

ORIGINAL

In the  
Supreme Court of Ohio

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

**FILED**  
 APR 17 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**DEFENDANT-APPELLANT ADMINISTRATOR,  
BUREAU OF WORKERS' COMPENSATION'S  
REPLY BRIEF**

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## INTRODUCTION

Hamilton County Educational Service Center (“Hamilton”) asks this Court to allow it to appeal from a claim of fraud even though the injured employee’s right to participate has been finally determined and the statute of limitations to challenge that determination has run. Because Hamilton’s request requires the Court to deviate from R.C. 4123.512’s strict jurisdictional limits, this Court should reject Hamilton’s interpretation of R.C. 4123.512 and respect the delicate balance between the Industrial Commission (“Commission”) and the courts.

As explained in earlier briefing, a litigant may seek judicial review of a Commission ruling by an appeal under R.C. 4123.512, an action for mandamus, or an action for declaratory judgment. *Felty v. AT&T Techs.* (1992), 65 Ohio St. 3d 234, 237. Which mechanism a claimant may use depends on the nature of the Commission’s decision, and appeals under R.C. 4123.512 are limited to cases involving one question: “whether an employee’s injury, disease, or death occurred in the course of and arising out of his or her employment.” *State ex rel. Liposchak v. Indus. Comm’n*, 90 Ohio St. 3d 276, 279, 2000-Ohio-73.

Hamilton argues that an R.C. 4123.512 appeal is appropriate in a case alleging fraud, even if the initial right to participate was allowed and not appealed. But Hamilton is wrong for four reasons. First, the Court has consistently held that only the initial right to participate or a termination of that right—and not a decision to continue to participate—are appealable under R.C. 4123.512. *Felty*, 65 Ohio St. 3d at 240; *Thomas v. Conrad* (1998), 81 Ohio St. 3d 475; *White v. Conrad*, 102 Ohio St. 3d 125, 2004-Ohio-2148, ¶ 14. Second, the Court’s reasoning and holding in *Thomas* support the Administrator’s argument that claimant Diazonia Benton’s initial right-to-participate determination remains undisturbed. Third, in *Thomas*, the Court considered and rejected a claim similar to Hamilton’s equal protection argument. Moreover, the law must have only a rational basis to withstand constitutional scrutiny, and the rationale described in earlier

briefing easily meets that test. Fourth, Hamilton's reliance on the Commission's ability to exercise continuing jurisdiction is irrelevant here, because whether the Commission can revisit an issue under R.C. 4123.52 is unrelated to whether an employer can appeal under R.C. 4123.512.

For all of these reasons, the Court should overrule the court below and hold that Hamilton cannot appeal under R.C. 4123.512.

## ARGUMENT

### **Administrator's Proposition of Law:**

*A court of common pleas lacks jurisdiction to hear appeals under R.C. 4123.512 once a workers' compensation claimant's right to participate is established and has not been appealed or discontinued.*

The issue in this case is not, as Hamilton implies, whether Benton's original claim should be allowed. The claim was allowed and Hamilton did not appeal that allowance. The issue here is whether Benton committed fraud when she originally submitted evidence that her claim should have been allowed, and whether the Commission was correct in finding that she had not committed the alleged fraud. Although a finding that Benton committed fraud might discontinue her claim retroactively, that potential effect does not transform the issue here into a right-to-participate determination. And Hamilton's arguments to the contrary are wrong for four reasons.

**A. The Court has consistently held that only decisions on the initial right to participate, or a termination of that right, are appealable under R.C. 4123.512.**

Although the Court has not yet faced the precise question here, the Court has consistently held that only the initial right to participate or a later termination of that right—and not a later decision to continue the right—are appealable under R.C. 4123.512. See *Felty*, 65 Ohio St. 3d at 240. In *Felty*, the Court held that an appeal from a Commission decision not to suspend an employee's claim was not appealable. The employer had wanted the claim suspended because

the employee had not released certain medical records. The Court held that the Commission's decision was "not a ruling on Felty's right to participate," because "[t]he decision not to suspend a claim is not the same as a decision to grant or deny a claim." *Id.* at 240. The Court continued by explaining that "[t]he *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." *Id.* at 238; see also *id.* at 239 ("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.").

In short, *Felty* held that an appeal to the court of common pleas is available to challenge a decision to grant or deny participation, or to challenge the discontinuance of participation, but not to challenge a decision to continue participation. Subsequent cases have confirmed *Felty*'s limitation on R.C. 4123.512 appeals. In *Thomas*, for instance, the Court held that a decision not to terminate participation is not appealable under the statute, because the employer did not seek to appeal a "decision to grant, to deny, or to terminate the employee's participation or continued participation in the system." *Thomas*, 81 Ohio St. 3d at 478 (quoting *Felty*, 65 Ohio St. 3d at 239). In contrast, the Court in *White* allowed an appeal under R.C. 4123.512 because the claimant wanted to challenge an order terminating her right to participate. *White*, 2004-Ohio-2148 at ¶¶ 11, 13 ("Once the right of participation for a specific condition is determined . . . no subsequent rulings, *except a ruling that terminates the right to participate*, are appealable.") (quoting *Felty*, 65 Ohio St. 3d at 240). Thus, both *Thomas* and *White* followed the *Felty* rule, which is what the Court should do here and deny Benton's appeal under R.C. 4123.512.

**B. *Thomas v. Conrad* supports the Administrator's argument.**

The Court has not directly addressed the question presented here: whether an employer may appeal the Commission's refusal to retroactively terminate a claim. In *Thomas*, the Court

addressed a slightly different fact situation, but *Thomas*'s reasoning applies here. The claimant in *Thomas* was attacked by a dog after her workers' compensation claim had been allowed. 81 Ohio St. 3d at 477. The employer objected to her right to participate in the system because, the employer said, the employee's current medical complaints were caused by the intervening dog attack, not by her industrial injury. The Commission disagreed and continued the employee's compensation. *Id.* at 478. The employer tried to appeal under R.C. 4123.512, but the Court held that the Commission's decision was an extent-of-disability issue, and, therefore, not appealable. *Id.*

Hamilton argues that this case is distinguishable because the employer in *Thomas* asked to discontinue a claim that was properly allowed initially, whereas here Hamilton is asking the Commission to disqualify Benton's initial claim because of fraud. The court below and two other courts also distinguished *Thomas* from the fact pattern of this case. See *Benton v. Hamilton County Educ. Serv. Ctr.* (1st Dist.), 2008 Ohio App. Lexis 3586, 2008-Ohio-4272, ¶ 18; *Jones v. Massillon Bd. of Educ.* (5th Dist.), 1994 Ohio App. Lexis 2891; *Moore v. Trimble* (10th Dist.), 1993 Ohio App. Lexis 6204. In dicta, the Court in *Thomas* acknowledged the *Jones* and *Moore* decisions and concluded that the issue in *Thomas* was different because "[the employer] did not raise the issue of fraud or question [the employee's] original claim." *Id.* at 478-79. Thus, while commenting on and distinguishing the *Jones* and *Moore* decisions in dicta, the Court did not directly decide the issue presented here.

Moreover, although the facts differ, *Thomas*'s reasoning supports the Administrator's argument in this case. The employer in *Thomas* claimed that because it "framed its motion in terms of terminating the right to participate," it could appeal under R.C. 4123.512 because, "had the Industrial Commission granted the motion, [the employer] would have been able to appeal."

*Id.* at 477. The Court rejected this argument. Because the employee's right-to-participate determination remained undisturbed, the Court treated the claim as an extent-of-disability question. *Id.* at 478.

The same is true here. Benton's initial right-to-participate determination remains undisturbed regardless of how Hamilton frames its claim. Thus, the Commission's refusal to terminate Benton's claim is an extent-of-disability issue and not appealable under R.C. 4123.512.

**C. In *Thomas v. Conrad*, the Court considered and rejected Hamilton's equal protection argument.**

*Thomas* also controls Hamilton's equal protection claim. As explained above, the employer in *Thomas* sought to discontinue an established claim. The employer argued that not permitting his appeal under R.C. 4123.512 would violate equal protection because an employee could appeal the termination of a claim. 81 Ohio St. 3d at 477-78. The Court rejected the employer's argument because "[t]he party who does not prevail . . . has the right to appeal." *Id.* at 479. "[W]hen the injured worker is granted the right to participate, the right to appeal would be exercised by the employer, since the employee prevailed. The right to appeal would be exercised by the injured worker when he or she is denied the right to participate." *Id.* And, when a right to participate is terminated "then, logically, the employee would be exercising the right." *Id.* Thus, concluded the Court, the employer and employee "are equally situated" because both "have the right to appeal when they are negatively affected by the commission's ruling." *Id.*

Moreover, even if *Thomas* is not on all fours here, equal protection is satisfied because the reasons for treating employers and employees differently satisfy rational basis review. For purposes of constitutional analysis, the Fourteenth Amendment of the U.S. Constitution and Section 2, Article I of the Ohio Constitution are "functionally equivalent," and the standards for

determining equal protection violations are the same. *AAUP v. Central State Univ.* (1998), 83 Ohio St.3d 229, 233. Under both Ohio and federal law, the fact that a law creates a classification does not necessarily render it unconstitutional. Indeed, a classification that involves neither a suspect class nor a fundamental right does not violate the equal protection clauses of the Ohio or U.S. Constitutions if the classification is rationally related to a legitimate government interest. *Id.* at 234.

The asserted classification here implicates neither a fundamental right nor a suspect class. The only asserted basis for an equal protection violation is that an employee may appeal the discontinuance of a claim and an employer may not appeal the continuance of a claim. The rationale for this difference easily passes rational basis review. As explained in earlier briefing, there are three reasons for treating continuances and discontinuances of claims differently.

First, only the threshold question of whether a claimant is entitled to participate in the system is amenable to the formal de novo hearing required under R.C. 4123.512. Other Commission decisions, including those to continue participation despite a fraud allegation, are more amenable to the flexible and informal administrative hearing, and, if necessary, a streamlined mandamus action. Second, the limitation on the courts' jurisdiction under R.C. 4123.512 ensures that the workers' compensation system functions largely outside the courts. And the ability to function extra-judicially is undermined if, after the initial right-to-participate decision, an employer can appeal an allegation of fraud or some other theory of discontinuance to the court of common pleas. Third, R.C. 4123.95's mandate to "liberally construe" workers' compensation laws "in favor of employees" supports allowing an employee to appeal the discontinuance of a claim, but not allowing the employer to appeal the continuance of a claim.

Accordingly, the differing treatment of employees and employers in this context easily meets rational basis review.

**D. The Industrial Commission's ability to exercise continuing jurisdiction is irrelevant to the jurisdictional question here.**

Hamilton also claims that, because the Commission may exercise continuing jurisdiction over a matter under R.C. 4123.52, the employer may automatically appeal such a case under R.C. 4123.512. But Hamilton's reliance on the Commission's ability to exercise continuing jurisdiction is irrelevant to the question presented here, because the Commission's continuing jurisdiction is unconnected with the common pleas courts' jurisdiction.

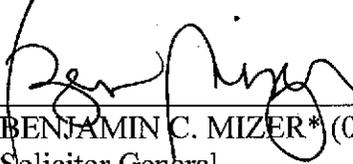
Under R.C. 4123.52 the Commission "may make such modification or change with respect to former findings or orders . . . as in its opinion is justified." R.C. 4123.52 makes no mention of R.C. 4123.512 jurisdiction, nor does R.C. 4123.512 mention the Commission's continuing jurisdiction. And while the Commission may exercise its continuing jurisdiction to discontinue the right to participate, which then would be appealable, it did not do so here. Here, the Commission refused to discontinue participation, and under *Felty* the Commission's decision is not appealable. The Commission's use of R.C. 4123.52 to invoke its own jurisdiction does not somehow trigger a court's jurisdiction under R.C. 4123.512 to review a Commission decision. A contrary rule would greatly expand the courts' jurisdiction over Commission decisions.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

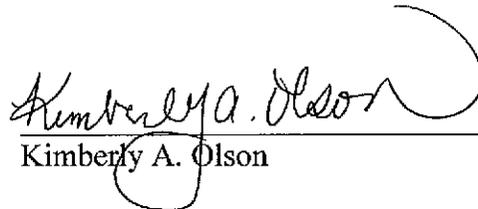
I certify that a copy of the foregoing Defendant-Appellant Administrator, Bureau of Workers' Compensation's Reply Brief was served by U.S. mail this 17th day of April, 2009 upon the following counsel:

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