

ORIGINAL

NOTICE OF APPEAL FROM A COURT OF APPEALS

IN THE SUPREME COURT OF OHIO

09-2150

JAMES E. LUNDEEN, SR., M.D.)

Appellant,)

vs.)

MARSHA P. RYAN, ADMINISTRATOR)

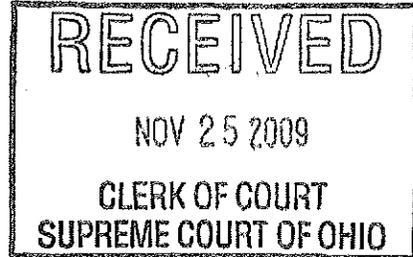
BUREAU OF WORKERS')

COMPENSATION)

Appellees.)

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

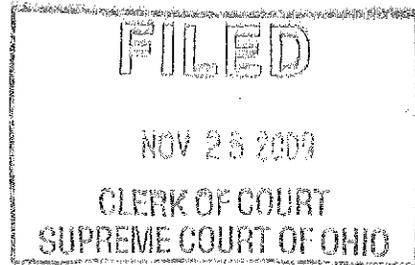
Court of Appeals
CASE NO. 08AP-601



NOTICE OF APPEAL OF APPELLANT JAMES E. LUNDEEN, SR., M.D.

James E. Lundeen, Sr., M.D.
668 N. Nelson Suite A
Columbus Ohio 43219
phone: 440-665-6051
fax: 614-252-7833
lundeenj@lundeenpm.com

Pro Se Appellant
James E. Lundeen, Sr., M.D.



Rema A. Ina (0082549), attorney of record
Assistant Attorney General

Richard A. Cordray (0038034)
Ohio Attorney General
Workers' Compensation Section
150 E. Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
phone: 614-466-6696
fax: 614-752-2538
e-mail: rema.ina@ohioattorneygeneral.gov

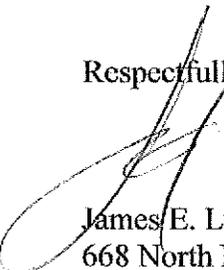
Counsel for Appellee:
Marsha P. Ryan, Administrator, Bureau of Workers' Compensation, Industrial
Commission of Ohio

Notice of Appeal of Appellant James E. Lundeen, Sr., M.D.

- 1) Appellant James E. Lundeen Sr., M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment (Magistrate's Decision) of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case No. 08AP-601 on October 13, 2009, a copy of the aforementioned decision being incorporated with this notice of appeal as Attachment A.

- 2) The nature of this proceeding is an appeal from a court of appeals as a matter of right for a case originating in a court of appeals, to wit, an appeal from an original action for Writ of Mandamus from the Franklin County Court of Appeals, Tenth Appellate District, CASE NO. 08AP-601.

Respectfully submitted,



James E. Lundeen, Sr, MD
668 North Nelson Road, Apt A
Columbus, Ohio 43219
Cell Phone: 216-789-7488 / 440-665-6051
Answering service 419-522-1092
Facsimile 614-252-7833
Email lundeenj@lundeenpm.com

CERTIFICATE OF SERVICE

A copy of the foregoing document, NOTICE OF APPEAL OF APPELLANT JAMES E. LUNDEEN, SR, M.D. , has been sent to the party shown below via U.S. mail postage prepaid on November 24, 2009.

Rema A. Ina (0082549), attorney of record
Assistant Attorney General
Richard A. Cordray (0038034)
Ohio Attorney General
Workers' Compensation Section
150 E. Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
phone: 614-466-6696
fax: 614-752-2538
e-mail: rema.ina@ohioattorneygeneral.gov



James E. Lundeen, Sr., M.D. *Pro Se* Appellant

20638 - T96

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO OHIO
2009 OCT 13 PM 3:29
CLERK OF COURTS

[State ex rel.]
James E. Lundeen, Sr., M.D.,

Relator,

v.

Marsha P. Ryan, Administrator, Ohio
Bureau of Workers' Compensation,

Respondent.

No. 08AP-801

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on October 13, 2009

James E. Lundeen, Sr., M.D., pro se.

Richard Cordray, Attorney General, and Rena A. Ina, for respondent.

IN MANDAMUS

In this original action, relator, James E. Lundeen, Sr., M.D., requests a writ of mandamus ordering respondent, Administrator of the Ohio Bureau of Workers' Compensation ("bureau"), to pay his medical provider claims that were allegedly the subject of an order of the United States Bankruptcy Court, Northern District of Ohio, Eastern Division ("bankruptcy court") in case No. 07-19423.

20638 - T97

No. 03AP-601

2

Findings of Fact:

PROCEDURAL CHRONOLOGY OF THIS ACTION

1. The focus of relator's complaint is an exhibit attached thereto. The exhibit is an order filed in the bankruptcy court on June 27, 2008. Respondent has also submitted to this court an identical copy of the above-described bankruptcy order. Captioned "Order Vacating Bench Ruling on Temporary Restraining Order and Setting Preliminary Injunction Hearing," the June 27, 2008 bankruptcy court order states:

Plaintiff-chapter 7 trustee Lauren Helbling moves to vacate the June 17, 2008 bench ruling on her motion for a temporary restraining order because one of the defendants, James Lundeen, Sr., M.D., was not served with the complaint or notice of the hearing, as required by the court's order of June 11, 2008. * * * The motion states good cause and is granted.

The Ohio Bureau of Workers' Compensation has frozen the funds at issue. As a result, it is not necessary to reschedule a hearing on the motion for a temporary restraining order. The court will, therefore, hold a hearing on the plaintiff's motion for a preliminary injunction on **July 8, 2008 at 10:00 a.m.** The parties are to confer immediately to discuss whether the hearing on the preliminary injunction should be combined with the final hearing on the merits and are to file a joint notice advising the court of their decision on or before **July 1, 2008.**

(Emphases sic.)

2. According to the complaint, when the bankruptcy court issued its June 27, 2008 order, respondent failed to release funds owed to relator. Relator requests that a writ order respondent to release the funds allegedly owed to him.

3. Following respondent's answer to the complaint, the magistrate issued a schedule for the filing of stipulated or certified evidence and briefs.

No. 08AP-601

3

4. In response to the magistrate's scheduling order, respondent filed the affidavit of Dora West, executed April 9, 2008:

1. I have been employed by the Ohio Bureau of Workers' Compensation for over 17 years and presently hold the position of Director of HPP Systems Support.

2. Creditors of James E. Lundeen, Sr., M.D., Inc. filed an involuntary chapter 7 case against that corporation in the United States Bankruptcy Court for the Northern District of Ohio on December 13, 2007.

3. Under that litigation, the Bureau of Workers' Compensation was subject to a Temporary Restraining Order. See attached Exhibit A.

4. The Temporary Restraining Order was vacated on June 27, 2008. See attached Exhibit B.

5. On July 14, 2008, the United States Bankruptcy Court for the Northern District of Ohio issued an order stating that the Bureau is preliminarily enjoined from disbursing the funds currently in its possession which it has categorized as being due to Lundeen Medical Group, Lundeen Physical Therapy Akron Inc., and Lundeen Therapy and Pain Management. See attached Exhibit C.

6. Following that, funds owed to Dr. Lundeen billed under his personal social security number were released, and continue to be paid. However, funds due to Lundeen Medical Group, Lundeen Physical Therapy Akron Inc., and Lundeen Therapy and Pain Management were frozen pursuant to the court order.

5. As the West affidavit indicates, three exhibits are submitted by the affidavit. Exhibit B is the June 27, 2008 bankruptcy court order quoted above at findings of fact number one.

6. Exhibit C referenced in the West affidavit is an order filed in the bankruptcy court on July 14, 2008. Captioned "Order Imposing Preliminary Injunction," the order states:

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff trustee's motion for a preliminary injunction requiring the Ohio Bureau of Workers' Compensation (Bureau) to freeze funds pending a decision on the merits of this adversary proceeding is granted in part and denied in part. (Docket 2). Pending further order, the Bureau is preliminarily enjoined from disbursing the funds currently in its possession which it has categorized as being due to Lundeen Medical Group, Lundeen Physical Therapy Akron Inc., and Lundeen Therapy and Pain Management. Within five days after the date on which this order is entered, the Bureau is to file a notice stating the amounts being held in the names of Lundeen Medical Group, Lundeen Physical Therapy Akron Inc., and Lundeen Therapy and Pain Management. The notice is also to state the amount that the Bureau has accounted for under Dr. Lundeen's social security number only.

7. On April 13, 2009, in response to the magistrate's scheduling order, relator filed a document captioned "Submission of Certified Evidence" ("SCE") which submits documents in a three-ring binder preceded by a table of contents. However, the only certification on the SCE is the signature of relator. There is no certification by any governmental agency or institution. See Loc.R. 12(G) of the Tenth District Court of Appeals.

Some of the SCE documents purport to be filed in the bankruptcy court in case No. 07-19423. For example, there is the June 10, 2008 verified complaint of "Lauren A. Helbling, duly appointed and acting Chapter 7 Trustee of James E. Lundeen Sr., M D., Inc." There are also copies of various e-mails to which relator was a party.

8. On April 28, 2009, relator filed his brief. On May 18, 2009, respondent filed its brief. On May 26, 2009, relator filed a reply brief.

9. On September 10, 2009, this magistrate issued an order that relator show cause why this mandamus action should not be dismissed on grounds that relator

No. 08AP-801

5

has an adequate remedy for equitable relief in the Franklin County Court of Common Pleas, see *Henley Health Care v. Ohio Bur. of Workers' Comp.*, (Feb. 23, 1995), 10th Dist. No. 94AP-1216, or an adequate remedy in the Ohio Court of Claims, see *State ex rel. Barbee v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 01AP-1286, 2002-Ohio-8279.

10. On September 24, 2009, relator filed his written response to the magistrate's show cause order.

11. On September 29, 2009, respondent filed its reply to relator's September 24, 2009 response.

Conclusions of Law:

It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

In order for a writ of mandamus to issue, the relator must demonstrate: (1) that he has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29.

It is also well settled that, in mandamus, the relator has the burden of proof with respect to demonstrating the prerequisite elements of the writ. *Id.*

Relator has presented no evidence showing that funds held by respondent are owed to him. Contrary to relator's suggestion, the bankruptcy court orders are not evidence that funds held by respondent are owed to him.

The West affidavit avers at paragraph six that "funds owed to Dr. Lundeen billed under his personal social security number were released, and continue to be

20638 - U2

No. 08AP-601

6

paid." Significantly, even though the complaint suggests otherwise, relator has presented no evidence countering the paragraph six averment of the West affidavit.

Based upon the above analysis, this magistrate must find that relator has failed to prove that he is owed any amount of money or funds from respondent.

Thus, even if relator's complaint was properly brought as a mandamus action—an issue this magistrate need not determine—relator cannot prevail in this mandamus action because he has failed to meet his burden of showing that funds held by respondent are actually owed to him.

Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ mandamus.


KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).