279-280 (2000).

¹⁴ Defendant-Appellant’s Brief at p. 6.

¹⁵ *State ex. Rel. Gobich v. Industrial Commission* (2004), 103 Ohio St.3d 585.

date of injury . . .” Hamilton ESC’s motion to terminate Benton’s initial claim for participation based on fraud was filed on February 3, 2006 - well within five years of Benton’s date of injury on March 19, 2003. The Industrial Commission’s September 19, 2006 final decision on the motion likewise fell within the five-year “look-back” period of R.C. 41323.52, and clearly involved Benton’s initial right to participate in the Fund. Consistent with *Liposchak*, the Industrial Commission’s decision involved whether Benton’s injury occurred in the course of and arising out of her employment. As such, the decision was an appealable right-to-participate issue.

No logical reading of R.C. 4123.512 and this Court’s subsequent rulings on the statute can lead this Court to conclude the Industrial Commission’s September 19, 2006 order decided the extent of Benton’s disabilities. Hamilton ESC sought to terminate Benton’s initial participation in the Fund based on fraud. The First District Court of Appeals correctly found this to be a right to participate case that was properly before the court of common pleas. The appellate court’s ruling should be upheld.

B. An employer does not receive equal protection under the law if it must pursue a mandamus action to appeal an Industrial Commission order involving a claimant’s initial right to participate in the Fund, when a claimant is afforded a de novo review by the common pleas court under R.C. 4123.512 on this same issue.

The right to equal protection under the law requires that Hamilton ESC be allowed a de novo review by the common pleas court through R.C. 4123.512 on this right-to-participate issue. Appellants brush aside this important constitutional issue with the contention that Hamilton ESC can simply file an action in mandamus or re-apply to the Commission on a different theory to discontinue Benton’s benefits.¹⁶ This Court has repeatedly observed that mandamus is an

¹⁶ Defendant-Administrator Brief at p. 12.

“extraordinary” legal remedy that is only available in very limited circumstances.¹⁷ The necessary findings for a court to issue a writ of mandamus are that: 1) the petitioner has a clear legal right to the relief sought; 2) the respondent has a clear legal duty to perform the requested act; and 3) the petitioner has no plain and adequate remedy at law.¹⁸ As stated by Defendant-Administrator, this review is oftentimes is constricted to merely a “paper hearing”.¹⁹

The first two prongs of the mandamus test go to the issue of standard of review. The courts have been very clear that a writ of mandamus cannot be used to control the exercise of administrative discretion.²⁰ Basically, there can be no “clear” right to relief or legal duty when an agency is properly exercising its discretion – even if a reviewing court would have decided differently. Mandamus is only appropriate when an administrative agency abuses its discretion.²¹

Abuse of discretion is a very heavy burden. To prove abuse of discretion, a petitioner for a writ of mandamus must show that the Industrial Commission’s decision is not supported by *any* evidence on the record.²² In other words, if there is “some evidence” in the record to support the Industrial Commission’s decision, mandamus will not lie.²³ In contrast, an appeal under R.C. 4123.512 proceeds under a de novo review by the common pleas court and is decided by a preponderance of the evidence.²⁴

There would be no debate that the September 19, 2006 Industrial Commission order involved Benton’s right to participate had the Industrial Commission found fraud and granted

¹⁷ *Laramie Corp. v. City of Cleveland* (1981), 65 Ohio St.2d 35, 35.

¹⁸ *Fattlar v. Boyle* (1998), 83 Ohio St.3d 123, 125.

¹⁹ Defendant-Administrator Brief at p. 7.

²⁰ *Crabtree v. Franklin Cty. Bd. Of Health* (1997), 77 Ohio St.3d 247, 249; *Goodyear Tire & Rubber Co. v. Industrial Com’n* (1974), 38 Ohio St.2d 57, 62.

²¹ *Id.*

²² *Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, 232.

²³ *Id.*

²⁴ R.C. 4123.512(D).

Hamilton ESC's motion to terminate Benton's initial participation in the Fund. In such instance, Benton could appeal the Industrial Commission order under R.C. 4123.512 and be afforded a de novo review of the Commission's order by the common pleas court.

However, under Appellants' reasoning, since the Industrial Commission denied this same motion, the Commission's order transforms into an order involving the extent of Benton's disability. This reasoning ignores the clear intent of Hamilton ESC to challenge Benton's initial claim to participate in the Fund based on fraud. Appellants' reasoning provides a claimant adjudicated by the Industrial Commission to have committed workers' compensation fraud in her initial claim to participate with the right to a de novo review of that order by a common pleas court.

Conversely, under Appellants' analysis, an employer that is unsuccessful in seeking this same finding of fraud by the Industrial Commission would be relegated to a much more stringent standard of review through a mandamus action. Because of the aforementioned limitations in seeking a writ of mandamus, it cannot be considered to be equivalent to the appeal process set forth in R.C. 4123.512.

While equal protection of the laws does not demand that a statute or rule necessarily apply equally to *all* persons, it does require, under rational basis analysis, that a governmental classification which singles out a group of persons for disparate treatment be rationally founded on differences that are real, and not illusory, and that such classification be reasonably related to a legitimate state interest.²⁵ Administrative convenience, by itself, does not constitute a valid basis for the imposition of disparate treatment upon persons who, with respect to the activity in

²⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1; *Lindsey v. Normet*, 405 U.S. 56 (1972); *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

question, are basically in the same position as others who are not singled out for different treatment.²⁶

In this respect, if the legitimate state interest is to limit the role courts are to have in reviewing workers compensation fraud claims, then Appellants' claim that mandamus is the proper avenue of appeal for an Industrial Commission order involving fraud in the claimant's initial claim for participation must apply equally to both claimants and employers. Both employers and claimants are equally motivated to appeal an Industrial Commission order involving fraud in the claimant's initial claim to participate, regardless of which party prevails. Therefore, applying differing standards of appellate review of this Industrial Commission order will not advance the legitimate state interest to limit the role of the courts in such instance.

Furthermore, a mandamus action is not proper for either a claimant or employer seeking to appeal an Industrial Commission order involving fraud in a claimant's initial claim to participate in the Fund. Numerous decisions by this Court have held that Industrial Commission orders involving a claimant's right to participate in the Fund are appealable under R.C. 4123.512. It is this underlying issue that decides the nature of the Industrial Commission's order, and not the success or failure of a party in arguing its position before the Commission. Equally applying these principles to both claimants and employers requires this Court to find that Hamilton ESC had the right to appeal the Industrial Commission order under R.C. 4123.512.

C. Hamilton ESC had the right to appeal the Industrial Commission's order, which involved a decision on Benton's initial right to participate in the Worker's Compensation Fund.

This Court in *Felty, supra* held, "[o]nce 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 (current R.C.

²⁶ *Rinaldi, supra*; *Baxstrom v. Herold*, 383 U.S. 107 (1966).

4123.512)”²⁷ The claimant in *Felty* suffered a work-related injury and was approved to participate in the Fund. Several years later, the employer moved the Industrial Commission to suspend claimant’s continued participation under R.C. 4123.53 and O.A.C. 4123-3-12 for claimant’s refusal to execute medical releases. The Industrial Commission’s denial of the employer’s motion to suspend the claim from the date of the motion on forward formed the basis of the employer’s appeal to the common pleas court per R.C. 4123.519. The *Felty* Court ruled the trial court lacked subject matter jurisdiction because “[t]his case does not involve a decision by the commission on Pearl Felty’s right to participate in the worker’s compensation system”²⁸

In contrast to *Felty*, the Industrial Commission’s decision on Hamilton ESC’s motion involved Benton’s initial right to participate in the Fund. And in contrast to the employer in *Felty*, Hamilton ESC challenged Benton’s initial right to participate in the Fund rather than her right to continued participation.

This key distinction is what also differentiates this case from this Court’s prior decisions in *Thomas v. Conrad, supra.* and *White v. Conrad.*²⁹ In *Thomas*, the employer appealed the Industrial Commission’s denial of its motion for a finding of fraud and order terminating the claimant’s continued participation in the Fund based on an intervening injury suffered after the claimant’s initial right to participate had been established. The *Thomas* Court found this to be an extent-of-disability issue since the Industrial Commission’s order did not decide the claimant’s right to participate or continue to participate in the Fund.³⁰

²⁷ *Felty, supra.* at paragraph two of syllabus.

²⁸ *Id.* at 240-241.

²⁹ *White v. Conrad* (2004), 102 Ohio St.3d 125.

³⁰ *Thomas, supra.* at 478-479.

Likewise, in *White v. Conrad* this Court analyzed the distinction between a right to participate case and a right to continue to participate case. The claimant in *White* was awarded death benefits per R.C. 4123.59 that would continue until her death or remarriage. Several years later, claimant remarried, causing her death benefits to stop. Thereafter, her marriage was annulled and claimant unsuccessfully sought restoration of her death benefits with the Industrial Commission. The claimant appealed the Industrial Commission's denial to the common pleas court.³¹

The *White* Court distinguished an Industrial Commission order involving the claimant's right to participate, as in *Liposchak, supra.*, from its case, which involved a claimant's right to continue to participate. The claimant in *White* had participated in the Fund for several years prior to her remarriage. As such, claimant was not appealing an Industrial Commission order involving her initial right to participate in the Fund. Rather, she sought the right to continue to participate in the Fund from the date her benefits were stopped (due to her remarriage) on forward.³²

In this respect, *White* is similar to *Thomas* in that both cases were appeals of Industrial Commission orders involving the continued participation of a claimant in the Fund. However, unlike *Thomas*, the Industrial Commission in *White* terminated the claimant's continued participation. The *White* Court applied the *Thomas* Court's reasoning that a claimant may appeal an order involving the termination of continued participation in the Fund to find that the claimant had the right to appeal the termination of her continued participation in the Fund caused by her remarriage.³³

³¹ *White, supra.* at 125-126.

³² *Id.* at 127.

³³ *Id.* at 127-128.

It is worth noting that the *Thomas* Court specifically referenced the reasoning applied by two appellate courts to note the aforementioned distinction between Industrial Commission orders involving a claimant's initial right to participate and a claimant's right to continue to participate in the Fund.³⁴ Those two appellate court decisions, much like the facts of this case, involved employers challenging a claimant's *initial* right to participate in the Fund based on fraud.

Specifically, in *Jones v. Massillon Bd. of Edn.*, the employer certified a workers' compensation claim and the claimant received benefits under the Fund. Thereafter, the employer moved the Industrial Commission to terminate the claim, alleging the injuries that formed the basis of the initial claim were actually the result of a non-occupational sports injury that occurred two years prior to the alleged employment injury. The Industrial Commission denied the employer's motion to terminate the claim, and the employer appealed the decision to the court of common pleas under R.C. 4123.519 (now R.C. 4123.512).³⁵

The common pleas court dismissed the employer's appeal for lack of subject matter jurisdiction. On appeal, the *Jones* court reversed, reasoning that the Ohio Supreme Court had definitively held that an Industrial Commission's decision involving a claimant's right to participate in the state insurance fund is appealable to the common pleas court.³⁶ The *Jones* court found the Industrial Commission's decision clearly involved the claimant's right to participate in the Fund, which was appealable to the court of common pleas under R.C. 4123.519.³⁷

³⁴ *Thomas, supra.* at 478-479 citing to *Moore v. Trimble*, 1993 W.L. 531289 (Ohio App. 10th Dist., Dec. 21, 1993) and *Jones v. Massillon Board of Education*, 1994 W.L. 313721 (Ohio App. 5th Dist., June 13, 1994).

³⁵ R.C. 4123.519 has since been repealed and recodified as R.C. 4123.512.

³⁶ *Jones*, at *2, citing to *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, paragraph one of syllabus, and *Felty, supra.* 65 Ohio St.3d 234.

³⁷ *Id.* at *2.

Likewise, in *Moore v. Trimble*, the claimant filed a claim with the Industrial Commission which was allowed. The employer did not appeal the decision to allow the claim. Thereafter, the employer filed motion with the Industrial Commission alleging the claimant committed fraud, and requesting the Industrial Commission to exercise continuing jurisdiction to terminate claimant's right to participate.

The Industrial Commission denied the employer's motion, and the employer appealed the decision to the court of common pleas under R.C. 4123.519 (now R.C. 4123.512). The common pleas court dismissed the employer's appeal for lack of subject matter jurisdiction.

The *Moore* court reversed, holding that the employer's 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, the 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 employer's appeal."³⁸ In its analysis, the *Moore* court referenced this Court's decision in *Afrates, supra*, which held that "the only decisions reviewable [by a common pleas court] pursuant to R.C. 4123.519 are those decisions involving a claimant's right to participate or to continue participation in the fund."³⁹

Similar to the employers in *Moore* and *Jones*, Hamilton ESC asked the Industrial Commission to terminate Benton's participation in the Fund based on fraud in her initial claim to participate. The *Benton* court followed the reasoning applied by the *Moore* and *Jones* courts, which this Court in *Thomas* analyzed and chose not to change.⁴⁰ The *Benton* court was also guided by *Liposchak*, another case involving the claimant's initial right to participate, to find that

³⁸ *Moore*, at *2.

³⁹ *Moore*, at *2, citing to *Afrates* at 26.

⁴⁰ *Thomas, supra*. at 478-479.

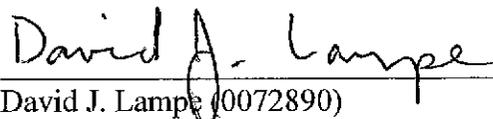
Hamilton ESC's motion for fraud directly questioned whether Benton's injury "occurred in the course of and arising out of her employment".

The *Benton*, *Moore* and *Jones* cases correctly apply this Court's reasoning in deciding appeals of Industrial Commission orders involving a claimant's initial right to participate in the Fund. This Court briefly analyzed this issue in *Thomas* and chose not to disturb the reasoning applied by the appellate courts in *Moore* and *Jones*. Hamilton ESC respectfully requests this Court to formalize this correct application of the law by holding that R.C. 4123.512 allowed Hamilton ESC to appeal the order of the Industrial Commission's to the common pleas court.

III. CONCLUSION

Based upon the foregoing, Hamilton ESC respectfully moves this Court to **AFFIRM** the decision of the First District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by ordinary U.S. mail this 1st day of April, 2008 upon the following:

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