

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.	:	

NOTICE OF ADDITIONAL AUTHORITY FOR ORAL ARGUMENT

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NOTICE OF ADDITIONAL AUTHORITY FOR ORAL ARGUMENT

In accordance with Supreme Court Practice Rule 9.8, Appellant submits the following authority:

Lochtefeld v. Conrad, 3d Dist. No. 2-05-31 (Sept. 5, 2005) (Attached).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Additional Authority, was served by U.S.

mail this 4th day of October, 2011, upon the following counsel:

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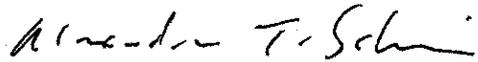
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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

AUGLAIZE COUNTY *CPC CASE # 2004 CV 0267*

DONALD LOCHTEFELD

CASE NUMBER 2-05-31

PLAINTIFF-APPELLANT

v.

JAMES CONRAD, Acting Administrator
for the Bureau of Workers' Compensation,
ET AL.

JOURNAL
ENTRY

2006 SEP -5 AM 11:11
AUGLAIZE COUNTY
COMMON PLEAS COURT
CLERK OF COURT

DEFENDANTS-APPELLEES

This appeal, having been heretofore placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12 and shall not be considered controlling authority except as provided in Rule 2(G)(1) of the Supreme Court Rules for Reporting of Opinions.

Appellant-plaintiff, Donald Lochtefeld (hereinafter "Lochtefeld"), appeals the judgment of the Auglaize County Court of Common Pleas. Upon review, we find that Lochtefeld did not properly file his notice of appeal and we affirm the judgment of the trial court.

Lochtefeld was employed by AAP St. Mary's Corporation, Division of Hitachi Metals (hereinafter "AAP"). On April 12, 2004, Lochtefeld filed a motion requesting worker's compensation for injuries to his left hand and wrist. The Industrial Commission (hereinafter "IC") denied Lochtefeld's request.

AUGLAIZE COUNTY
SP -5 2006
CLERK OF COURT

Subsequently, Lochtefeld filed a notice of appeal pursuant to R.C. 4123.512. Lochtefeld named the IC, rather than the administrator of the Bureau of Worker's Compensation (hereinafter "BWC"), in the notice of appeal. On December 28, 2004, Lochtefeld filed his complaint naming the IC as a defendant. The IC filed a motion to dismiss itself as a defendant on February 22, 2005, which the trial court granted.

Thereafter, Lochtefeld filed a motion for leave to file an amended complaint. The trial court granted the motion. The amended complaint added the administrator of the BWC as a defendant. Both AAP and the BWC filed motions for reconsideration which the trial court denied.

The BWC and AAP filed motions to dismiss. The trial court held a hearing on the motions on May 24, 2005. Lochtefeld then filed "supplemental documentation" with the trial court on June 10, 2005. Thereafter, the trial court granted the motions to dismiss and ordered the "supplemental documentation" stricken from the record.

It is from this judgment Lochtefeld appeals and sets forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

**THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S
MOTION TO DISMISS AS LOCHTEFELD'S NOTICE OF
APPEAL SUBSTANTIALLY COMPLIES WITH O.R.C. §
4123.512.**

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In his first assignment of error, Lochtefeld argues the BWC was served with the notice of appeal on December 6, 2004, even though it was not named in the notice of appeal, therefore, the BWC had notice. Lochtefeld also argues that he substantially complied with the requirements found in R.C. 4123.512 and the trial court erred in granting the motion to dismiss. Lochtefeld maintains that the failure to list the administrator of the BWC was not a fatal defect because there was a sufficient connection between the IC and the BWC to constitute substantial compliance. As a basis for his argument, Lochtefeld points out that the BWC and the IC are required to adopt joint rules for operating procedures, and the attorney general, or an assistant of the attorney general, must represent both the BWC administrator and the IC in a worker's compensation appeal in the common pleas court. Lochtefeld also asserts that the amended complaint naming the BWC relates back to the original pleading, thus, the administrator of the BWC is considered originally named in the notice of appeal.

In order for a claimant to appeal the Industrial Commission's denial of a worker's compensation claim to the court of common pleas, the claimant must file a notice of appeal within sixty days after the receipt of the Industrial Commission's order. R.C. 4123.512. "The filing of the notice of appeal with the court is the only act required to perfect the appeal." R.C. 4123.512(A).

Pursuant to R.C. 4123.512(B):

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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, 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 of workers' compensation at the central office of the bureau of workers' compensation in Columbus. ¹ * * *

The Ohio Supreme Court has held that a notice of appeal must substantially comply with the statute. *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 10-11, 30 O.B.R. 16, 505 N.E.2d 975. Substantial compliance "occurs when a timely notice of appeal filed pursuant to [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.*, emphasis added. (The Ohio Supreme Court interpreted former R.C. 4123.519.)

The Second District Court of Appeals has held that a claimant who mistakenly named the county sheriff as his employer, instead of the county itself, substantially complied with the notice of appeal requirements. *Tudor v. Mayfield* (1989), 62 Ohio App.3d 633, 577 N.E. 2d 367. The court found that the notice of appeal naming the county sheriff as employer was in a form "reasonably

¹ The General Assembly amended the statute effective 6-30-06. However, the amendment does not impact our decision in this case.

calculated” to place the county on notice that the claimant had an appeal pending, and thus the notice of appeal substantial complied with the statute. *Id.* at 639.

The present case is distinguishable from *Tudor*. In *Tudor*, the sheriff named in the notice of appeal as the employer worked for the claimant’s actual employer, the county. *Id.* at 637. However, in this case, the IC was not an employee of the administrator of the BWC. Rather, the IC and the BWC are two different and separate administrative agencies with different functions and responsibilities pertaining to worker’s compensation. (The Industrial Commission was created under R.C. 4121.02 and its duties are listed in R.C. 4121.03. However, R.C. 4121.121 created the BWC and listed the general duties of the administrator of the BWC.)

In the present case, we find that even if the BWC received a copy of the notice of appeal on December 6, 2004, it did not receive a copy until the deadline for filing the notice of appeal had expired. Consequently, the administrator of the BWC did not have timely notice of the appeal.

Further, we find that the BWC and the IC are not sufficiently connected so that Lochtefeld’s listing of the IC, instead of the administrator of the BWC, as a defendant would qualify as substantially complying with R.C. 4123.512. Although the BWC and the IC are required to adopt joint rules of procedure and are both represented by the attorney general or his assistants in appeals to the

courts of common pleas, the BWC and the IC are two separate and distinct government agencies. See R.C. 4121.30; R.C. 4123.512(C); R.C. 4121.02; R.C. 4121.03; R.C. 4121.121. Consequently, naming the IC in the notice of appeal did not constitute substantial compliance with the requirement that the administrator of the BWC be named a party to an appeal under R.C. 4123.512.

Assuming, arguendo, that a notice of appeal could be amended using Civ. R. 15, the rule would be inapplicable in this case. Lochtefeld amended his complaint to include the administrator of the BWC, but never filed a motion to amend the notice of appeal nor otherwise amended the notice of appeal. Merely amending the complaint does not result in the automatic amendment of the notice of appeal.

Lochtefeld's first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN STRIKING PLAINTIFF-APPELLANT'S ADDITIONAL EVIDENCE FROM THE RECORD.

In his second assignment of error, Lochtefeld asserts that the trial court abused its discretion by not allowing the "supplemental documentation", which consisted of Lochtefeld's affidavit, a fax cover sheet and a faxed copy of the notice of appeal, to be admitted into evidence. As a basis for his argument,

Lochtefeld maintains that the "supplemental documentation" is relevant as it establishes the BWC was aware of the notice of appeal in a timely manner.

A trial court's decision regarding the admissibility of evidence is reviewed under an abuse of discretion standard. *Beard v. Meridia Huron Hosp.* 106 Ohio St. 3d 237, 2005-Ohio-4787, 834 N.E. 2d 323, at ¶ 20 citing *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 164-165, 17 O.O. 3d 98, 407 N.E.2d 490. Abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Id.* at ¶ 22, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; 450 N.E.2d 1140.

The "supplemental documentation" Lochtefeld sought to admit existed prior to the motion to dismiss hearing, however, he did not file the documents until approximately three weeks after the hearing. Furthermore, Lochtefeld received the Industrial Commission's order on September 27, 2004, and had sixty days from the receipt of the order to file his notice of appeal. See R.C. 4123.512. The "supplemental documentation" Lochtefeld sought to admit only establishes that the BWC received a copy of the notice of appeal by fax on December 6, 2004, which was after the sixty days required for filing the notice of appeal.

We hold that, under the facts and circumstances of this case, the trial court did not abuse its discretion by striking the "supplemental documentation" from the record. Lochtefeld's second assignment of error is, therefore, overruled.

For the aforementioned reasons, it is the order of this Court that the judgment of the Auglaize County Court of Common Pleas be, and hereby is, affirmed at the costs of appellant against whom judgment is rendered, and the cause be, and hereby is, remanded to the trial court for the execution of the judgment of costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by App.R. 27 or by any other provision of law, and also furnish a copy of this journal entry to the trial judge and the parties of record.

Robert R. Cypert
Thomas H. Bryant
[Signature]
JUDGES

DATED: September 5, 2006

State of Ohio, Auglaize County, SS. **APPEALS**
I, Sue Ellen Kohler, Clerk of the Court of ~~Common Pleas~~
within and for said County, hereby certify that the foregoing
is a true and correct copy of the original record on file
in this office.
In Witness Whereof, I have hereunto set my hand
and affixed the Seal of said Court at Wapakoneta,
Ohio.
this 5th day of
September, 2006
SUE ELLEN KOHLER, CLERK OF COURT
By: Sue Ellen Kohler Deputy Clerk

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