

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1174

William D. Ochs, Deceased, et al.

Appellant,

v.

Administrator, Bureau of Workers' Compensation, et al.

Appellee.

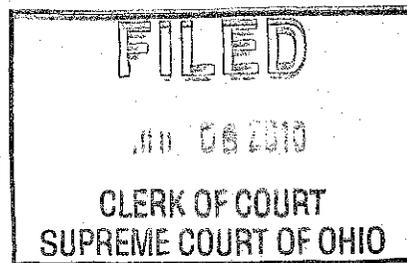
On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 93824

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT WILLIAM D. OCHS, DECEASED, CARE OF ROBERT OCHS, EXECUTOR

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents two critical issues with constitutional implications that affect every estate of a deceased worker's compensation claimant. Specifically, it involves 1) an estate's right to participate in the Worker's Compensation fund for accrued compensation owed to the decedent at death and 2) final medical and funeral bills where the death was related to decedent's work related injuries. Related to both of these issues is the question of whether a denial of all of these benefits sought by the estate creates a right to participate issue that is appealable into common pleas court, when no other benefits have been awarded to the estate.

As explained herein, the Court of Appeals erred in several respects by deciding that the trial court in this case had no jurisdiction to review any of these claims, despite the fact that the estate had been entirely denied the right to participate in the State's fund. Appellant contends that the estate's claims and right to participate are distinct from the original claimant's claims since the claimant's claims are abated at the time of death. For the reasons explained herein, the Court of Appeals' decision to the contrary is incorrect and violates Appellant's constitutional rights to due process of law, equal protection under the law and a jury trial. If the decision is permitted to stand, it would pave the way for further violation of other estate representatives' rights and substantive due process created by the Workers' Compensation statutes at issue.

Next, Decedent's Executor and authorized representative appealed to the Cuyahoga County Court of Common Pleas. The Appellee Administrator, BWC moved to dismiss the appeal for lack of subject matter jurisdiction, arguing that the trial court could not hear this appeal since the plaintiff was the executor of the estate of Decedent, rather than a surviving spouse or dependent beneficiary. Appellant responded to the motion, arguing for several reasons that jurisdiction was appropriate. The trial court denied the motion to dismiss.

Appellee then moved for summary judgment, arguing 1) (again) that Plaintiff as an executor had no standing to file a death claim, 2) therefore, jurisdiction was not appropriate and 3) the order appealed was not appealable into common pleas court since it did not address right to participate issues. Appellant filed a Brief in Opposition to the Motion for Summary Judgment, where it asserted counter-arguments to Appellee's Motion, asking that the motion be denied as a matter of law. The trial court granted Appellee's Motion for Summary Judgment in an entry dated July 29, 2009. The trial court did not state why it granted summary judgment or address specific legal issues in its entry. (*Id.*)

Appellant appealed to the Eighth District Court of Appeals, arguing that the trial court erred in granting summary judgment to Appellee since there were genuine issues of material fact that remained to be litigated in this appeal. Specifically, Appellant argued there was standing to appeal the IC's decision into common pleas court, the court had jurisdiction to hear the appeal and the issues appealed were right to participate issues which could be appealed by Appellant, the executor of the claimant's estate.

STATEMENT OF THE CASE AND FACTS

Appellant's decedent William D. Ochs, while alive, had a Workers Compensation claim from which he had been receiving Permanent Total Disability Compensation. The claim number was 384394-22 with a date of injury on July 12, 1960. The Industrial Commission of Ohio and the Ohio Bureau of Workers Compensation (BWC) had previously allowed the claim for the following conditions: osteoarthritis of both knees and thoraco-lumbar spine; medial meisectomies of both knees, lumbar laminectomy; left leg phlebitis with pulmonary embolism; lumbosacral syndrome and superimposed upon changes resultant from a remote hemiparesis.

On August 17, 2005, the Decedent's authorized representative filed a request with the BWC for the further clarification of additional medical conditions in the claim. In response, on September 12, 2005, a physician selected by the BWC reviewed the claim file and concurred with the request for clarification of the additional medical conditions.

On September 26, 2005 Decedent underwent bilateral knee replacement surgery and passed away on September 28, 2005 as a result of therapeutic complications secondary to the knee replacements. On the same date, Decedent's open and active Workers Compensation claim was abated as a result of his death, pursuant to Ohio Admin. Code §4123-5-21(A).

Thereafter, on September 28, 2006, the Executor of Decedent's Estate filed a new and distinct death claim asserting the right to participate in the BWC system, for payment of Decedent's final medical and funeral expenses and accrued compensation that was owed to the decedent at the time of his death. On November 20, 2007, a Staff Hearing Officer for the Industrial Commission of Ohio (IC) denied the death claim.

Next, Decedent's Executor and authorized representative appealed to the Cuyahoga County Court of Common Pleas. The Appellee Administrator, BWC moved to dismiss the appeal for lack of subject matter jurisdiction, arguing that the trial court could not hear this appeal since the plaintiff was the executor of the estate of Decedent, rather than a surviving spouse or dependent beneficiary. Appellant responded to the motion, arguing for several reasons that jurisdiction was appropriate. The trial court denied the motion to dismiss.

Appellee then moved for summary judgment, arguing 1) (again) that Plaintiff as an executor had no standing to file a death claim, 2) therefore, jurisdiction was not appropriate and 3) the order appealed was not appealable into common pleas court since it did not address right to participate issues. Appellant filed a Brief in Opposition to the Motion for Summary Judgment, where it asserted counter-arguments to Appellee's Motion, asking that the motion be denied as a matter of law. The trial court granted Appellee's Motion for Summary Judgment in an entry dated July 29, 2009. The trial court did not state why it granted summary judgment or address specific legal issues in its entry. (*Id.*)

Appellant appealed to the Eighth District Court of Appeals, arguing that the trial court erred in granting summary judgment to Appellee since there were genuine issues of material fact that remained to be litigated in this appeal. Specifically, Appellant argued there was standing to appeal the IC's decision into common pleas court, the court had jurisdiction to hear the appeal and the issues appealed were right to participate issues which could be appealed by Appellant, the executor of the claimant's estate.

However, the Court of Appeals affirmed the judgment of the Court of Common Pleas and found that: 1) the estate had no right to appeal for payment of decedent's final medical bills or denial of decedent's loss of use of legs claim since these issues related to the extent of injury, and 2) an estate has no right to claim death benefits including accrued compensation, medical bills and funeral bills of the decedent since these claims can only be made by dependents and reviewed in mandamus. *Ochs v. Administrator, BWC* (May 24, 2010) 8th Dist. No. 93824, 2010 Ohio 2103.

The Court of Appeals erred in its rulings since an estate has standing to make a claim for a decedent's accrued compensation, final medical bills and funeral bills. Further, these issues are "right to participate" issues that are appealable into common pleas court. In support of his position on these issues, Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

The court of common pleas has standing to review an estate's worker's compensation appeal for the deceased claimant's compensation that was accrued but not yet paid at the time of death when no aspect of the estate's death claims have been allowed, since the original decedent's claim abates at the time of death and the estate's claims are separate, new and distinct claims and the right to participate has been denied.

Initially, on the issue of standing, R.C. 4123.60 states in pertinent part:

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, *** R.C. 4123.60

While R.C. 4123.60 focuses on payments being made to the dependents, this Honorable Court has held that where there is no surviving spouse or dependents, the estate of the decedent can alternatively collect these funds:

***Walter, as executor of Robert's estate, reasonably asks why estates of workers should not be able to collect accrued compensation when the estates of dependents are able to collect. We see no reason for such an inequity. Accordingly, we follow Nosal, and hold that Robert's estate is entitled under R.C. 4123.60 to compensation that accrued to Robert, but that has not been paid to him at the time of his death. *State ex rel. Liposchak v. Indus. Comm.* (2000), 90 Ohio St.3d 276, citing *State ex rel. Nossal v. Terex Div. of I.B.H.* (1999), 86 Ohio St.3d 175, 712 N.E.2d 747, syllabus.

While dependency issues are not appealable on these claims, e.g. whether someone is a dependent of the decedent, the right to participate, if denied, is appealable if "it concerns the causal connection between injury, disease, or death and employment. *Id.* at 281.

Here, dependency was never an issue argued in this claim or the appeal, despite the prior characterizations of the BWC Administrator and the SHO. The right to participate, for the payment of accrued compensation, medical and funeral expenses related to death, were the issues claimed and appealed.

As represented in Appellant's Complaint, at the time of Decedent's death the BWC owed Decedent permanent total disability compensation benefits but had not yet paid those benefits. At the time of his death, Decedent had incurred medical expenses for treatment received near the time of his death, for conditions that had been allowed in his BWC claims, which precipitated his bilateral knee replacement surgery that he underwent immediately before his death. Decedent's death necessarily caused Appellant to pay

funeral expenses. When there is no surviving spouse or dependents, an executor has the right to make these claims, pursuant to *Liposchak, supra*.

The Court of Appeals correctly ruled that the estate has the right to appeal these issues to the IC, but incorrectly held that thereafter the decision of the IC can only be addressed in mandamus. The Court specifically relied on the decision in *Felty v. AT&T Technologies* (1992), 65 Ohio St.3d 475, as authority that Appellant's claims were not appealable.

However, in *Liposhack, supra*, this Honorable Court recognized that *Felty* and other related decisions were superceded by statute: "In fact, the General Assembly enacted these provisions [R.C. § 4123.59 and 4123.60] in 1993, the year after the *Felty*, *Evans* and *Afrates* decisions in an apparent attempt to settle the matter." *Liposhack*, 90 Ohio St.3d 276 at 281.

Regarding accrued but unpaid compensation, this Court cited R.C. 4123.60 for the proposition that, "[a]n order issued by the administrator under this section is appealable pursuant to section 4123.511 of the Revised Code [administrative appeal to the commission] but is not appealable to court under section 4123.512 of the Revised Code." *Id.* at 280. Yet, later in the opinion the *Liposhack* Court held, [W]e follow *Nossal* [86 Ohio St.3d 175] and hold that Robert's estate is entitled under R.C. 4123.60 to compensation that accrued to Robert, but had not been paid to him at the time of his death." *Id.* at 281.

Appellant asks this Honorable Court to review this legal question under the fact pattern of this case, since an inequity or loophole in the law is created because the estate has no relief in common pleas court and cannot seek review in mandamus since no

portion of the estate's claims were ever allowed. The result is that the estate is denied due process of law where dependents of a decedent and/or the estate of a decedent whose death claims have been approved in part have a right to appeal or mandamus review.

Specifically, as the Court of Appeals correctly stated in this case, "It was Ochs's death that ended his participation in the fund." *Ochs, supra* at p.6. By that rationale, Appellant argues that since the claimant's participation ends at death, only the estate can now seek participation. When the IC's order precludes the estate from ever participating in the BWC fund in any way, the issue appealed is the right to participate. To the contrary, Edith Liposhack's case had to be addressed in mandamus since a portion of her claim, regarding her husband final funeral expenses, had been allowed, i.e., "the commission has already determined the basic right to participate." *Liposhack, supra* at 281. Thus, this case is distinguishable from *Liposhack* on its facts.

Similarly, the estate cannot seek mandamus review here since the estate has never been granted a right to participate in this case. There is no "extent of participation" issue. This specific set of facts forces the estate to be denied due process and equal protection under the law, in violation of the Ohio and United States Constitutions.

Appellant contends that this issue must be addressed in the common pleas court since the estate's basic right to participate was denied. If current precedent allows this situation, this Court must review this issue so that the constitutional violations can be corrected. As it stands, the Court of Appeals has left Appellant and similarly situated estate claimants in a trap where they cannot appeal into court and there is no existing, allowed claim to support a mandamus action.

Proposition of Law No. II:

Separate from the issue of death benefits, pursuant to R.C. § 4123.66 an estate has the right to seek reimbursement for a deceased worker's compensation claimant final medical and funeral expenses when the death is connected to work related injuries. These issues are appealable into common pleas court when the estate has been denied the right to participate.

On this issue, the Court of Appeals erred by considering death benefits and payment of medical and funeral expenses as one issue. *Ochs, supra* at p.7. The Court further mischaracterized Appellant's argument by stating that Appellant argued that funeral and medical expenses are accrued compensation. The Court then continued to analyze payment of final medical and funeral expenses as controlled by R.C. 4123.60. Respectfully, the Court of Appeals' analysis on this issue was flawed from the start.

In fact, three different statutes are at play on these issues and traditional "death benefits" never were at issue in this case. "Death benefits" that can be claimed by a surviving spouse or dependents are controlled by R.C. §4123.59. No claim for such benefits was ever made in this case. Accrued compensation due to the decedent at the time of death, which is also sometimes referred to as a part of "death benefits" is controlled by R.C. §4123.60. Lastly, final medical and funeral expenses of a deceased claimant are controlled by R.C. §4123.66. All three of these statutes have different requirements for the claimant's survivors or the estate seeking compensation.

With respect to final medical and funeral bills of the deceased claimant, R.C. § 4123.66 mandates in pertinent part, "The bureau of workers compensation shall reimburse **anyone**, whether dependent, volunteer or otherwise, who pays the funeral expense of any employee whose death ensues from any injury or occupational disease as provided in this section." (Emphasis added). Therefore, it cannot be doubted that the

estate has the right to make a claim for final medical and funeral bills, provided that the claimant's "death ensues from the injury or occupational disease." R.C. 4123.66.

On the issue of the estate's right to appeal a denial of R.C. 4123.66 benefits into common pleas court, this issue is appealable when the right to participate has been entirely denied to the estate into common pleas court since it concerns the right to participate. See *Cook v. Mayfield* (1989), 45 Ohio St.3d 200, 202 (distinguishing right to participate from extent of disability). Again, Edith Liposhack's appeal had to be heard in mandamus since funeral benefits were allowed but accrued compensation pursuant to R.C. 4123.60 was not. *Liposhack, supra* at 281. Here, the facts are entirely different since the estate has been entirely denied the right to participate. Thus, with respect to all issues appealed in this case, they are only a part of the overall issue appealed, which is the right of the estate to participate, after the claimant's claim has been abated by death.

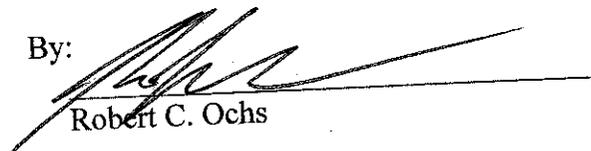
Most importantly, no other appellate or Ohio Supreme Court decisions address these critical issues as applied to the fact pattern at bar. Clearly, the Court of Appeals erred in its analysis and conclusion in this case, perpetuating a violation of Appellant's constitutional rights to due process and equal protection. If the decision is permitted to stand, similarly situated estate representatives will also be deprived of their constitutional and substantive due process rights created by the cited statutes.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional questions that effect Ohio citizens' right to due process and equal protection under the law. These issues are likely ones of first impression. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

By: 
Jesse M. Schmidt, Counsel of Record

By: 
Robert C. Ochs

COUNSEL FOR APPELLANT
WILLIAM OCHS, DECEDENT,
CARE OF ROBERT OCHS, EXECUTOR

Certificate of Service

I certify that on this 2nd day of July, 2010, a copy of this Memorandum in Support of Jurisdiction has been sent by ordinary United States Mail to Nancy Q. Walker, Assistant Attorney General, Office of the Ohio Attorney General, 615 Superior Ave. West, 11th Floor, Cleveland, OH 44113.



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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

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APPENDIX, P. 1



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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 _____ 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 _____ DEP.

**COPIES MAILED TO COUNSEL FOR
ALL PARTIES.- COSTS TAXED**

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

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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; hypercalcemia; 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.

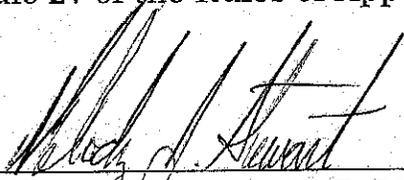
Judgment affirmed.

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