

ORIGINAL

In the
Supreme Court of Ohio

JAMES SPENCER,	:	Case No. 2010-2138
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Miami County Court of Appeals,
v.	:	Second Appellate District
	:	
FREIGHT HANDLERS, INC, et al.,	:	Court of Appeals
	:	Case No. 09CA00044
	:	
Defendants-Appellants.	:	

**MERIT BRIEF OF DEFENDANT-APPELLANT, ADMINISTRATOR,
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INTRODUCTION

To appeal a decision of the Ohio Industrial Commission under R.C. 4123.512, an appealing party must name the Administrator of the Bureau of Workers' Compensation as a party to the appeal and must serve a copy of the notice of appeal at the Administrator's central office in Columbus. These statutorily-mandated requirements are jurisdictional for two reasons: (1) To invoke a court's jurisdiction, a notice of appeal under R.C. 4123.512 must place all parties on notice that an appeal has been filed; and (2) the General Assembly intentionally made the Administrator an essential party in *every* workers' compensation appeal, consistent with the Administrator's responsibility to safeguard the workers' compensation fund.

Although a party need only "substantially comply" with the requirements for a notice of appeal set forth in R.C. 4123.512 to invoke jurisdiction, the requirements that the Administrator "shall be [a] part[y]" to an appeal under that section, and that the appealing party "shall serve a copy of the notice of the appeal on the administrator" are absolute. This is because substantial compliance occurs only if a timely notice of appeal includes enough information to place all parties to a proceeding on notice that an appeal has been filed. A notice of appeal that fails to name or serve the Administrator cannot possibly put him on notice that an appeal has been filed, and therefore is jurisdictionally defective.

The Administrator's statutory responsibility to safeguard and maintain the state insurance fund further confirms the jurisdictional character of R.C. 4123.512's notice requirements. The General Assembly intended that the Administrator be able to represent the workers' compensation fund at every level of administrative and appellate review. If an appealing party can bypass the notice requirements and still invoke the jurisdiction of a common pleas court, the remaining parties to an action would be able to diminish the state fund in numerous ways, both without the Administrator's knowledge and without him being able to act on the fund's behalf.

Here, the commission denied James Spencer's claim to workers' compensation benefits and Spencer appealed that denial to the court of common pleas under R.C. 4123.512(B). But Spencer's notice of appeal was defective because it did not name the Administrator as a party and because he did not notify the Administrator of the appeal. Because these notice requirements are jurisdictional, the common pleas court could not take jurisdiction of Spencer's appeal: The most important party in the appeal—the Administrator—was not even on notice of the litigation.

The Court should therefore reverse the Second District's decision and hold that the requirements in R.C. 4123.512(B) that the Administrator be named as a party and served with the notice of appeal are jurisdictional, and that the common pleas court therefore never had jurisdiction over Spencer's case.

STATEMENT OF THE CASE AND FACTS

A. The Administrator of the Bureau of Workers' Compensation is a party to all workers' compensation proceedings, including at all levels of appeals.

When a claimant seeks workers' compensation benefits, he must file a claim with the Bureau of Workers' Compensation. The Administrator of the bureau makes an initial determination to grant or deny the claim. R.C. 4123.511(B). That determination is reviewable through several layers of administrative proceedings before the commission: An employer or claimant may appeal the Administrator's decision to a district hearing officer, R.C. 4123.511(C), appeal the district hearing officer's determination to a staff hearing officer, R.C. 4123.511(D), and finally seek review before the entire commission, R.C. 4123.511(E). In each of these proceedings, "the administrator is a party and may appear and participate. . . on behalf of the state insurance fund." R.C. 4123.511(G)(3). Under certain circumstances, the Administrator himself can also file administrative appeals on behalf of the fund. *Id.*

Once administrative proceedings are complete, “R.C. 4123.512 provides a unique process for an appeal to the court of common pleas regarding a claimant’s right to participate in the State Insurance Fund.” *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d 411, 413, 1999-Ohio-360. An employer or claimant has sixty days to appeal a final administrative determination to the appropriate common pleas court. R.C. 4123.512(A). To “perfect the appeal,” a party must file a timely notice of appeal, “stat[ing] 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.” R.C. 4123.512(B). Even at this stage, as in the administrative proceedings, the Administrator is a party to the appeal: “The administrator of workers’ compensation, the claimant, and the employer shall be parties to the appeal.” *Id.* The appealing party must serve a copy of the notice on the Administrator at the bureau’s central office in Columbus. *Id.*

Regardless of who files a notice of appeal, the “claimant has both the burden of going forward with evidence and the burden of proof at the hearing before the common pleas court.” *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St. 3d 361, 366, 1998-Ohio-432 (internal quotation and citation omitted); see also *Kaiser*, 84 Ohio St. 3d at 413. Accordingly, the claimant has thirty days after the notice of appeal is filed to file a petition—similar to a complaint—“containing a statement of facts . . . 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.” R.C. 4123.512(D); see *Robinson*, 81 Ohio St. 3d at 364 (explaining that a petition is a complaint for purposes of the Rules of Civil Procedure); *Kaiser*, 84 Ohio St. 3d at 413.

This case turns on whether a common pleas court has jurisdiction to review a workers’ compensation determination under R.C. 4123.512 when a claimant files a notice of appeal, but

fails to name the Administrator as a party to the action and fails to serve the Administrator with a copy of the notice.

B. The commission denied Spencer's workers' compensation claim and he appealed to the court of common pleas. But Spencer neglected to name the Administrator as a party or to serve him with the notice of appeal.

In 2009, the commission denied Spencer's workers' compensation claim against his employer, Freight Handlers, Inc. ("FHI"), for a shoulder injury that allegedly occurred while he was on the job. *Spencer v. FHI, LLC* (2d Dist. Oct. 29, 2010), No. 09-CA-44, 2010-Ohio-5288 ("App. Op."), ¶ 2.

Spencer filed a notice of appeal in the Darke County Court of Common Pleas under R.C. 4123.512, naming only FHI as a defendant. Spencer omitted the Administrator as a party to the appeal and failed to serve the Administrator with the notice of appeal. *Id.* at ¶ 3. Instead, Spencer mailed the notice of appeal to a Cincinnati attorney who neither represented the bureau, nor was affiliated with the bureau or the commission, contrary to the Second District's understanding. See *id.* at ¶ 18; see also Br. of Def.-Appellee FHI, *Spencer v. FHI, LLC* (2d Dist. Apr. 2, 2010), No. 09-CA-44, at 3 ("Rather, both the Notice of Appeal and the Petition were sent to FHI, FHI's counsel, FHI's third party administrator ("TPA"), and to the law offices of Joseph C. Gruber—an attorney retained by FHI's TPA to handle administrative hearings relative to this workers' compensation claim."). Spencer then filed a petition, again failing to name the Administrator as a party or to serve him with the petition. App. Op. at ¶ 3.

FHI moved to dismiss for lack of subject matter jurisdiction and failure to join a necessary party, arguing that Spencer's notice of appeal was fatally defective under R.C. 4123.512 because Spencer failed to name the Administrator as a party or serve him with a copy of the notice of appeal. *Id.* at ¶ 4.

In response, Spencer moved for leave to amend his petition. *Id.* at ¶ 5. He attached a revised petition to the motion, naming the Administrator as a party. *Id.* Without receiving leave to amend, Spencer served a copy of the revised petition on the Administrator, thereby informing him of the appeal for the first time. *Id.*

Upon learning of the appeal—more than eleven weeks after it was filed—the Administrator filed an answer to Spencer’s petition and argued that the trial court lacked jurisdiction based on Spencer’s failure to name and serve the Administrator with the notice of appeal. *Id.* at ¶¶ 3, 6.

The Darke County court transferred the case to the Miami County Court of Common Pleas, the county in which the injury allegedly occurred. *Id.* at ¶ 5. The Miami County Common Pleas court granted FHI’s motion to dismiss for lack of subject matter jurisdiction, concluding that “omitting the Administrator as a party and failing to serve the Administrator with the notice of appeal does not substantially comply” with the requirements of R.C. 4123.512(B). Order of Dismissal for Lack of Jurisdiction and Order Overruling Plaintiff’s Motion to Amend Complaint, *Spencer v. FHI, LLC* (Miami C.P. Oct. 29, 2009), No. 09-988, at 2. The court also denied Spencer’s motion to amend the petition. Because the defective notice of appeal meant that jurisdiction never vested in the trial court to begin with, the court reasoned that “the defect cannot be corrected by the amendment of the pleadings or otherwise.”¹ *Id.* The court then denied Spencer’s motion for reconsideration. Order Overruling Plaintiff’s Motion for Reconsideration, *Spencer v. FHI, LLC* (Miami C.P. Dec. 11, 2009), No. 09-988.

¹ Because the Miami County common pleas court did not have jurisdiction, “[t]he safe harbor provision of O.R.C. 4123.512(A) which allows transfer of the case to a court with proper venue and jurisdiction [did] not apply.” Spencer also could not file a new notice of appeal because the sixty-day filing period had already run. See R.C. 4123.512(A).

The Second District reversed, App. Op. at ¶ 29, holding that “failure to name the Administrator in the notice of appeal or to serve the Administrator with the notice of appeal does not deprive a court of common pleas of subject matter jurisdiction to hear an R.C. 4123.512 appeal,” *id.* at ¶ 22.

FHI and the Administrator moved to certify a conflict, citing a Sixth District Court of Appeals decision that reached the opposite outcome on similar facts. The Second District denied the motion.² See Decision & Entry, *Spencer v. FHI, LLC* (2d Dist. Jan. 6, 2011), No. 09-CA-44.

The Administrator asked this Court to accept discretionary jurisdiction and the Court accepted the appeal on March 16, 2011.

ARGUMENT

Administrator’s Proposition of Law:

R.C. 4123.512(B)’s requirements that the Administrator be a party to the appeal and be served with a notice of appeal are jurisdictional, and noncompliance with these requirements cannot be cured later.

- A. In light of the statute’s plain language and the Administrator’s statutory role as protector of the workers’ compensation fund, R.C. 4123.512(B)’s notice requirements are jurisdictional.**

R.C. 4123.512(B)’s notice requirements are jurisdictional for two reasons. First, the plain language describing the contents of a notice of appeal clearly mandates both that the

² The Second District concluded that there was no conflict on the jurisdictional question because it had decided the case on different grounds. See Decision & Entry, *Spencer v. FHI, LLC* (2d Dist. Jan. 6, 2011), No. 09CA00044, at 2. Specifically, the court characterized its earlier opinion as having held “that the jurisdictional defect was waived by the administrator’s voluntary appearance in the action filed in the common pleas court.” *Id.* But the Second District’s earlier opinion neither mentioned “waiver” nor obviated a conflict on the jurisdictional question, since it held only “[a]lternatively” that “an appearance by the Administrator, as in the present case, demonstrates that the Administrator was put on notice to the extent that R.C. 4123.512(B) requires.” App. Op. at ¶ 24. More important, “waiver [cannot] apply to a challenge to the subject-matter jurisdiction of a court.” *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 39.

Administrator is included as a party and served with the notice of appeal. Second, the General Assembly intended for the Administrator to have the opportunity to play a role in *every* appeal under R.C. 4123.512, consistent with his statutory obligations as protector of the workers' compensation fund.

1. To invoke a court's jurisdiction, a notice of appeal under R.C. 4123.512 must place all parties on notice that an appeal has been filed.

Ohio common pleas courts do not have inherent jurisdiction over workers' compensation matters. *Jenkins v. Keller* (1966), 6 Ohio St. 2d 122, syl. ¶ 4. Rather, they have only such jurisdiction as is conferred by statute. *Id.* "The filing of the notice of the appeal with the court is the only act required to perfect the appeal," and it is the act that actually vests the court with jurisdiction to hear the matter. R.C. 4123.512(A). In other words, because the common pleas courts have jurisdiction only as statutorily prescribed, a statutorily defective notice of appeal deprives the court of jurisdiction. See *Olaru v. Fed Ex Custom Critical* (6th Dist.), No. L-03-1143, 2003-Ohio-6376, ¶ 2 & Ex. A; *Day v. Noah's Ark Learning Ctr.* (5th Dist.), No. 01-CVE-12-068, 2002-Ohio-4245, ¶ 15.

Revised Code 4123.512(B) provides that: "[t]he administrator of workers' compensation," along with the claimant and the employer, "*shall be parties to the appeal,*" and "[t]he 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.*" (Emphasis added). "[W]hen it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute *is mandatory.*" *Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 1992-Ohio-17 (emphasis in original). Accordingly, the statute mandates that the Administrator be a party to all appeals and that the party filing the appeal "shall" serve a copy of the notice on the Administrator.

Historically, courts have required strict compliance with the statute's prerequisites. See *Cadle v. Gen. Motors Corp.* (1976), 45 Ohio St. 2d 28, syl. ¶ 1. Accordingly, under *Cadle*, failure to include in the notice of appeal any of the following statutorily requirements would result in dismissal for lack of subject matter jurisdiction: (1) the claimant's name; (2) the employer's name; (3) the claim number; (4) the date of the order appealed from; (5) that an appeal was being taken. R.C. 4123.512(B).

The absolute jurisdictional character of those requirements was relaxed somewhat in *Fisher v. Mayfield* (1987), 30 Ohio St. 3d 8, which overruled *Cadle*. Now, to invoke a common pleas court's jurisdiction over a workers' compensation appeal, the notice of appeal must be "in substantial compliance" with the requirements of R.C. 4123.512. *Id.* at 10-11. Even under *Fisher*, however, the requirement to name and serve the Administrator remains absolute: "Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. 4123.519 [renumbered R.C. 4123.512] includes *sufficient information*, in intelligible form, *to place on notice all parties to a proceeding that an appeal has been filed* from an identifiable final order which has determined the parties' substantive rights and liabilities." *Id.* at 11 (emphasis added). That baseline notice requirement is utterly lacking where a notice of appeal fails to name the Administrator and fails otherwise to advise him that an appeal is underway. To hold otherwise would be incongruous with *Fisher*, as a notice of appeal that fails to name or serve the Administrator could not possibly put him on notice that an appeal has been filed.

Other articulations of the "substantial compliance" test are in accord. When a party's notice of appeal fails to comply with a statutory requirement, the Court has asked "whether the purpose of the unsatisfied provision is sufficiently important to require compliance for

jurisdictional purposes.” *Mullins v. Whiteway Mfg. Co.* (1984), 15 Ohio St. 3d 18, 21. Given that “[t]he purpose of a notice of appeal is to set forth the names of the parties and to advise those parties that an appeal of a particular claim is forthcoming,” naming and serving the Administrator—who is a *statutorily-required party*—is imperative and thus non-negotiable. *Wells v. Chrysler Corp.* (1984), 15 Ohio St. 3d 21, 24.

Many lower courts have recognized that notice to the Administrator is elemental to “substantial compliance” with R.C. 4123.512. See *Welsh Dev. Co. v. Warren County Reg’l Planning Comm’n*, Nos. 2010-6111 & 2010-858, 2011-Ohio-1604, ¶ 30 (if “a notice of appeal . . . informs and appries the [party] of the taking of an appeal, sets forth the names of the parties, and advises those parties that an appeal of a particular claim is forthcoming,” then it meets *Fisher’s* substantial compliance standard); *Wethington v. Univ. of Cincinnati Hosp.* (1st Dist. Apr. 9, 1999), No. C-980656, 1999 Ohio App. Lexis 1567, *8 (failing to name and serve the Administrator is an omission to the jurisdictional requirement that, by definition, is “essential [to] provid[e] appropriate notice” to the Administrator); *Howard v. Penske Logistics, LLC* (9th Dist. Aug. 27, 2008), No. 24210, 2008-Ohio-4336, ¶ 10 (“Howard’s notice of appeal is fatally defective in that it fails . . . to place all parties of the appeal on notice.”); *Haas v. Indus. Comm’n of Ohio* (10th Dist. Dec. 21, 1999), No. 99AP-475, 1999 Ohio App. Lexis 6483 (observing that none of the cases the claimant cited as examples of substantial compliance with R.C. 4123.512 involved “fail[ure] to provide proper service of the notice of appeal and complaint to the defendant, as happened in this case”).

By contrast, appealing parties substantially comply with the notice requirements of R.C. 4123.512(B) when some information is omitted in the notice of appeal, but that information is still sufficient to put parties on notice that the appeal is forthcoming—not when they bypass *the*

very act of putting a party on notice, as Spencer did here. For example, misstating the date of the order appealed from was not fatal to an otherwise compliant notice of appeal, because “all concerned parties had sufficient information from which they could determine that a particular claim or action was forthcoming.” *Fisher*, 30 Ohio St. 3d at 11; accord *State ex rel. Lapp Roofing & Sheet Metal Co. v. Indus. Comm’n of Ohio*, 117 Ohio St. 3d 179, 2008-Ohio-850, ¶ 21; *Mullins*, 15 Ohio St. 3d at 20; *State ex rel. Jones v. Indus. Comm’n of Ohio*, 65 Ohio St. 3d 133, 136, 1992-Ohio-16. Similarly, filing in the common pleas court a document called an “objection” to the commission’s determination, rather than a “notice of appeal,” was not fatal where the document otherwise complied with the statutory requirements for a notice of appeal. See *Kaiser*, 84 Ohio St. 3d at 413. In all of these situations, a party received notice and had enough information to “determine that a particular claim or action was forthcoming.” *Fisher*, 30 Ohio St. 3d at 11. That was not the case here. The Administrator received no notice whatsoever that Spencer had filed an appeal.

Concluding that these statutory naming and service requirements are absolute jurisdictional prerequisites is consistent with this Court’s prior holdings that compliance with naming and service requirements under analogous statutes is necessary to invoke a court’s jurisdiction. For example, failure to serve the Attorney General when filing a declaratory judgment action under R.C. 2721.12 “is a jurisdictional defect.” *Asbury Apts., Joint Venture v. Dayton Bd. of Zoning Appeals*, 77 Ohio St. 3d 1229, 1997-Ohio-272; accord *Sebastiani v. City of Youngstown* (1979), 60 Ohio St. 2d 166, 167. Failure to name the Tax Commissioner as a party and serve him when appealing a Board of Tax Appeals decision under R.C. 5717.03(B) is a jurisdictional flaw. See *Olympic Steel, Inc. v. Cuyahoga County Bd. of Revision*, 110 Ohio St. 3d 1242, 2006-Ohio-4091, ¶ 2; *Columbus City Sch. Dist. Bd. of Educ. v. Franklin County Bd. of Revision*, 114 Ohio St. 3d

1224, 2007-Ohio-4007, ¶ 2. And failure to join the county Board of Education and serve it with a notice when appealing a county board of revision's decision under R.C. 5717.05 is jurisdictional. *Huber Hts. Circuit Courts, Ltd. v. Carne*, 74 Ohio St. 3d 306, 307-08, 1996-Ohio-157. When an appellant fails to comply with its statutory obligation to name and serve a required party, as here, a court lacks jurisdiction. See *Olympic Steel*, 2006-Ohio-4091, at ¶ 2.

For all these reasons, the Court should conclude that naming and serving the Administrator are absolute jurisdictional requirements under R.C. 4123.512(B) and that the trial court therefore lacked jurisdiction over the matter.

2. The Administrator's statutory responsibility to safeguard and maintain the state insurance fund confirms the jurisdictional nature of R.C. 4123.512's notice requirements.

We know that the notice requirements in R.C. 4123.512(B) are jurisdictional for an additional reason—because the General Assembly intentionally made the Administrator the most important party in every workers' compensation appeal. The Administrator plays a pivotal role in these cases because of the statutory responsibilities the General Assembly confers upon him in R.C. 4123.512 and R.C. 4123.34. To properly discharge these obligations to the workers' compensation fund, the Administrator must be a party to these appeals from the outset.

In addition to requiring that the Administrator be named and served, R.C. 4123.512 contemplates a role for the Administrator at the outset of every appeal. Specifically, the Administrator must notify the employer of the consequences of its failing to actively participate in litigation, and decide whether to actively involve the bureau in litigation: “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.” R.C. 4123.512(B) (emphasis added). If the Administrator is not timely served—and an employer is thereby not warned of the consequences

of its nonparticipation—an employer may be prejudiced by making an ill-informed decision. Moreover, if the Administrator cannot warn the employer, and finds out only later that the employer is not taking an active role in the litigation, the Administrator's other statutory obligations may be compromised.

Most important, the Administrator's ability to actively participate in every appeal—and therefore, his notice of the appeal—is necessary because the Administrator has a statutory responsibility “to safeguard and maintain the solvency of the state insurance fund.” R.C. 4123.34; see also R.C. 4123.44 (designating the Administrator as a “trustee[] of the state insurance fund”). As part of these obligations, the Administrator must “fix and maintain . . . the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims.” R.C. 4123.34. The Administrator has authority to approve all fund disbursements, R.C. 4123.31, and to invest fund surplus, R.C. 4123.44. Further, the Administrator has broad authority to adopt rules for collection, maintenance, and disbursements of the fund. R.C. 4123.32.

In keeping with these duties as the guardian of the fund, the Administrator needs to be (and is statutorily contemplated as) a party to actions involving claims against the fund, both at the administrative and appellate level. See R.C. 4123.511(G)(3) (designating the Administrator as a party in administrative claims proceedings, authorizing him to appear on behalf of the fund, and allowing him to file appeals on behalf of the fund); R.C. 4123.512(B) (making the Administrator a party to appeals to the common pleas court). If the Administrator never receives a notice of an appeal under R.C. 4123.512, he cannot possibly represent the fund's interests in that litigation. And even if the Administrator receives untimely notice of an action, his inability to participate in

early dispositive motions could limit his subsequent ability to weigh in on workers' compensation issues in the common pleas court or on further appeal.

The Administrator needs notice of all R.C. 4123.512 appeals at the outset, as required by R.C. 4123.512(B), because litigation—even at an early stage—can proceed in numerous ways that are unfavorable to the Administrator and the state fund. For example, if the Administrator lacks notice that an employer is appealing the commission's approval of a workers' compensation claim, the employer could—without the Administrator's opposition—prevail in a motion to dismiss or motion on the pleadings, overturn the commission's decision, and apply for a premium rate adjustment. Alternatively, if a claimant appeals the commission's denial of a claim without giving notice to the Administrator and prevails on a motion for summary judgment, the workers' compensation fund would be liable for the costs of the claim, *even though the Administrator had no opportunity to oppose the motion.*

Even more troublesome, if appeals can proceed without notice to the Administrator, then an employer and claimant could settle without the Administrator's participation, causing additional difficulties related to fund administration. See, e.g., *State ex rel. Dillard Dep't Stores v. Ryan*, 122 Ohio St. 3d 241, 2009-Ohio-2683 (employer unable to obtain reimbursement after settling with claimant when the parties failed to notify the bureau of the settlement). In all these situations, the Administrator, lacking notice, is unable to protect fully the resources that all parties want to access and that the Administrator is charged with protecting: the state fund and the surplus fund.

In sum, the General Assembly's mandate that the appealing party put the Administrator on notice of the appeal must be read in conjunction with the Administrator's responsibilities to the state insurance fund and his obligation to notify employers of their risk in choosing not to

actively participate in litigation. In light of those obligations, it is reasonable—indeed, vital—to conclude that the General Assembly intended for the Administrator to be named and served with all notices of appeal, and therefore to construe those particular requirements in R.C. 4123.512 as jurisdictional.

B. Failure to name the Administrator and serve him with a notice of appeal cannot be cured by amending a petition or complaint.

Revised Code 4123.512(B)'s notice requirements are jurisdictional, and an appealing party's initial noncompliance cannot be cured later by amending the notice of appeal or serving notice on the Administrator, or by filing an amended complaint. This is true because: (1) A defective notice of appeal fails to vest the trial court with jurisdiction, so the court has no power to grant a motion to amend the complaint to include the Administrator; (2) As explained above, consistent with the Administrator's unique responsibilities, the General Assembly intended him to be a party to a R.C. 4123.512 appeal *at the outset* of litigation; and (3) Even if the trial court could rule on Spencer's motion, it did not abuse its discretion by denying leave to amend.

First, Spencer cannot cure the flaws in his notice of appeal by filing an amended petition naming the Administrator, because the original defective notice failed to vest jurisdiction in the trial court in the first place and the sixty-day limitations period had run. Lacking jurisdiction from the outset, the trial court could not rule on the later motion to amend. If a claimant could amend his pleadings to include a party who is necessary to trigger jurisdiction more than sixty days after the final administrative disposition, that would frustrate the limitations period in R.C. 4123.512 and undermine the very purpose of the notice requirements. Because the trial court has jurisdiction *only* when all parties to a proceeding are put on notice that an appeal has been filed, see *Fisher*, 30 Ohio St. 3d at 11, it lacks jurisdiction to allow the pleading amendment necessary to create jurisdiction.

Second, the idea that an appealing party can correct notice defects later in the litigation is illusory because, as explained above in Part A.2, the General Assembly contemplated that the Administrator receive notice at the outset of an appeal so that he can fulfill his statutory duties to safeguard the fund. The Second District's assertion that the lack of notice can be cured simply by a motion to join the Administrator, App. Op. at ¶ 26, is therefore unworkable, and it undermines the purpose of the notice requirements in R.C. 4123.512(B). The General Assembly intended the Administrator to receive notice of all appeals at the outset, recognizing that otherwise the Administrator would often lack actual notice. Thousands of workers' compensation appeals are filed every year, and the Administrator cannot monitor every common pleas court on the off-chance that an appeal is filed without notice. Imposing such a duty on the Administrator—in direct contravention to the General Assembly's intent—would result in significant fund expenditure and consume unnecessary legal and judicial resources. Conversely, requiring compliance with simple naming and service requirements—requirements that the statute already explicitly mandates—is efficient and predictable for the Administrator, the parties, and the courts.

Finally, even if the trial court could have ruled on Spencer's motion to amend—and it lacked jurisdiction to do so—the trial court did not abuse its discretion by denying the motion. See *Richardson v. Indus. Comm'n of Ohio*, (2d Dist. May 29, 2009), No. 22797, 2009-Ohio-2548, at ¶¶ 38-40 (reviewing denial of motion to amend for abuse of discretion). Unlike some cases where a court may find jurisdiction because there was a close enough connection between a named defendant and the defendant who should have been named; see, e.g., *Wethington*, 1999 Ohio App. Lexis 1567, at *9, this is not one of those cases. Spencer neither named nor served *any* party with a sufficient connection to the Administrator to allow the conclusion that Spencer

substantially complied with R.C. 4123.512. Spencer does not dispute that he omitted the Administrator as a party in both his notice of appeal and petition, and he did not serve the Administrator with either pleading. Thus, the trial court acted within its discretion in denying Spencer's request to amend his pleadings to include the Administrator.

In short, the statute's plain language, the General Assembly's clear intent to include the Administrator in every appeal under the statute, and principles of public policy support the conclusion that R.C. 4123.512(B)'s notice requirements are jurisdictional, and an appealing party's noncompliance deprives the common pleas court of jurisdiction.

CONCLUSION

For all the reasons discussed above, the requirements in R.C. 4123.512(B) that the Administrator be named as a party and served with the notice of appeal are jurisdictional. Because noncompliance with those requirements deprives a common pleas court of jurisdiction, the Administrator respectfully requests that the Court reverse the Second District's decision and dismiss Spencer's case for lack of subject matter jurisdiction.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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CERTIFICATE OF SERVICE

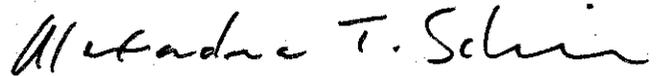
I certify that a copy of the foregoing Merit Brief of Defendant-Appellant, Administrator, Ohio Bureau of Workers' Compensation, was served by U.S. mail this 13th day of May, 2011, upon the following counsel:

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Counsel for Defendant-Appellee,
Freight Handlers, Inc.



Alexandra T. Schimmer
Solicitor General

APPENDIX

ORIGINAL

In the
Supreme Court of Ohio

10-2138

JAMES SPENCER,

Plaintiff-Appellee,

v.

FREIGHT HANDLERS, INC, et al.,

Defendant-Appellant.

Case No. 2010-

On Appeal from the
Miami County
Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 09CA00044

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT MARSHA RYAN,
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION**

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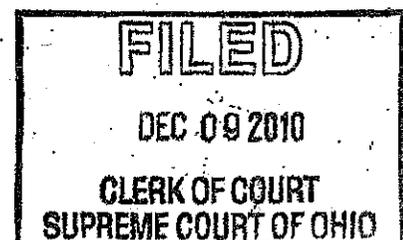
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EXHIBIT 1



**NOTICE OF APPEAL OF DEFENDANT-APPELLANT MARSHA RYAN,
ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION**

Defendant-Appellant Marsha Ryan, Administrator, Bureau of Workers' Compensation gives notice of her discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Miami County Court of Appeals, Second Appellate District, journalized in Case No. 09CA00044 on December 6, 2010. Date-stamped copies of the Second District's Journal Entry and Opinion are attached as Exhibit 1 to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General

Alexandra T. Schimmer

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CERTIFICATE OF SERVICE

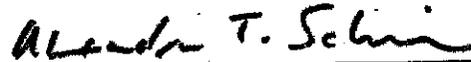
I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant Administrator, Bureau of Workers' Compensation, was served by U.S. mail this 9th day of December, 2010 upon the following counsel:

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Alexandra T. Schimmer (0075732)
Chief Deputy Solicitor General

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER
Plaintiff-Appellant

C.A. CASE NO. 09-CA-44

vs.

T.C. CASE NO. 09-988

FHI, LLC, et al.
Defendants-Appellees

(Civil Appeal from
Common Pleas Court)

O P I N I O N

Rendered on the 29th day of October, 2010.

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Attorneys for Defendant-Appellee Administrator, Bureau of
Workers' Compensation

GRADY, J.:

Plaintiff, James Spencer, appeals from an order dismissing
his R.C. 4123.512 appeal from a decision of the Industrial
Commission and overruling his motion for leave to amend his
petition.

Spencer filed a workers' compensation claim against Freight

Handlers, Inc. ("FHI") for a left shoulder injury he allegedly suffered on October 23, 2008, while lifting at his employment with FHI in Miami County. Spencer's claim ultimately was denied by the Industrial Commission on June 6, 2009.

On August 7, 2009, Spencer filed a notice of appeal pursuant to R.C. 4123.512 in the Court of Common Pleas of Darke County. Spencer's notice of appeal did not name the Administrator of the Bureau of Workers' Compensation ("Administrator") as a party to the appeal, and Spencer failed to serve a copy of the notice of appeal on the Administrator "at the central office of the bureau of workers' compensation in Columbus" as required by R.C. 4123.512(B). On September 3, 2009, Spencer filed the petition required by R.C. 4123.512(D), but he neither served a copy on the Administrator nor named the Administrator as a party in the petition.

On September 11, 2009, FHI filed a motion to dismiss for lack of subject matter jurisdiction and/or for failure to join a necessary party based on Spencer's failures to name the Administrator as a party and serve the Administrator with a copy of the notice of appeal. Alternatively, FHI's motion sought to transfer the case to the Common Pleas Court of Miami County for decision on its motion to dismiss, because Spencer's injury occurred in Miami County, not in Darke County. R.C. 4123.512(A) requires the notice of appeal to be filed in "the court of common pleas of the county in which the injury was inflicted ***."

In response to FHI's motion, Spencer filed a motion for

leave to amend his petition and to transfer the case to the Miami County Court. Spencer attached an amended petition to his motion for leave to amend and served a copy of the amended petition on the Administrator at the central office of the bureau of workers' compensation in Columbus. On October 8, 2009, the Court of Common Pleas of Darke County transferred the case to the Court of Common Pleas of Miami County pursuant to R.C. 4123.512(A).

On October 27, 2009, the Administrator filed an Answer to Spencer's amended petition. Two days later, the Court of Common Pleas of Miami County granted FHI's motion to dismiss for lack of subject matter jurisdiction and overruled Spencer's motion to amend his petition. Spencer filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT HELD IT LACKED SUBJECT MATTER JURISDICTION TO HEAR APPELLANT JAMES SPENCER'S NOTICE OF APPEAL."

The trial court found that it lacked subject matter jurisdiction to decide Spencer's appeal "because the Plaintiff did not name the Administrator as a party in the notice of appeal and did not serve the notice as required by O.R.C. 4123.512(B)." The trial court concluded:

"Since neither Court had jurisdiction, the defect cannot be corrected by the amendment of the pleadings or otherwise. The safe harbor provision of O.R.C. 4123.512(A) which allows the transfer of the case to a court with proper venue and jurisdiction does not apply because neither the Darke County Common Pleas Court or this Court ever had subject matter

jurisdiction.

"Accordingly, the Court lacks subject matter jurisdiction. The motion for leave to amend the complaint is moot and therefore overruled." (Dkt. 3.)

R.C. 4123.512(A) confers a right on a claimant to appeal from an order of the Industrial Commission to the court of common pleas of the county in which the alleged injury occurred. R.C. 4123.512(A) further provides:

"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."

Spencer filed a notice of appeal in the Court of Common Pleas of Darke County. The notice should have been filed in the Court of Common Pleas of Miami County, where the injury occurred. Although at one point in time this would have resulted in a dismissal for lack of subject matter jurisdiction, *Heskett v. Kenworth Truck Co.* (1985), 26 Ohio App.3d 97, R.C. 4123.512(A)

now contains a safe harbor provision that required the transfer of Spencer's appeal from Darke County to Miami County. Further, R.C. 4123.512(A) provides that "[t]he filing of the notice of appeal with the court is the only act required to perfect the appeal." Therefore, if Spencer's notice of appeal complied with the jurisdictional requirements of R.C. 4123.512(B), he could rely on his filing date in Darke County and his notice of appeal would be timely filed pursuant to R.C. 4123.512(A).

R.C. 4123.512(B) provides for the contents of the notice of appeal and identifies the parties to the appeal:

"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."

It is undisputed that the contents of Spencer's notice of appeal satisfied the five requirements that the first paragraph

of R.C. 4123.512(B) imposes. However, neither the notice of appeal nor the subsequent petition that Spencer filed pursuant to R.C. 4123.512(D) named the Administrator as a party. Neither was the Administrator served with a copy of the notice of appeal in the manner that R.C. 4123.512(B) requires. Instead, copies were mailed to an attorney in Cincinnati who apparently represented the Bureau of Workers' Compensation in the proceedings before the Industrial Commission.

In *Jarmon v. Ford Motor Company* (April 30, 1996), Franklin App. No. 95APE10-1377, the Tenth District held that the failure to name the Administrator as a party did not deprive the court of common pleas of subject matter jurisdiction:

"In oral argument, Ford relied upon the R.C. 4123.512(B) language that 'the administrator [of the bureau of worker's compensation], the claimant, and the employer shall be parties to the appeal ***,' asserting plaintiff's letter did not comply with R.C. 4123.512(B) because the letter did not name the administrator as a party. Despite Ford's construction, R.C. 4123.512(B) provides separate requirements for a valid notice of appeal and for naming parties to the appeal itself. *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 104, 181 N.E.2d 814; *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527, unreported, citing *Milenkovich*, supra. According to the plain language of the statute, the notice of appeal must state only the five factors set forth above; it need not state the administrator's name. *Goricki*, supra. The court's

jurisdiction depends on timely filing the notice of appeal, not on naming within the notice the administrator or the necessary parties to the appeal itself. *Goricki, supra*, citing *Singer Sewing Machine, supra*. [] Accordingly, plaintiff's failure to name the administrator in her letter does not warrant dismissal for lack of jurisdiction." (Emphasis in original.)

As noted in *Jarmon*, the Ninth and Eleventh Districts have also held that the naming of the Administrator as a party is not a jurisdictional requirement when filing a notice of appeal. *Karnofel v. Cafaro Management Co.* (June 26, 1998), Trumbull App. No. 97-T-0072 (citations omitted); *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527; *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 181 N.E.2d 814.

We agree with these other appellate districts that a failure to name the Administrator in the notice of appeal or to serve the Administrator with the notice of appeal does not deprive a court of common pleas of subject matter jurisdiction to hear an R.C. 4123.512 appeal. R.C. 4123.512(A) provides that the filing of a notice of appeal perfects an appeal authorized by that section. The first paragraph of R.C. 5123.512(B) identifies the matters the notice must contain in order to be valid: 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. Failure to include these matters in a notice of appeal which is filed may be fatal to the court's jurisdiction because the notice is then not valid. The content requirement is

analogous to App.R. 3(D), which specifies the contents of a notice of appeal to this court.

The second paragraph of R.C. 4123.512(B), wherein the requirements concerning naming and serving the Administrator are established, were set apart from the "contents" requirements of the first paragraph by the General Assembly when it adopted R.C. 4123.512(B). That separation suggests a different purpose. That purpose is addressed by that section: to allow the Administrator to advise the employer of possibly adverse consequences if the employer fails to actively participate in the appeal, instead relying on the Administrator. That purpose may yet be served by allowing the appellant to amend the notice of appeal and the subsequent petition required by R.C. 4123.512(D) and subsequently to serve the Administrator.

Alternatively, an appearance by the Administrator, as in the present case, demonstrates that the Administrator was put on notice to the extent that R.C. 4123.512(B) requires. In *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21, the claimant filed a timely notice of appeal but failed to include the name of the employer in the text of the notice of appeal. The trial court granted the employer's motion to dismiss on jurisdictional grounds. The Supreme Court reversed, holding:

"[T]he purpose of a notice of appeal is to set forth the names of the parties and to advise those parties that an appeal of a particular claim is forthcoming. This notice of appeal clearly satisfied this purpose. Indeed, Chrysler Corporation

answered this notice with a motion to dismiss. There was no demonstrated surprise or prejudice." *Id.* at 24.¹

Although the requirements in the second paragraph of R.C. 4123.512(B) regarding the Administrator are not jurisdictional, they nevertheless establish the Administrator as a necessary party for purposes of Civ.R. 19(A). That rule provides that if a necessary party is not joined "the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7)." That result is the preferred alternative to a dismissal for failure to join a necessary party. *Congress Lake Club v. Witte*, Stark App. No. 05CA0037, 2006-Ohio-59.

The trial court cited the following cases in support of its decision to dismiss the appeal on jurisdictional grounds: *Olaru v. Fed Ex Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376; *Brown v. Liebert Corp.*, Franklin App. No. 03AP-437, 2004-Ohio-841; *Day v. Noah's Ark Learning Center*, Delaware App. No. 01-CVE-12-068, 2002-Ohio-4245; and *Gdovichin v. Geauga Cty. Hwy. Department* (1993), 90 Ohio App.3d 805. We believe these cases are inapposite and unpersuasive.

In *Brown*, *Day*, and *Gdovichin*, the plaintiffs failed to file a notice of appeal at all. Rather, the plaintiffs instead filed petitions or complaints contemplated by R.C. 4123.512(D). The

¹ Accord: *Wethington v. University of Cincinnati Hospital* (April 9, 1999), Hamilton App. No. C-980656 (noting that the University of Cincinnati, like Chrysler, answered the notice of appeal with a motion for summary judgment, demonstrating that it had actual notice of the appeal).

R.C. 4123.512 appeals were dismissed on jurisdictional grounds because the petitions or complaints were insufficient to constitute a notice of appeal. There is no question, however, that Spencer filed a notice of appeal. Therefore, we believe that the trial court's reliance on *Brown*, *Day*, and *Gdovichin* is misplaced. Further, in *Olaru*, the Sixth District adopted the judgment of the trial court as its own. The trial court in turn relied on the decision in *Day*, which we believe is inapposite to the facts before us.

The assignment of error is sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and BROGAN, J. concur.

Copies mailed to:

Jeffrey D. Wilson, Esq.
William H. Barney, III, Esq.
Abigail K. White, Esq.
Colleen Erdman, Esq.
Hon. Jeffrey M. Welbaum

FILED
MIAMI COUNTY
COURT OF APPEALS

10 DEC -6 AM 11:00

JAN A. MOTTING
CLERK OF COURT

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER
Plaintiff-Appellant

: C.A. CASE NO. 09-CA-44

vs.

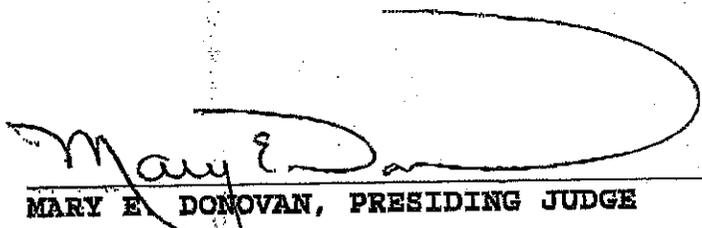
: T.C. CASE NO. 09-988

: FINAL ENTRY

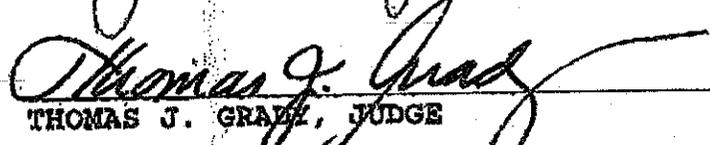
FHI, LLC, et al.
Defendants-Appellees

:

.....
Pursuant to the opinion of this court rendered on the
29th day of October, 2010, the judgment of the trial
court is Reversed and the matter is Remanded to the trial court
for further proceedings consistent with the opinion. Costs are
to be paid as provided in App.R. 24.


MARY E. DONOVAN, PRESIDING JUDGE


JAMES A. BROGAN, JUDGE


THOMAS J. GRADY, JUDGE

JR. 17 P. 39

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Hon. Jeffrey M. Welbaum
Common Pleas Court
201 W. Main Street
Troy, OH 45373

SPF

FILED
MIAMI COUNTY
COMMON PLEAS COURT

2009 OCT 29 A 9:47

IN THE COMMON PLEAS COURT OF MIAMI COUNTY, OHIO
GENERAL DIVISION

JOHN W. WELBAUM
CLERK OF COURT

JAMES SPENCER : CASE NO. 09-988

Plaintiff : Judge Welbaum

vs. :

FHI, LLC :

Defendant :

ORDER OF DISMISSAL FOR LACK OF JURISDICTION AND
ORDER OVERRULING PLAINTIFF'S MOTION TO AMEND COMPLAINT

.....

On September 11, 2009, Defendant Freight Handlers, Inc. filed a motion to dismiss while the case was pending in Darke County Common Pleas Court. On September 24, the Plaintiff filed a memorandum in opposition and his own motion for leave to amend the complaint and to transfer the case to Miami County. On that date the Plaintiff also filed an amended petition without leave. Defendant Freight Handlers Inc. filed a reply memorandum on October 2. On October 8, Defendant Freight Handlers filed a memorandum in opposition to Plaintiff's motions.

On October 8, the Darke County Court of Common Pleas found that it did not have venue and this Court does. On that date it transferred the case to this Court and the entry was

EXHIBIT 3

filed in this Court on October 21. The entry of transfer did not address the jurisdictional challenge or the Plaintiff's motion for leave to amend the complaint so those motions are pending.

The said Defendant says that the Court lacks subject matter jurisdiction because the Plaintiff did not name the Administrator as a party in the notice of appeal and did not serve the Administrator with the notice as required by O.R.C. 4123.512(B). Substantial compliance is required. It has been held that omitting the Administrator as a party and failing to serve the Administrator with the notice of appeal does not substantially comply with the statute. *Olaru v. Fed Ex Custom Critical*, 2003 Ohio 6376, *Brown v. Liebert Corp*, 2004 Ohio 841, *Days v. Noah's Ark Learning Center*, 2002 Ohio 4245, *Gdovichin v. Geauga Cty Hwy Department*, (1993) 90 Ohio App. 3d 805.

Since neither Court had jurisdiction, the defect cannot be corrected by the amendment of the pleadings or otherwise. The safe harbor provision of O.R.C. 4123.512(A) which allows transfer of the case to a court with proper venue and jurisdiction does not apply because neither the Darke County Common Pleas Court or this Court ever had subject matter jurisdiction.

Accordingly, the Court lacks subject matter jurisdiction. The motion for leave to amend the complaint is moot and therefore overruled. The said Defendant's motion is granted. The case is dismissed.

IT IS SO ORDERED.


JEFFREY M. WELBAUM, JUDGE

Pursuant to Civil Rule 58(B), the Clerk of this Court is hereby directed to serve upon all parties not in default for failure to appear, notice of this judgement and the date of entry upon the Journal of its filing.

cc: All Counsel of Record



Judge

CA
1-09-11

000068

FILED
MIAMI COUNTY
COURT OF APPEALS
41 JAN -7 AM 11:1
JAN A. HOTTING
CLERK OF COURT

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER	:	
Plaintiff-Appellant	:	C.A. CASE NO. 09-CA-44
vs.	:	T.C. CASE NO. 09-988
	:	
FHI, LLC, et al.	:	
Defendants-Appellees	:	

DECISION AND ENTRY

Rendered on the 6th day of January, 2011.

PER CURIAM:

This matter is before the court on two motions to certify conflict to the Supreme Court filed pursuant to App.R. 25. The motions were filed by Defendant-Appellee Freight Handlers, Inc and by the Attorney General on behalf of the Administrator of the Bureau of Worker's Compensation.

The movants contend that our decision in the present case in conflict with the decision of the Sixth District Court Appeals in *Olaru v. FedEx Custom Critical*, Lucas App. No. L-0 1143, 2003-Ohio-6376. The alleged conflict concerns whether the provisions of R.C. 4123.512(B) regarding naming the administrator as a party to an action on an appeal to the common pleas court filed pursuant to that section and serving a copy of the notice of appeal in the action on the administrator are jurisdictional.

We acknowledge that our holding herein and the holding in *Olaru*, at least with respect to their outcomes concerning the question of jurisdiction, are in conflict. However, we also held in the present case that the jurisdictional defect was waived by the administrator's voluntary appearance in the action filed in the common pleas court, citing the holding in *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21. Because of our reliance on those alternative grounds, the jurisdictional issue in the present case was decided on facts different from those in *Olaru*. To qualify for certification, "the alleged conflict must be on a rule of law-not facts." *Whitelock v. Gilbane Building Company* (1993), 66 Ohio St.3d 594.

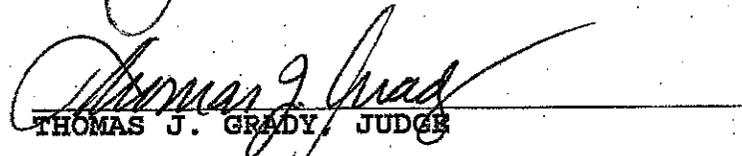
The motions to certify are Denied.



 MARY E. DONOVAN, PRESIDING JUDGE



 JAMES A. BROGAN, JUDGE



 THOMAS J. GRADY, JUDGE

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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

EXHIBIT 5

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