

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-0924

JOSEPH STARKEY
Plaintiff-Appellee,

-vs-

BUILDERS FIRSTSOURCE OHIO VALLEY, LLC
Defendants-Appellants, et. al.

ON APPEAL FROM HAMILTON COUNTY
COURT OF APPEALS, FIRST APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND
OHIO ASSOCIATION FOR JUSTICE
URGING AFFIRMANCE ON BEHALF OF PLAINTIFF-APPELLEE

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FILED
NOV 17 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization with over 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was created to advance the founding ideals of the NACCA and to educate the public and legal community on workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ file this merit brief to ask this Court to affirm the decision of the Court of Appeals for the First Appellate District. The OACC and OAJ adopt the statement of facts set forth in Plaintiff-Appellee, Joseph Starkey's, merit brief.

ARGUMENT

In these proceedings, this Court has agreed to examine the following two propositions of law:

Proposition of Law No. 1: A workers' compensation claim for a certain 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*.

Proposition of Law No. 2: A claimant in a 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.

OACC and OAJ request that this Court affirm the decision of the Court of Appeals for the First Appellate District of Ohio because a method of causation is not a distinct and separate medical condition. See R.C. 4123.01(C)(4) (encompassed in the definition of "injury" under R.C. 4123.01(C) are "pre-existing conditions substantially aggravated by the injury). See, also *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 602 N.E.2d 1141 ("A 'claim' in a workers' compensation case is the basic or underlying request by an employee to participate in the compensation system because of a specific work-related injury or disease."). Accordingly, a claimant is able to put forth a claim for aggravation of a condition at the trial court even when they did not allege this theory of causation at the administrative level. *Torres v. General 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.

Allowing a claimant to assert a new theory of causation at the trial level is in accordance with the de novo nature of a R.C. 4123.512 appeal, which allows for the contemplation of new evidence as long as it relates to the same medical condition. *Robinson v. AT&T Network Systems* (10th Dist.), 2003-Ohio-1513, at ¶ 15. In addition, the remedial nature of the workers compensation statute, in combination with its informal procedural rules, show that a claimant

must be able to raise a new theory of causation on appeal or else it would introduce a rigid technicality into an otherwise simple and just system. See R.C. 4123.95 (stating that the workers compensation statute should be liberally interpreted in favor of the injured worker). See, also *Roma v. Indus. Comm.* (1918), 97 Ohio St. 247, 119 N.E.2d 461 (stating that the remedial purpose of the system would be frustrated if a failure to observe every technicality would defeat a just claim).

Alternatively, if this Court finds that a claimant cannot raise a new theory of causation at the trial court, the claimant should not be precluded by *res judicata* from seeking the administrative allowance of an additional claim for the same injury on a different theory of causation; holding otherwise would produce an inequitable result for injured workers.

I. A METHOD OF CAUSATION DOES NOT CONSTITUTE A DISTINCT INJURY; THEREFORE, AS LONG AS A CLAIMANT IS APPEALING THE ALLOWANCE OF THE SAME INJURY AT TRIAL COURT, THE CLAIMANT CAN OFFER A NEW METHOD OF CAUSATION.

R.C. 4123.01(C) defines “injury” as “any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee’s employment.” Encompassed in the definition of “injury” are “pre-existing conditions substantially aggravated by the injury.” R.C. 4123.01(C)(4). Therefore, as long as a claimant proves that his or her injury, whether by direct causation or through the aggravation of a preexisting condition, arose out of the employment, the claimant is entitled to participate in the workers compensation fund. The method of causation is only important in proving this causal relationship.

In the same vein, it does not matter if a claimant wishes to change the theory of causation for the same claim and injury upon appeal since the method of causation does not constitute a

distinct injury. See *Robinson v. AT&T Network Systems*, 2003-Ohio-1513, at ¶ 16 (“Advancing a new theory of causation is not tantamount to trying to prove a new injury”) (citation omitted). However, the Hamilton County Court of Common Pleas did not take this view, incorrectly stating that “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.” Trial decision, pg. 2, citing *Plotner v. Family Dollar Stores* (6th Dist. App.), 2008-Ohio-4035. In fact, the only court that has applied this reasoning to its holding, and which is of precedential value,¹ is the Second Appellate District in *Davidson v. Bur. of Workers’ Comp.* (2d. Dist.), 2007-Ohio-792 (the *Plotner* court distinguished the facts before it from *Davidson* and still granted benefits to the employee for his claim of aggravation of the pre-existing condition). The trial court cited favorably to *Davidson* to support its holding, but the *Davidson* decision is fundamentally flawed.

In *Davidson*, 2007-Ohio-792, at ¶ 13, a claimant argued that that his claim to participate in the workers’ compensation system for a lumbar sprain “inherently included a request for the condition of aggravation of a pre-existing lumbar sprain.” The court disagreed, holding, “[b]ased on the Supreme Court’s opinion in *Ward [v. Kroger]*, 106 Ohio St.3d 35, 2005-Ohio-3560], we find that a claim for an aggravation of a pre-existing condition not previously adjudicated by the commission is not appealable at the trial court.” *Davidson*, 2007-Ohio-792, at ¶ 27. It also

¹ *Collins v. Conrad* (Nov. 15, 2006), 1st. Dist. Nos. C-050829 and C-050862, a decision relied upon by the trial court and the court in *Davidson v. Bur. of Workers’ Comp.* (2d. Dist.), 2007-Ohio-792, is a judgment entry and carries no precedential value. S.Ct.Rep.Op.(3)(A).

pointed to the differing evidentiary requirements needed to prove the aggravation of a preexisting condition versus an injury raised by way of direct causation.

However, *Davidson's* holding is flawed for two reasons: first, the decision rested upon this Court's decision in *Ward*, which is factually inapposite to *Davidson*, and second, its reasoning is in direct conflict with the hearing officer manual, which directs hearing officers to broadly construe a condition in a claim to include both theories of causation as long as there is some evidence on file to support either theory. Hearing Officer Manual Memo S-11.

In fact, *Ward* only stands for the proposition that a claimant is precluded from seeking the allowance of additional *conditions* at the trial court not formerly addressed at the administrative level. Here, Appellee is merely asserting a different method of causation but is litigating the same condition that he put forth at the administrative level: left hip degenerative osteoarthritis injury. Further, the *Davidson* court misinterpreted the commission's fact-finding role: "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." As already mentioned, this is in direct conflict with the hearing officer manual, which dictates that the hearing officer "address the origin of the condition under both theories of causation without referring the claim back to the prior hearing level or BWC."

In short, the trial court erred by relying on *Davidson* to reject Appellee's claims, since the *Davidson* opinion misinterprets the commission's role and relies on *Ward* for support of its holding, a case that does not address the same issues. See *Ward*, 2005-Ohio-3560, at fn.1 ("Specifically, we do not address the issue 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*.").

As a method of causation does not constitute a separate and distinct condition, this Court should affirm the court of appeals decision.

II. THE DE NOVO NATURE OF A R.C. 4123.512 APPEAL, IN ADDITION TO THE REMEDIAL NATURE OF THE WORKERS COMPENSATION STATUTE, ALLOW THE CLAIMANT TO PRESENT NEW EVIDENCE PERTINENT TO THEIR CLAIM, INCLUDING A DIFFERENT THEORY OF CAUSATION.

R.C. 4123.512, which governs appeals into the court of common pleas for any injury or occupational disease other than the extent of disability, prescribes:

[N]ot only a full and complete de novo determination of both facts and law but also contemplates that such determination shall be predicated not upon the evidence adduced before the Industrial Commission but, instead, upon evidence adduced before the common pleas court as in any civil action, which may involve a jury trial if demanded. The proceedings are de novo both in the sense of receipt of evidence and determination. The common pleas court, or the jury if it be the factual determiner, makes the determination de novo without consideration of, and without deference to, the decision of the Industrial Commission.

Jones v. Keller (2d. dist. 1966), 9 Ohio App.2d 210, 223 N.E.2d 657. See Philip J. Fulton, Ohio Workers Compensation Law (3 Ed. 2008), section 12.6, at 508:

With respect to a R.C. 4123.[512] appeal, there are no words such as 'review, affirm, modify, reverse' as are contained in R.C. 2502.02, nor even the word 'affirm' or the words 'reverse, vacate, or modify' as set forth in R.C. 119.12 with respect to administrative appeals generally. Rather, the express language of R.C. 4123.[512] is that contained in division (C) that the court or jury shall 'determine the right of the claimant to participate or to continue to participate in the fund upon evidence adduced at the hearing of the action.'

It follows that a claimant is not required to advance a specific theory of causation at the administrative level if they wish to bring it up in the trial court; R.C. 4123.512 allows for the contemplation of new evidence as long as it relates to the same medical condition. *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.

Further, precluding claimants from raising new theories of causation at the trial level runs afoul of the spirit of the workers compensation statute, which states that the law should be liberally interpreted in favor of the injured worker. R.C. 4123.95.² Similarly, the administrative proceedings and appeals process of workers compensation cases are governed by informal rules; therefore, restricting a claimant to the theories of causation raised administratively does not fit into this informal and remedial statutory scheme. See Philip J. Fulton, *supra*, at 87:

The procedural law of workers' compensation, like the substantive law, is supposed to permit the effectuation of the beneficent and remedial character of the generative legislation. . . . The . . . informal workers' compensation proceedings are designed to avoid the cumbersome procedures and pleading technicalities of the common law and facilitate the making of a just and expeditious decision. . . . This anti-technical bias implicit in workers' compensation proceedings is intended to prevent technicalities from preventing just claims.

Accordingly, the plain language of R.C. 4123.512, coupled with the informal substantive and procedural nature of the workers compensation statute, demonstrate that the decision of the court of appeals is sound.

III. IF THIS COURT DECIDES THAT A CLAIMANT CANNOT RAISE A NEW THEORY OF CAUSATION AT THE TRIAL COURT AND THEIR CLAIM IS SUBSEQUENTLY DENIED, THEY SHOULD NOT BE PRECLUDED BY RES JUDICATA FROM SEEKING THE ADMINISTRATIVE ALLOWANCE OF AN ADDITIONAL CLAIM FOR THE SAME INJURY BUT ON A DIFFERENT THEORY OF CAUSATION.

If a claimant is prevented from raising a new theory of causation at the trial court, OACC and OAJ acknowledge that judicial resources would not be expended efficiently if the same parties were required to litigate the same condition with the same evidence, albeit under a different theory of causation, at the administrative level. However, if this Court holds that a

² Following narrow judicial interpretations of "compensable injury," the General Assembly clarified the definition in 1959 by adding this statutory provision.

claimant cannot raise a different theory of causation at the trial court, preventing them from litigating an alternative theory of causation at the administrative level would lead to inequitable results.

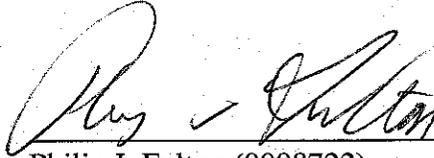
In addition, OACC and OAJ agree with the decision of the Court of Appeals for the First District that *Robinson v. AT&T Network Systems* (10th Dist.), 2003-Ohio-1513, is not controlling to this case. In *Robinson*, the court held that a claimant must raise all theories of causation on appeal to the common pleas court, or *res judicata* would preclude him from bringing a separate claim for the same injury under a different theory of causation at the administrative level. However, as Robinson never appealed his claim to the common pleas court, his situation is different from a fact pattern where a claimant potentially appeals his claim, is precluded from bringing a new theory of causation at the trial court, loses his claim, and then is prevented, as a result of *res judicata*, from asserting a different theory of causation at the administrative level. Under the latter scenario, the parties would not implicate *res judicata* because they would be barred from litigating a variant of the initial causation theory at the trial court if not already asserted administratively. Contra *Robinson*, 2003-Ohio-1513, at ¶ 12 (“The crux of AT&T’s argument is that when Robinson declined to pursue a R.C. 4123.512 appeal of the original claim, where he could have presented the arguments alternatively, he forfeited his opportunity to litigate a variant of the initial causation theory. We agree.”).

Therefore, if this Court holds that a claimant cannot assert a new theory of causation at the trial court, the claimant should be free to pursue the alternative theory at the administrative level because they would be precluded from asserting every ground for relief on the first action. Contra *id.* at ¶ 14 (“The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” (citation omitted)).

CONCLUSION

For the foregoing reasons, OACC and OAJ urge this Court to affirm the decision of the Court of Appeals for the First Appellate District and enter judgment for Appellee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular U.S.

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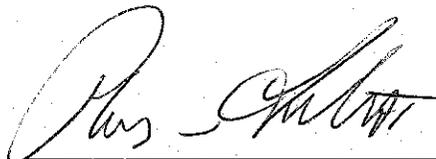
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