

ORIGINAL

IN THE SUPREME COURT OF OHIO

BUILDERS FIRSTSOURCE OHIO. :
VALLEY, LLC :

Appellant, :

vs. :

JOSEPH STARKEY :

Appellee. :

CASE NO. 2010-0924

On Appeal from the
Hamilton County Court
of Appeals, First
Appellate District

MERIT BRIEF OF APPELLANT BUILDERS FIRSTSOURCE OHIO VALLEY, LLC

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STATEMENT OF FACTS

Starkey filed an R.C. 4123.512 complaint requesting that he be permitted to participate in the Ohio workers' compensation system for the additional condition of "degenerative osteoarthritis of the left hip" (Supplement to the Brief, page 1). Testimony which the trial court found to be "undisputed" (T.d. 22) established that this was not the correct diagnosis of Starkey's condition. The correct diagnosis was "aggravation of pre-existing left hip degenerative osteoarthritis" (T.d. 15, 34) (as opposed to "direct causation"), a diagnosis that had not been requested or argued by Starkey administratively (T.d. 22). Appellant raised that issue and the trial court granted judgment in its favor, ruling that Starkey was not entitled to participate for the claimed condition because he had not requested it administratively. The Court of Appeals for the First Appellate District thereafter reversed the trial court and specifically allowed the claim for "degenerative osteoarthritis of the left hip" despite all medical evidence introduced in the underlying case and discussed in detail by the First District identifying the correct condition as "aggravation of pre-existing degenerative osteoarthritis of the left hip".

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A workers' compensation claim for an identified condition by way of direct causation does not necessarily include a claim for aggravation of that condition for purposes of either R.C. 4123.512 or res judicata.

What is the nature of an R.C. 4123.512 appeal? Is it a mechanism for judicial review, or an alternative method for a claimant to amend an administrative claim and

pursue relief at the judicial level? That is the essential question posed by this case.

The district courts of appeals currently falling on one side or the other of the issue nearly directly mirror the arguments and the split appellate court decisions this Court decided between in *Ward v. Kroger* (2005), 106 Ohio St. 3d. 35., 830 N.E.2d 1155. Prior to *Ward*, the Fourth, Fifth, Seventh, Eighth, and Ninth Appellate Districts had held that claimants were precluded from litigating new or different conditions in the courts of common pleas, i.e., conditions that had not been sought at the administrative level prior to judicial appeal.¹ The First, Third and Sixth Appellate Districts had held that claimants could amend a complaint (an appeal of an administrative determination) to add new and distinct conditions.² This Court agreed with the majority of appellate districts that had considered the question and held that permitting a claimant to amend a complaint to add new or distinct conditions on appeal would usurp the Industrial Commission's authority and cast the common pleas courts "in the role of a claims processor". *Ward* at 36, 830 N.E.2d at _____. BUT, at the same time the Court specifically reserved the further question of "whether a claim for a certain condition by way of direct causation must necessarily include a claim for aggravation of that condition for purposes of either R.C. 4123.512 or res judicata". *Id* at Fn 1. That reserved question is the precise issue this appeal presents. It has caused a split in the Courts of Appeals which have now considered it along generally the same lines and following similar arguments as *Ward*: the Second and Sixth Appellate Districts have answered in the negative, extrapolating from *Ward*³, while the First District has (with the decision underlying this Appeal)

¹ See *Starkey v. Builders FirstSource* (April 9, 2010), 1st Dist. No. C-081279, attached.

² *Id.*

³ *Id.*

answered in the affirmative⁴, specifically stating that *Ward* does not control the issue and is distinguishable.

Ohio Courts have repeatedly ruled that direct causation of an injury and aggravation of an injury are separate and distinct. Not only is it “intrinsic” as noted by the court in *Davidson v. Bureau of Worker’s Compensation et al.* (2007) Ohio 792, but there is an entire line of case law commencing with *Schell v. Globe Trucking, Inc.* (1990) 48 Ohio St. 3d 1, 548 N.E.2d 920 and continuing through *Ward* wherein the differences between direct causation and aggravation injuries are discussed in detail. That is precisely the reason for *Ward*, *Davidson* and even the First District Court of Appeal’s (disregarded) decision in *Collins v. Conrad* (Nov. 15, 2006), Hamilton Cty. App. No. C-05-829: direct causation and aggravation are distinct injuries, with differing medical and legal criteria. “A worker’s compensation claim for any given condition does not include a claim for aggravation of that condition, and vice versa”. *Plotner v. Family Dollar Stores* (2008), 2008 Ohio 4035.

Starkey argued that the Industrial Commission MUST have considered his claim to be one for aggravation as well as direct causation, or alternatively, as a trial do novo on a worker’s compensation appeal that he can advance new theories of causation. The problem with this position is that Starkey’s Motion filed with the Industrial Commission did not request an allowance for aggravation, or allowances in the alternative (i.e., by direct causation, aggravation or flow-through); only for direct causation. This is consistent with the hearing officer manual noted in Starkey’s First District Appellate Brief at pp. 7, as well as the administrative decisions which led to this appeal: claimants can present alternative theories of causation at the administrative level. Here, Starkey simply did not do so and

⁴ Id.

“...to presume that the Commission will consider the evidence in light of both types of conditions, regardless of the type of claim made, is too broad an interpretation of the Commission’s role”. *Davidson*, supra at 28. Yet Starkey asked for, and the First District Court of Appeals granted to him, just that presumption.

Starkey next argued that he was only attempting to offer differing methodologies of proof, as opposed to differing conditions (“merely advancing a new theory of causation”, Starkey First Dist. App. Brief at 7). That is both legally and medically incorrect. Aggravation and direct causation are differing injuries with differing elements or proof, as first recognized by *Schell*, supra and continuously since then; Starkey’s own treating physician distinguished them and corrected the diagnosis in his trial deposition. *Davidson* and *Collins*, among many others and in considering this precise issue, referred repeatedly to the “conditions” being sought, and *Collins* specifically states: “Aggravation of those preexisting conditions was not simply a matter of causation and proof. It involved separate injuries with different elements of proof, and, therefore, it gave rise to separate claims”. Id. at 6.

Aggravation and direct causation must be considered separate and distinct for both purposes of R.C. 4123.512 appeals and, by extension, *res judicata* purposes. In practical terms, if a claimant files for an allowance by way of direct causation, and on appeal to a court of common pleas the medical evidence actually demonstrates that the claimant suffered an aggravation (now, a “substantial” aggravation), the claim should properly be denied. However, the claimant could then go back and (assuming there was the requisite proof and the request was otherwise timely) administratively file for the aggravation. This is entirely consistent with a trial Court’s 4123.512 role as a reviewer of the administrative issues raised. Should this Court decide otherwise it would cause mass confusion at the

trial court level as a claimant could, for example, file administratively for a lumbar sprain, appeal the matter into the Court of Common Pleas upon a denial, and then claim a leg injury as part of the Common Pleas proceedings, a leg injury which had never been filed for or determined administratively.

Aggravations “need to be presented to the Industrial Commission in the first instance and cannot be decided for the first time at the judicial level....Because aggravation claims were not presented to the Industrial Commission, those issues were not properly before the Common Pleas Court”. *Id.* There are both legal and practical reasons for the distinction:

“...order is lost, fairness is jeopardized, and the statutory framework is destroyed when the administrative process is merely used as a conduit to get the first claim to the trial court in order to raise other conditions for the first time in the trial court after bypassing the administrative process. Simply put, R.C. 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level”. *Ward*, *supra* at 36-37.

Proposition of Law No. II: A claimant in an R.C. 4123.512 appeal may seek to participate in the Worker’s Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken.

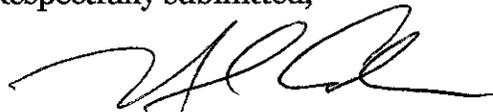
BFS offers the same arguments in support of its second Proposition of Law as its 1st but shall not repeat them for brevity’s sake. BFS believes that *Ward* and *Collins*, as originally noted by the trial court, are directly on point in this matter. Starkey did not present an aggravation claim to the Industrial Commission, only a direct causation claim.

His original motion did not request aggravation; none of the Hearing Officer Orders which led to this appeal discuss or allow for aggravation; and his treating physician essentially ambushed both counsel, at his trial deposition, with the change in diagnosis from direct to aggravation. Yet not only has the First District by its decision now permitted Starkey to participate for a condition he indisputably did not ask for, it went a step further and allowed the claim for “degenerative osteoarthritis of the left hip” even though all medical evidence introduced in the underlying case and discussed in detail by the First District identifies the correct condition as “aggravation of pre-existing degenerative osteoarthritis of the left hip”; in other words, the First District ruling means that there is no difference between aggravation and direct causation for purposes of R.C. 4123.512 appeals and that they must be considered as interchangeable. This determination is similar to the position that same court had taken before *Ward*, and appears to again directly contradict this Court’s pronouncements.

CONCLUSION

WHEREFORE, For all the foregoing reasons Appellant Builders FirstSource Ohio Valley, LLC respectfully requests that the Court reverse the judgment of the Court of Appeals for the First Appellate District of Ohio and enter judgment for Appellant.

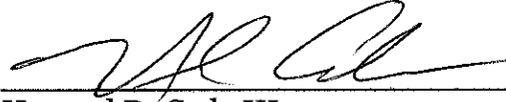
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Certificate of Service

I hereby certify that a copy of the foregoing Merit Brief was served upon M. Christopher Kneflin, Esq., Fox and Fox, 2407 Ashland Avenue, Cincinnati, Ohio 45206 and Thomas J. Straus, Esq., Assistant Attorney General, 441 Vine Street 1600 Carew Tower, Cincinnati, Ohio 45202 by regular U.S. Mail, postage prepaid, this 15th day of October, 2010.



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Counsel for Appellant Builders FirstSource
Ohio Valley, LLC

APPENDIX

IN THE SUPREME COURT OF OHIO

BUILDERS FIRSTSOURCE OHIO. :
VALLEY, LLC,

10-0924

Appellant,

: On Appeal from the Hamilton
: County Court of Appeals, First
: Appellate District

vs.

JOSEPH STARKEY, et al.

: Court of Appeals
: Case No. C-081279

Appellees.

NOTICE OF APPEAL OF APPELLANT
BUILDERS FIRSTSOURCE OHIO VALLEY, LLC

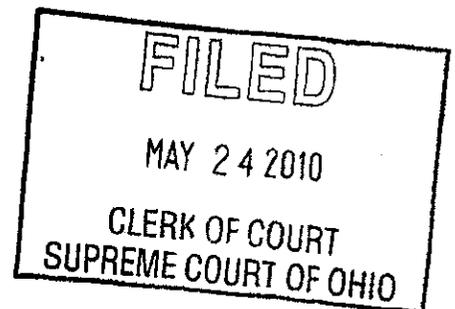
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Notice of Appeal of Appellant Builders FirstSource Ohio Valley, LLC

Appellant Builders FirstSource Ohio Valley, LLC hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case No. C-081279 on April 9, 2010.

This appeal is of public or great general interest and a memorandum in support of jurisdiction is filed herewith.



Howard D. Cade III

COUNSEL FOR APPELLANT
BUILDERS FIRSTSOURCE OHIO VALLEY,
LLC

Certificate of Service

I hereby certify that a copy of this Notice of Appeal was served upon M. Christopher Kneflin, Esq., 2407 Ashland Avenue, Cincinnati, Ohio 45206 and Thomas J. Straus, Assistant Attorney General, Suite 1600, 441 Vine Street, Cincinnati, Ohio 45202 by ordinary U.S. Mail this 21st day of May, 2010.



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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STARKEY,	:	APPEAL NO. C-081279
	:	TRIAL NO. A-0801187
Appellant,	:	
	:	<i>OPINION.</i>
v.	:	
BUILDERS FIRSTSOURCE	:	
OHIO VALLEY, L.L.C.,	:	
	:	
Appellee, et al.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Final Judgment Entered for Appellant

Date of Judgment Entry on Appeal: April 9, 2010

Fox & Fox Co. L.P.A., Bernard C. Fox, and M. Christopher Kneflin, for appellant.

Becker & Cade and Howard D. Cade III, for appellee, Builders Firstsource Ohio Valley, L.L.C.

Richard Cordray, Attorney General of Ohio, and Thomas J. Straus, Assistant Attorney General, for defendant Administrator, Ohio Bureau of Workers' Compensation.

J. HOWARD SUNDERMANN, Judge.

{¶ 1} The principal question raised in this appeal is whether a claimant who wishes to participate in the Workers' Compensation Fund for a specific condition under a theory of direct causation must also include a claim for aggravation of a condition at the administrative level if the claimant wishes to raise aggravation of a condition in an appeal under R.C. 4123.512. Because we agree with those Ohio appellate districts that have held that aggravation of an appealed condition is based on a theory of causation that a claimant need not raise administratively before pursuing an appeal under R.C. 4123.512, we reverse the judgment of the trial court and enter judgment for plaintiff-appellant Joseph Starkey on his claim for "degenerative osteoarthritis of the left hip."

I. Starkey's Workers' Compensation Claim

{¶ 2} Starkey was injured on September 11, 2003, in the course and scope of his employment with defendant-appellee Builders Firstsource Ohio Valley, L.L.C. He filed a claim with the Bureau of Workers' Compensation that was allowed for the following conditions: sprain of left hip and thigh, "sprain lumbrosacral"; "enthesopathy of left hip"; "tear left hamstring"; "glenoid labrum tear of left hip"; "venous embolism deep vein thrombosis" left leg; and "degenerative joint disease left hip." His claim for "diabetes either by way of direct causation or aggravation" was disallowed.

{¶ 3} In December 2005, Starkey moved to amend his claim to add the additional condition of "degenerative osteoarthritis of the left hip." The claim was allowed by a district hearing officer and a staff hearing officer. Builders Firstsource appealed to the Industrial Commission, which denied further review.

II. Builders Firstsource's Appeal to the Common Pleas Court

{¶ 4} Builders Firstsource then appealed to the common pleas court pursuant to R.C. 4123.512. Starkey filed a complaint, which he then voluntarily dismissed under

Civ.R. 41(A). He then refiled the complaint within the one-year period provided by R.C. 2305.19, the saving statute. Starkey's case then proceeded to a trial before the court.¹

{¶ 5} At trial, Starkey testified that he was working as a service technician for Builders Firstsource on September 11, 2003, when he injured his hip while installing a window. Starkey testified that he had not had any left-hip problems prior to the workplace incident. He sought immediate medical attention for his injured hip at Mercy Fairfield Hospital's emergency room. When the problems with his left hip persisted, he sought follow-up treatment with Dr. John Gallagher, M.D., a board-certified orthopedic surgeon. When this proved unavailing, he was referred to Dr. George Shybut, M.D., in 2005, for arthroscopic surgery on his left hip. When this surgery ultimately proved unsuccessful, he was referred back to Gallagher. In July 2006, he underwent a total hip replacement, which was performed by Gallagher. Starkey testified that he has continued to receive treatment from Gallagher for problems related to his left hip.

{¶ 6} Starkey's counsel then introduced the deposition of Gallagher. Gallagher testified that he had treated Starkey for the left-hip problems resulting from his September 11, 2003, workplace injury. During his treatment of Starkey, Gallagher reviewed x-rays, an MRI, and an arthrogram of Starkey's left hip. The MRI and arthrogram showed that Starkey had osteoarthritis in his left hip. Gallagher testified that Starkey had no history of left-hip pain or left-hip problems prior to the workplace injury. Gallagher testified that conservative care of Starkey's left-hip injury failed, so he referred Starkey to Dr. Shybut for arthroscopic surgery on his left hip. When the surgery

¹ The Ohio Attorney General's Office filed an answer to Starkey's complaint on behalf of the Administrator for the Bureau of Workers' Compensation, stating that Starkey was entitled to participate in the Workers Compensation Fund. The Attorney General's Office also indicated that it would be inactive in the common pleas court proceedings.

failed to alleviate Starkey's left-hip pain, Shybut referred Starkey back to Gallagher for a total left-hip replacement. Gallagher performed that surgery on Starkey in 2006.

{¶ 7} Gallagher testified that in his opinion, Starkey had degenerative osteoarthritis in his left hip; that the degenerative osteoarthritis had pre-existed his injury of September 11, 2003; and that it had been "directly aggravated by [his workplace] injury o[n] September 11[, 2003]." Gallagher testified that his opinion was consistent with Dr. Thomas Bender, Builders Firstsource's expert witness. During cross-examination, Gallagher was again asked whether Starkey's work-related injury had caused the degenerative osteoarthritis or whether it had aggravated it. Gallagher testified that Starkey's workplace injury had aggravated the degenerative osteoarthritis.

{¶ 8} At the conclusion of Starkey's evidence, Builders Firstsource moved for a directed verdict based upon the Ohio Supreme Court's decision in *Ward v. Kroger*.² It argued that because Starkey had applied to the Bureau of Workers' Compensation to allow his claim only for degenerative osteoarthritis of the left hip, he could not, for the first time in the trial court, seek to participate in the fund for aggravation of the pre-existing degenerative osteoarthritis, when that was a separate condition that Starkey had not raised before the bureau. The trial court overruled the motion for a directed verdict sub silencio when it ultimately entered judgment for Builders Firstsource on Starkey's workers' compensation claim for "the additional condition of degenerative osteoarthritis of the left hip." In its findings of fact and conclusions of law, the trial court stated that it felt compelled to follow this court's judgment in *Collins v. Conrad*,³ which had been cited by the Second Appellate District in *Davidson v. Bur. of Workers' Comp.*⁴ Starkey now appeals, raising a single assignment of error for our review.

² *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155.

³ *Collins v. Conrad* (Nov. 15, 2006), 1st Dist. Nos. C-050829 and C-050865.

⁴ *Davidson v. Bur. of Workers' Comp.*, 2d Dist. No. 21731, 2007-Ohio-792.

III. Starkey's Appeal

{¶ 9} In his sole assignment of error, Starkey argues that the trial court erred as a matter of law when it granted judgment to Builders Firstsource on his claim for degenerative osteoarthritis of the left hip. Starkey contends that the trial court too narrowly interpreted the scope of an appeal under R.C. 4123.512. Starkey relies on a line of cases that were decided prior to the Ohio Supreme Court's decision in *Ward v. Kroger*, which hold that because aggravation is a theory of causation, a claimant need not raise the aggravation of an appealed condition administratively to raise it in an appeal pursuant to R.C. 4123.512.

{¶ 10} Builders Firstsource, on the other hand, relies on another line of cases that were decided after the Ohio Supreme Court's decision in *Ward v. Kroger*. These cases hold that a claim for the aggravation of a pre-existing condition and a claim for that same condition by way of direct causation are intrinsically two separate claims because they require different elements of proof. Thus, claimants who do not raise the issue of aggravation administratively are precluded from raising that issue on appeal to the common pleas court under *Ward v. Kroger*.

A. Aggravation as a Theory of Causation

{¶ 11} Prior to the Ohio Supreme Court's decision in *Ward v. Kroger*, the Fifth, Sixth, Eighth, Tenth, and Eleventh Appellate Districts had held that a claimant could raise the aggravation of a pre-existing condition in an appeal under R.C. 4123.512, where the claimant had raised the direct causation of that same condition administratively, because the claimant was not seeking to prove a new or separate injury, but was merely advancing a new theory of causation.⁵ The reasoning was based on the de novo nature

⁵ See *McManus v. Eaton Corp.* (May 16, 1988), 5th Dist. No. CA-7346; *Clark v. Connor* (Nov. 23, 1984), 6th Dist. No. L-84-175; *Torres v. Gen. Motors Corp.* (Nov. 21, 1991), 8th Dist. No. 59122; *Coventry v. AT&T Technologies, Inc.* (Sept. 25, 1986), 10th Dist. No. 86AP-313; *Maitland v. St.*

of an appeal under R.C. 4123.512. The courts acknowledged that such appeals were not error proceedings or even appeals upon questions of law and fact, but rather were governed by the issues as raised in the petition filed by the claimant and in the subsequent pleadings filed by the parties.⁶

{¶ 12} The trial court was then required to conduct a trial de novo to determine the right of the claimant to participate or to continue to participate in the fund. While that determination was informed by the evidence adduced before the Industrial Commission, neither party was limited to that evidence, but instead could present such evidence pertinent to the issues raised by the petition as was material and relevant to the issue of the right of the claimant to participate or to continue to participate in the fund.⁷ Because only the claimant's theory of causation had changed at the common pleas level (i.e., aggravation of condition rather than direct causation), not the medical condition for which the claimant had sought participation before the Industrial Commission, the claimant was not precluded from seeking participation under this new theory.⁸

{¶ 13} In *Robinson v. AT&T Network Sys.*, the Tenth Appellate District extended the reasoning in these cases to a claimant who had failed to appeal the Industrial Commission's denial of an earlier claim for the allowance of degenerative disc disease.⁹ The court held that the claimant was barred by res judicata from bringing a subsequent claim before the Bureau of Workers' Compensation for aggravation of degenerative disc disease,¹⁰ because he was not advancing a new injury, but was merely litigating a variant of the initial causation theory.¹¹

Anthony Hosp. (Oct. 3, 1985), 10th Dist. No. 85 AP-301; *Bright v. EC Lyons* (Sept. 30, 1993), 11th Dist. No. 93-G-1753, 1993 WL 407361.

⁶ See *Maitland*, supra.

⁷ Id.

⁸ Id.

⁹ *Robinson v. AT&T Network Sys.*, 2003-Ohio-1513.

¹⁰ Id. at ¶ 10.

¹¹ Id. at ¶ 16.

B. Ward v. Kroger

{¶ 14} In *Ward v. Kroger*, the Ohio Supreme Court held that claimants may seek to participate in the Workers' Compensation Fund only for those conditions that have been addressed at the administrative level.¹² Therefore, a claimant in an appeal from a decision of the Industrial Commission may not amend a complaint at the common pleas level to add conditions that were not part of the administrative proceedings.¹³ As a result, the Supreme Court concluded in the case before it that the common pleas court had exceeded its jurisdiction under R.C. 4123.512 when it permitted the claimant, who had sought to participate in the Workers' Compensation Fund for a medial meniscus tear and chondromalacia of the right knee, to amend his complaint to include two new conditions: aggravation of pre-existing degenerative joint disease and aggravation of pre-existing osteoarthritis.¹⁴

{¶ 15} In so holding, the court resolved a conflict between Ohio's appellate districts.¹⁵ Previously, this district, along with the Third and Sixth Appellate Districts, had allowed a claimant to amend a complaint to add new and distinct conditions on appeal.¹⁶ The Fourth, Fifth, Seventh, Eighth, and Ninth Appellate Districts had reached the opposite conclusion, holding that claimants were precluded from litigating new or different conditions in the court of common pleas.¹⁷ The Ohio Supreme Court agreed with the latter courts' interpretation, holding that permitting a claimant to amend a complaint to add new or distinct conditions on appeal would usurp the Industrial

¹² *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155, syllabus.

¹³ *Id.*

¹⁴ *Id.* at ¶ 1-5 and ¶ 15.

¹⁵ *Id.* at ¶ 7.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 8.

Commission's authority and would cast the common pleas court "in the role of a claims processor."¹⁸

{¶ 16} The claimant in *Ward* had argued that he was required under the Tenth Appellate District's decision in *Robinson v. AT&T Network Sys.*¹⁹ to "litigate all issues relating to the same body part in one proceeding or trial."²⁰ Thus, it was imperative that he include the aggravated conditions in his appeal, or res judicata would bar him from later raising those claims administratively.²¹ The Ohio Supreme Court disagreed.²²

{¶ 17} It held that the holding in *Robinson* was distinguishable because the claimant in that case had sought the administrative allowance of an additional claim for the same injury to the same body part, but on a different theory of recovery.²³ The claimant in *Ward*, however, had originally sought to participate for one condition and had then sought to add two new and distinct conditions on appeal.²⁴ Thus, the Supreme Court held that nothing in *Robinson* prevented the claimant in *Ward* "from going back to the administrative agencies and requesting" the allowance of these two additional conditions.²⁵

{¶ 18} The Supreme Court limited *Robinson* "to the situation in which a claimant obtains an allowance of a particular claim for a particular body part, does not appeal the order to the common pleas court, and then seeks the administrative allowance of an additional claim for the same injury to the same body part, but on a different theory."²⁶ The court specifically stated, however, that it was not addressing "whether a claim for a certain condition by way of direct causation must necessarily

¹⁸ Id. at ¶ 10.

¹⁹ *Robinson v. AT&T Network Sys.*, 10th Dist. No. 02AP-807, 2003-Ohio-1513.

²⁰ Id. at ¶ 13.

²¹ Id.

²² Id. at ¶ 15.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. at ¶ 14.

include a claim for aggravation of that [same] condition for purposes of either R.C. 4123.512 or res judicata.”²⁷

C. Aggravation of a Condition as a Separate Condition

{¶ 19} Following *Ward*, the Second Appellate District in *Davidson v. Bur. of Workers’ Comp.* held that “a claim for aggravation of a pre-existing condition not previously adjudicated by the commission is not appealable at the trial court level,” even where direct causation of the condition itself had been addressed administratively, because the direct causation of an injury and the aggravation of that same injury are intrinsically two separate conditions.²⁸ The claimant in *Davidson* had argued under *Robinson* that his claim to participate in the Workers’ Compensation Fund for a lumbar sprain “inherently included a request for the condition of aggravation of a pre-existing lumbar sprain.”²⁹ Thus, he argued that the trial court had erred by failing to adopt his proposed jury instruction and verdict form for aggravation of a pre-existing lumbar strain.³⁰

{¶ 20} The Second Appellate District disagreed. While acknowledging that “the Ohio Supreme Court [had] explicitly chose[n] not to address this issue in its review of *Robinson*,” the Second Appellate District nonetheless held that under *Ward*, a claim for aggravation of a pre-existing condition not previously adjudicated by the Industrial Commission cannot be raised at the trial-court level.³¹ In viewing the aggravation of an injury as a separate condition from an injury by way of direct causation, the Second Appellate District focused solely on the evidence a claimant must present to advance such a claim.³²

²⁷ Id. at fn.1.

²⁸ *Davidson v. Bur. of Workers’ Comp.*, 2d Dist. No. 21731, 2007-Ohio-792, at ¶ 12, 30.

²⁹ Id. at ¶ 13-14.

³⁰ Id. at ¶ 10.

³¹ Id. at ¶ 27.

³² Id. at ¶ 28.

{¶ 21} The court noted that claimants who argue a direct injury as the result of a workplace accident “must show that a direct or proximate causal relationship existed between the claimant’s accidental injury and his or her harm.”³³ But claimants who argue that a pre-existing condition has been aggravated by a workplace injury must show that the “ ‘aggravation had an impact on a person’s bodily functions or affected an individual’s ability to function or work.’ ”³⁴ The court further noted that the “aggravation of a pre-existing condition can be demonstrated ‘through symptoms, debilitating effects, or physiological changes not due to the normal progression of the condition.’ ”³⁵ The court then concluded that “[t]o presume that the commission will consider the evidence in light of both types of conditions, regardless of the type of claim made, is too broad an interpretation of the commission’s role.”³⁶

{¶ 22} The Second Appellate District cited this court’s judgment entry in *Collins v. Conrad* as instructive.³⁷ In that case, we had “found that the employee’s jury instruction addressing an aggravation of her claimed condition was not a correct statement of law where the original claim to participate in the Workers’ Compensation Fund only sought allowance for conditions directly caused by her injury.”³⁸ We held that “*Ward* preclude[d] claimants from seeking to participate in the Workers’ Compensation Fund for conditions not addressed in the administrative order from which the appeal to the common pleas court was taken.”³⁹ Thus, we held that “the trial court [ha]d not abuse[d] its discretion in refusing to submit the claimant’s instruction.”⁴⁰

³³ Id.
³⁴(Citations omitted.) Id., quoting *Gower v. Conrad* (2001), 146 Ohio App.3d 200, 204, 765 N.E.2d 905.
³⁵ Id.
³⁶ Id.
³⁷ Id. at ¶ 27, fn. 1.
³⁸ Id.
³⁹ Id.
⁴⁰ Id.

{¶ 23} In *Plotner v. Family Dollar Stores*, the Sixth Appellate District “recognize[d] that a workers’ compensation claim for any given condition does not include a claim for aggravation of that condition, and vice-versa” and cited *Davidson* with approval.⁴¹ The court, however, found *Davidson* to be factually distinguishable from the case before it.⁴² The court held that because the employee’s claim, although inartfully drafted, had included a claim for the aggravation of a pre-existing condition, and because there was ample evidence before the court to support the employee’s claim for aggravation of the pre-existing condition, the trial court had not erred in failing to grant a directed verdict to the employer on the employee’s claim for aggravation of the pre-existing condition.⁴³

{¶ 24} Similarly, in *Plaster v. Elbeco*, the Third Appellate District acknowledged the Second Appellate District’s holding in *Davidson*, but nonetheless concluded that *Davidson* did not apply to the facts before it, because the employee had not argued the aggravation of the condition claimed, but had merely sought to prove the claimed condition, a herniated disc, by showing the aggravation of degenerative disc disease.⁴⁴ Thus, the Third Appellate District held that the trial court had not erred in instructing the jury on the theory of aggravation when the evidence in the case supported such an instruction.⁴⁵

D. Analysis of Arguments in this Appeal

{¶ 25} Starkey first argues that the trial court erred as a matter of law in relying upon our decision in *Collins*, which was cited by the Second Appellate District in *Davidson*. We agree. *Collins* is a judgment entry, and as such, it has no precedential

⁴¹ *Plotner v. Family Dollar Stores*, 6th Dist. No. L-07-1287, 2008-Ohio-4035, at ¶ 29.

⁴² *Id.* at ¶ 30.

⁴³ *Id.* ¶ 26-34.

⁴⁴ 3d Dist. No. 3-07-06, 2007-Ohio-5623, at ¶ 15.

⁴⁵ *Id.* at ¶ 21.

value beyond the parties in that case.⁴⁶ As a result, the analysis and reasoning in *Collins* is not binding upon this court in the current appeal.

{¶ 26} We disagree with Starkey, however, that the outcome of his case is controlled by *Robinson*. Starkey argues that under *Robinson*, he was required to raise all possible theories of causation for the injury of degenerative osteoarthritis of his left hip on appeal to the common pleas court, or res judicata would have precluded him from later bringing a claim on that issue. But in *Ward*, the Ohio Supreme Court explicitly limited *Robinson* “to the situation in which a claimant obtains an allowance of a particular claim for a particular body part, does not appeal the order to the common pleas court, and then seeks the administrative allowance of an additional claim for the same injury to the same body part, but on a different theory.”⁴⁷ Because Starkey raised the issue of his participation in the Workers’ Compensation Fund for the condition of aggravation of pre-existing degenerative osteoarthritis of the left hip on appeal to the common pleas court, *Robinson* is factually inapposite.⁴⁸

{¶ 27} Thus, in the absence of a definitive statement by the Ohio Supreme Court on this issue, we are left to determine which line of cases is better reasoned: the one marked by *McManus v. Eaton Corp.*, or the one marked by *Davidson v. Bur. of Workers’ Comp.* Builders Firstsource argues that the line of cases Starkey relies upon is no longer good law following *Ward*. But as Starkey points out, the reasoning in these cases is not inconsistent with the Ohio Supreme Court’s decision in *Ward*. These courts, like *Ward*, had held that the scope of an appeal under R.C. 4123.512 as a trial de novo meant only that new evidence could be presented with regard to the appealed condition, not that evidence of a new condition could be presented for the first time on

⁴⁶ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

⁴⁷ *Ward*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155, at ¶ 14.

⁴⁸ See *Plaster*, 2007-Ohio-5623, at ¶ 13.

appeal.⁴⁹ Thus, we agree with Starkey that nothing in these cases conflicts with the *Ward* court's interpretation of the scope of an appeal under R.C. 4123.512.

{¶ 28} Furthermore, as Starkey points out, R.C. 4123.01, in defining an injury, does not prescribe how the causal link is to be made between the work-related event and the employee's injury. Ohio courts have ruled that workers can be injured in various ways, including by direct causation, aggravation of a pre-existing condition, flow-through, a secondary condition, or acceleration.⁵⁰ In *Ward*, the Ohio Supreme Court clarified that a workers' compensation claim simply seeks the recognition of the employee's right to participate in the fund for a specific injury or medical condition that is defined narrowly, and that it is only for that condition, as set forth in the claim, that compensation and benefits under the act may be provided.⁵¹ The court explicitly stated that it was not determining any issues related to the causation of the injury or condition.⁵²

{¶ 29} In this case, Starkey sought to participate in the Workers' Compensation Fund for the additional condition of "degenerative osteoarthritis of the left hip." The Industrial Commission held that he was entitled to workers' compensation benefits for this condition. On appeal to the common pleas court, his argument involved that same medical condition. The only thing that changed was the method of causation. The trial court, however, assumed that because the Industrial Commission's order referred to Starkey's medical condition without any modifiers, his claim had involved only direct causation. But there are no statutes, rules, administrative code sections, or cases, aside

⁴⁹ See *Torres v. Gen. Motors Corp.* (Nov. 21, 1991), 8th Dist. No. 59122; *McManus v. Eaton Corp.* (May 16, 1998), 5th Dist. No. CA-7346; *Maitland v. St. Anthony Hosp.* (Oct. 3, 1985), 10th Dist. No. 85AP-301.

⁵⁰ *Fox v. Indus. Comm.* (1955), 162 Ohio St. 569, 125 N.E.2d 1 (direct causation); *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St.3d 1, 548 N.E.2d 920 (aggravation); *Lewis v. Trimble* (1997), 79 Ohio St.3d 231, 680 N.E.2d 1207 (flow-through or secondary condition); *Oswald v. Connor* (1985), 16 Ohio St.3d 38, 476 N.E.2d 658 (acceleration).

⁵¹ *Ward*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155, at ¶ 10.

⁵² *Id.* at ¶ 15, fn. 1.

from *Davidson*, that create a presumption that a condition identified by the Industrial Commission has automatically arisen by direct causation unless otherwise stated in the order.

{¶ 30} Moreover, the Second Appellate District’s statement in *Davidson*—that it could not presume “that the commission will consider the evidence in light of both types of conditions, regardless of the type of claim made, is too broad an interpretation of the commission’s role”⁵³—is at direct odds with Industrial Commission Hearing Officer Manual Memo S-11, which explicitly provides that “a request to allow a condition in a claim is to be broadly construed to cover theories of causation.”

{¶ 31} Finally, we agree with Starkey that the underpinnings of the Ohio Supreme Court’s decision in *Ward* are not implicated here. Medical evidence and testimony were presented administratively by both parties on Starkey’s medical condition of “degenerative osteoarthritis of the left hip.” On appeal to the common pleas court, Dr. Gallagher, Starkey’s expert witness, acknowledged that his opinion that Starkey had degenerative osteoarthritis in his left hip; that the degenerative osteoarthritis had pre-existed his injury of September 11, 2003; and that it had been “directly aggravated by [his workplace] injury o[n] September 11[, 2003],” was consistent with the opinion of Builders Firstsource’s expert, Dr. Thomas Bender. Thus, there was no ambush by Starkey’s counsel in this case.

{¶ 32} For all of these reasons, we sustain Starkey’s assignment of error and reverse the trial court’s decision. Based upon the undisputed evidence presented at trial, we enter judgment for Starkey and order that he is entitled to participate in the Workers’ Compensation Fund for the additional condition of degenerative osteoarthritis of the left hip. Furthermore, we would be inclined to entertain a motion to certify our

⁵³ Id.

judgment as being in conflict with the Second and Sixth Appellate Districts, should the parties choose that course of action.

Judgment accordingly.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JOSEPH STARKEY,
Plaintiff-Appellant,
vs.
BUILDERS FIRSTSOURCE
OHIO VALLEY, LLC.,
Defendant-Appellee,
and
ADMINISTRATOR, OHIO BUREAU
OF WORKERS' COMPENSATION,
Defendant.

APPEAL NO. C-081279
TRIAL NO. A-0801187
JUDGMENT ENTRY.



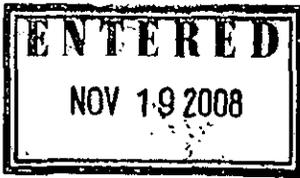
This cause was heard upon the appeal, the record, the briefs, and arguments.
The judgment of the trial court is reversed and final judgment entered for the appellant for the reasons set forth in the Opinion filed this date.
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.
The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on April 9, 2010 per Order of the Court.

By: *[Signature]*
Presiding Judge





COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



Joseph Starkey,	:	CASE No. A0801187
	:	
PLAINTIFF,	:	
	:	
	:	JUDGE FRED NELSON
	:	
-vs-	:	
	:	FINDINGS OF FACT AND
Administrator, Ohio BWC, et al.,	:	CONCLUSIONS OF LAW
	:	
DEFENDANTS.	:	

Pursuant to Plaintiff's request and Civil Rule 52, the court recites the following findings of fact and conclusions of law underlying the judgment for Defendants announced at the post-trial conference of October 23, 2008.

FINDINGS OF FACT

Plaintiff Joseph Starkey was injured on September 11, 2003 in the course and scope of his employment with Defendant Builders FirstSource.

His workers' compensation claim was allowed administratively for a variety of conditions, was disallowed for some, and later was allowed as amended to include the additional condition of "degenerative osteoarthritis of the left hip." The matter came before this court for *de novo* consideration at a trial to the bench on what in effect is the employer's appeal with regard only to the left hip degenerative osteoarthritis allowance.

Plaintiff's expert testified on direct examination that "the pre-existing condition of left hip degenerative osteoarthritis" was "directly aggravated by [the] injury of September 11th." Trial Depo. of John Gallagher, M.D. at 26; *see also id.* at 34 (Q.: "But it didn't cause the osteoarthritis[,] it aggravated it?" A.: "Right."). The court accepts that undisputed testimony.

CONCLUSIONS OF LAW

The court adopts here the conclusions of law recited in its October 23, 2008 ruling. In sum, Ohio appellate case law dictates that, for workers' compensation purposes, a claim for aggravation of a preexisting condition is a claim separate and distinct from a claim for that underlying condition itself, and administrative action on one such claim does not without more trigger Common Pleas Court jurisdiction to consider the other. That is, "a workers' compensation claim for any given condition does not include a claim for aggravation of that condition, and vice versa." *Plotner v. Family Dollar Stores* (6th Dist. App.), 2008-Ohio-4035.

In *Davidson v. Bureau of Workers' Compensation, et al.* (2nd Dist. App.), 2007-Ohio-792, the Second District Court of Appeals ruled that a claim to add the condition of lumbar sprain did not inherently include a request for the condition of aggravation of a pre-existing lumbar sprain: "Intrinsically, these are two separate conditions." Under *Ward v. Roger Company et al.* (2005), 106 Ohio St.3d 35, 39, "the claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken." The *Davidson* court thus reasoned that "a claim for an aggravation of a pre-existing condition not previously adjudicated by the commission is not appealable at the trial court level," even where direct causation of the condition itself had been addressed administratively.

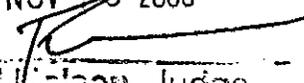
The *Davidson* court explicitly stated: “we find the First District’s judgment in *Collins v. Conrad* (Nov. 15, 2006), Hamilton App. No. C-050829 and C-050865, instructive on this issue. There, the court found that the employee’s jury instruction addressing an aggravation of her claimed condition was not a correct statement of law where the original claim to participate in the Workers’ Compensation Fund only sought allowance for conditions directly caused by her injury.”

The Court in *Collins* found that aggravations “needed to be presented to the Industrial Commission in the first instance and cannot be decided for the first time at the judicial level.... Because the aggravation claims were not presented to the Industrial Commission, those issues were not properly before the common pleas court.”

That principle as applied to this case dictates against a judgment for Plaintiff in the litigation as currently postured. This case remains set for final entry on December 1, 2008 at 3:00 p.m.

ENTERED

NOV 19 2008


Fred Nelson, Judge

Judge

cc: counsel of record

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
DEC 03 2008

Joseph A. Starkey

Plaintiff,

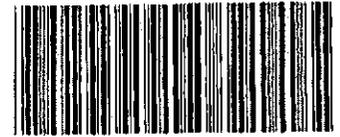
vs.

Marsha P. Ryan, Administrator,
Ohio BWC, et al.

Defendants.

Case No. A0801187

Judge Fredrick Nelson



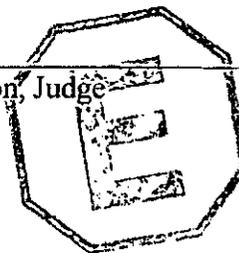
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JUDGMENT ENTRY

The court after hearing the evidence adduced, the arguments of counsel and previously having issued its findings of fact and conclusions of law regarding that evidence and arguments, hereby renders judgment in favor of Defendants and against Plaintiff in this matter. Plaintiff's Ohio Bureau of Workers' Compensation Administration Claim No. 03-416164 is denied for the additional condition of "degenerative osteoarthritis of the left hip". Costs of the deposition transcript of John Gallagher, M.D. in the amount of \$472.50 to be paid to Plaintiff's counsel, Fox & Fox Co., L.P.A. from the surplus fund pursuant to R.C. §4123.512(D). Court costs to Plaintiff.

ENTERED
DEC 03 2008

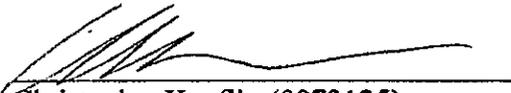
Nelson, Judge



Fred Nelson

PER CONSENT 12/2/08
Howard D. Cade III (0040187)
Becker & Cade
526-A Wards Corner Road
Loveland, Ohio 45140
Phone: (513) 683-2252, ext. 143
Fax: (513) 683-2257
Attorney for Defendant Builders FirstSource

COURT OF COMMON PLEAS
ENTER
FRED NELSON, Judge
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN.



Christopher Kneflin (0073125)
Fox & Fox, LPA
2406 Ashland Avenue
Cincinnati, Ohio 45206
Phone: (513) 961-6644
Fax: (513) 475-5975
Attorney for Plaintiff Joseph Starkey

PER CONSENT 12/3/08

Thomas J. Straus (0031851)
Assistant Attorney General
441 Vine Street, 16th Floor
Cincinnati, Ohio 45202
Phone: (513) 852-1558
Fax: (513) 852-3484
Attorney for Defendant, Administrator

DSP

FILED
COURT OF APPEALS

DEC 17 2008

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**



JOSEPH STARKEY
7970 Pippin Road
Cincinnati, OH 45239

Plaintiff-Appellant,

vs.

BUILDERS FIRSTSOURCE
OHIO VALLEY, LLC
2001 Bryan Street, Suite 1600
Dallas, TX 75201-3017

and

WILLIAM MABE, Administrator
Bureau of Workers' Compensation
30 West Spring Street
Columbus, OH 43215

Defendants-Appellees

APPEAL NO. **C081279**

CASE NO. A0801187

NOTICE OF APPEAL

C081279

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

2008 DEC 17 P 1:49

FILED

Now comes Plaintiff-Appellant, Joseph Starkey and hereby gives notice to the Defendants-Appellees, Builders Firstsource Ohio Valley, LLC and William Mabe, Administrator, Bureau of Workers' Compensation of Plaintiff-Appellant's appeal from the decision of the trial court entered on December 3, 2008.

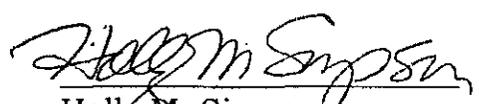
Bernard C. Fox, Jr. (0020466)
Holly M. Simpson (0078739)
Fox & Fox Co., L.P.A.
2407 Ashland Avenue
Cincinnati, OH 45206
Tel: 513-961-6644
Fax: 513-475-5975
Email: barney@foxfoxlaw.com

OBIG, COMP, PARTIES, SUMMONS
<input type="checkbox"/> CERT MAIL <input type="checkbox"/> SHERIFF <input type="checkbox"/> WAVE
<input type="checkbox"/> PROCESS SERVER <input type="checkbox"/> NONE
CLERKS FEES _____ TIC
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DEPOSITED BY <u>20466</u>
FILING CODE <u>A101</u>

CERTIFICATE OF SERVICE

40187
31851

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was served upon Howard Cade III, Esq. 526 Wards Corner Road, Suite A, Loveland, OH 45140 and Thomas Straus, Esq. Office of the Attorney General of Ohio, 1600 Carew Tower, 441 Vine Street, Cincinnati, OH 45202 by ordinary U.S. Mail, postage prepaid this 18 day of December, 2008.


Holly M. Simpson

4123.512 Appeal to court.

(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 the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (A) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-

insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Effective Date: 08-06-1999; 2006 SB7 10-11-2006; 2007 HB100 09-10-2007