

ORIGINAL

IN THE SUPREME COURT OF OHIO

William D. Ochs, Deceased, et al.,	:	10-1174
Appellant,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
	:	Eighth Appellate District
v.	:	
Administrator, Bureau of Workers'	:	Court of Appeals
Compensation, et al.	:	Case No. 93824
	:	
Appellees.	:	

NOTICE OF APPEAL OF APPELLANT
 WILLIAM D. OCHS, DECEASED, CARE OF ROBERT OCHS, EXECUTOR.

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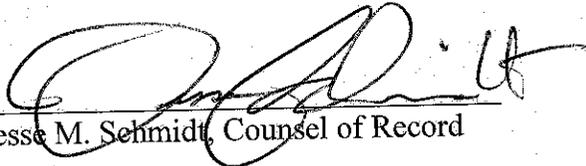
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Notice of Appeal of Appellant William D. Ochs, Deceased,
Care of Robert Ochs, Executor

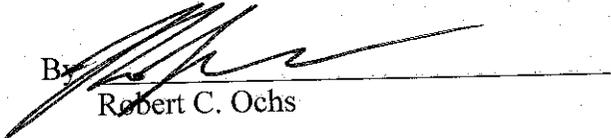
Appellant hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 93824 on May 24, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

By: 

Jesse M. Schmidt, Counsel of Record

By: 

Robert C. Ochs

COUNSEL FOR APPELLANT
WILLIAM D. OCHS, DECEASED, ET AL.

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary United States Mail to counsel for appellee, Nancy Q. Walker, Assistant Attorney General at 615 Superior Ave., West, 11th Fl., Cleveland, Ohio 44113 on this 2nd day of July, 2010.


COUNSEL FOR APPELLANT

WILLIAM D. OCHS, DECEASED, ET AL.

MAY 24 2010

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93824

**WILLIAM D. OCHS, DECEASED,
ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**ADMINISTRATOR, BUREAU OF
WORKERS' COMPENSATION, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-654804

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: May 13, 2010

JOURNALIZED: MAY 24 2010

VOL 0705 PG 0071



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**FILED AND JOURNALIZED
PER APP.R. 22(C)**

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MAY 24 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY MB DEP.

BY: Nancy Q. Walker
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**ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED**

MAY 13 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY SMB DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

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MELODY J. STEWART, P.J.:

Appellant, Robert Ochs, executor of the estate of decedent William D. Ochs, appeals from the judgment of the Cuyahoga County Court of Common Pleas, granting summary judgment to appellee, Administrator, Ohio Bureau of Workers' Compensation. For the reasons that follow, we affirm the decision of the trial court.

As a result of a work-related injury suffered on July 12, 1960, William Ochs filed for workers compensation benefits with the Ohio Bureau of Workers' Compensation ("BWC"). His claim, assigned BWC number 384394-22, was allowed for "lumbrosacral syndrome and possibly a torn left medial meniscus superimposed upon changes resultant from his remote hemiparesis." In 1974, Ochs was granted total permanent disability benefits under this claim. He continued to receive these benefits until he passed away on September 28, 2005, at the age of 87. The cause of death was bronchopneumonia following bilateral knee replacement surgery.

On September 29, 2006, appellant filed a claim with BWC seeking: 1) death allowance, 2) payment of bills, 3) scheduled loss/loss of use — left and right legs, and 4) compensation accrued at death. The BWC denied the claim, and appellant appealed the denial to the Industrial Commission ("Commission"). A hearing was held on November 20, 2007 before a staff

hearing officer. The hearing officer denied appellant's claim for death benefits, finding "no medical evidence that causally relates the injured worker's death to the injury of July 12, 1960." The hearing officer also denied the claim for accrued compensation finding, "no evidence of a dependent in the claim." Finally, the hearing officer denied appellant's request for payment of bills and the claim for loss of the use of left and right legs, finding "no evidence of any unpaid bills relating to the conditions allowed in this claim, nor is there any medical evidence of a loss of use of the legs related to this claim. * * * [A]ny claim for additional allowance of any medical condition abated at the injured worker's death."

On January 16, 2008, the Commission issued its final decision denying appellant's appeal of the staff hearing officer's order. On March 25, 2008, appellant noticed an appeal to the Cuyahoga County Court of Common Pleas, pursuant to R.C. 4123.512, and filed a complaint seeking the right to participate in the Ohio Workers' Compensation Fund for death benefits, accrued compensation, and payment of medical bills for the following medical conditions: "loss of the use of the left and right legs; paroxymal atrilaflutter/sic sinus syncope syndrome, ulcerative protosigmoiditis; acute renal failure; hypercalcernia; left knee laceration; hyperkalemia; CAD; CABG; pulmonary hypertension/hypotension; isolated phlebitis left arm; cardiomyopathy;

clostridium difficile colitis; leukocytosis; depression; septicemia; right hip/leg hemotoma with abcess; anemia; hemotoma of the right lower lobe; right trochanteric; bursitis laceration; viral pharyngitis/laryngitis; sprain/contusion right elbow; hip and bilateral knees; right shoulder sprain; closed head injury; right thumb laceration; abrasion/skin tear left shoulder; cervical strain.”

On July 29, 2009, the trial court granted appellee summary judgment on appellant’s claims. Appellant now appeals from this order and raises a single assignment of error for review claiming that the trial court erred in granting summary judgment since genuine issues of material fact remained to be decided.

We review the granting of summary judgment under a de novo standard. We afford no deference to the trial court’s decision and independently review the record to determine whether summary judgment is appropriate. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d

372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

Appellee moved for summary judgment on the grounds that: 1) there are no dependents or surviving spouse and therefore no one with standing to assert a claim for death benefits, and 2) the claims for accrued compensation and unpaid bills do not involve a "right to participate" issue and therefore the denial of these claims is not appealable to the court of common pleas.

Payment of Bills and Loss of Use of Legs Claim

R.C. 4123.512(A) provides that a "claimant * * * 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 * * *."

Direct appeal to the common pleas court is the most limited form of judicial review of the Commission's decisions because there is no inherent right to appeal workers' compensation matters. *Felty v. AT & T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 237, 602 N.E.2d 1141. "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. Under R.C. 4123.512(A), a claimant may appeal only those

decisions involving the right to participate or to continue to participate in the workers' compensation fund. See *White v. Conrad*, 102 Ohio St.3d 125, 2004-Ohio-2148, 807 N.E.2d 327, at ¶10-13; *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 278-279, 2000-Ohio-73, 737 N.E.2d 519; *Felty*, 65 Ohio St.3d at 239.

Decisions that relate to the extent of the injury are not appealable to the common pleas court. *Felty* at 237, citing *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175, paragraph one of the syllabus. "The Industrial Commission's decision to grant or deny additional benefits under an existing claim does not determine the worker's right to participate in the State Insurance Fund, and therefore is not subject to appeal * * *." *State ex rel. Evans v. Indus. Comm. of Ohio*, 64 Ohio St.3d 236, 1992-Ohio-8, 594 N.E.2d 609, paragraph two of the syllabus. However, an order that permanently forecloses further benefits under a claim that has been filed is appealable. *Id.*

At the time of his death, William Ochs was participating and receiving permanent total disability benefits under claim number 384394-22 for allowed medical conditions relating to the back and knee injury suffered in 1960. Appellant's September 29, 2006 motion alleged aggravation of these medical conditions, and sought to amend the original claim to allow payment for additional medical conditions, and for new treatments including knee

replacement surgery. The motion also sought recognition of additional disabilities under the claim, including the loss of use of both legs.

Contrary to appellant's assertion, the September 2006 request is not a "new" claim. It is a request for additional benefits under the existing claim. The Commission's ruling did not affect Ochs's right to participate in the workers' compensation system, it only affected the determination of the extent and nature of his disability and denied him additional benefits under his claim. Had Ochs lived, the ruling would not have permanently foreclosed future benefits under the claim. He would have continued to participate for his original allowed condition and could have filed subsequent requests for additional benefits under that claim. It was Ochs's death that ended his participation in the fund. Therefore, the ruling disallowing the request cannot be characterized as a "decision to grant, to deny, or to terminate the employee's participation or continued participation in the system." *Felty v. AT & T Technologies, Inc.*, 65 Ohio St.3d at 239. Accordingly, the ruling of the Commission was not appealable to the court of common pleas.

Death Benefits and Accrued Benefits

Appellant argues that under R.C. 4123.60 and R.C. 4123.66, the estate of a deceased claimant has a right to file a "death claim" for payment of funeral expenses and medical expenses related to the claimant's death and for accrued

compensation. Appellant further argues that the Commission's ruling affects the claimant's "right to participate" and therefore, pursuant to R.C. 4123.152, the trial court has jurisdiction to hear an appeal of the order.

The Ohio Supreme Court has held that payment of death benefits from the Workers' Compensation Fund is allowed where the injury directly causes the death, or where an injury is the proximate cause of the acceleration of death. *Oswald v. Connor* (1985), 16 Ohio St.3d 38, 40, 476 N.E.2d 658; *Weaver v. Indus. Comm.* (1932), 125 Ohio St. 465, 181 N.E. 894. Under R.C. 4123.59 and R.C. 4123.60, dependents of employees who die as a result of occupational disease or industrial injury may be afforded benefits. Only a statutorily defined "dependent" — usually a surviving spouse or a dependent child — may claim an allowance for death benefits. R.C. 4123.59. Appellant concedes that there are no dependents with standing to file a claim for death benefits in this case. Accordingly, the trial court properly granted judgment to appellee on the issue of death benefits.

Appellant argues that funeral expenses and the medical expenses incurred prior to Ochs's death are not "death benefits," but rather "accrued compensation" to which the estate is entitled to claim under R.C. 4123.60.

Under R.C. 4123.60, the administrator may award an amount for temporary, or permanent partial, or total disability compensation that was

“accrued and due the decedent at the time of his death.” According to the statute: “If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case[.]”

Unlike an order denying death benefits under R.C. 4123.59, which may be appealed to a court of common pleas, R.C. 4123.60 explicitly states: “An order issued by the administrator under this section is appealable pursuant to section 4123.511 of the Revised Code *but is not appealable to court under section 4123.512 of the Revised Code.*” (Emphasis added.) Accordingly, the trial court was without jurisdiction to consider appellant’s appeal of the order denying the estate’s claim for medical and funeral expenses and accrued compensation under R.C. 4123.60.

Appellant relies upon the case of *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 2000-Ohio-73, 737 N.E.2d 519. In that case, the brother of a deceased worker filed an action in mandamus to obtain accrued unpaid

benefits under R.C. 4123.60 in his capacity as executor of his brother's estate. The Franklin County Court of Appeals dismissed the action finding the estate had no right to receive the worker's accrued unpaid benefits because only a dependent could claim such benefits and the estate could not establish dependency as a matter of law. The Ohio Supreme Court reversed, holding that a deceased worker's estate could, under R.C. 4123.60, recover the disability compensation that had been awarded to the worker but remained unpaid at the time of the worker's death.

Liposchak is readily distinguishable from the instant case. The issue in the case before us is not whether the estate is entitled to recover benefits under R.C. 4123.60, but whether the trial court had jurisdiction to review the Commission's denial of appellant's claims for accrued compensation. The language of R.C. 4123.60 clearly precludes such judicial review.

Accordingly, the trial court lacked jurisdiction to consider appellant's claims. Just as in *Liposchak*, the estate's remedy lies not in judicial review, but in mandamus.¹

Appellant's single assignment of error is overruled.

¹Prior to filing the mandamus action, Liposchak's estate filed an appeal of the Commission's order in the court of common pleas of Jefferson County, pursuant to R.C. 4123.512. The Jefferson County court dismissed the appeal, without prejudice to the filing of an action in mandamus, finding the language of R.C. 4123.60 precluded judicial review. This decision was affirmed on appeal. See *Liposchak v. Admr., Ohio Bur. of Workers' Comp.* (2000), 138 Ohio App.3d 368, 741 N.E.2d 537.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR