

IN THE SUPREME COURT OF OHIO

MARK A. BENNETT,

Plaintiff-Appellant,

v.

ADMINISTRATOR,
OHIO BUREAU OF WORKERS'
COMPENSATION,

Defendant-Appellee,

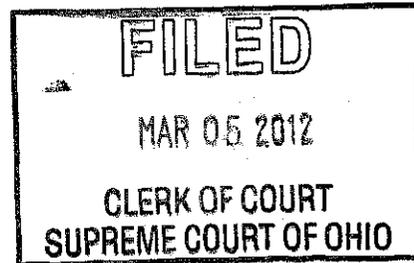
and

GOODREMONT'S INC.

Defendant.

Case No. 2011-0902

On Appeal from the
Lucas County Court of Appeals
Sixth Appellate District



REPLY BRIEF OF APPELLANT MARK A. BENNETT

PAUL A. HOEFFEL * (0008697)

**Counsel of Record*

Kennedy, Purdy, Hoeffel & Gernert LLC

111 West Rensselaer Street

Bucyrus, Ohio 44820

419-562-4075

419-562-7850 fax

kphg@embarqmail.com

Counsel for Appellant

Mark A. Bennett

ROMAN ARCE (0059887)

Marshall & Melhorn, LLC

Four SeaGate, Eighth Floor

Toledo, Ohio 43604

419-249-7100; 419-249-7151 fax

arce@marshall-melhorn.com

Counsel for Appellee

Goodremont's, Inc.

MICHAEL DEWINE (0009181)

Attorney General

ALEXANDRA-T. SCHIMMER* (0075732)

Solicitor General

**Counsel of Record*

ELISABETH A. LONG (0084128)

MATTHEW P. HAMPTON (*pro hac vice*)

Deputy Solicitors

ELISE PORTER (0055548)

Assistant Section Chief

Workers' Compensation

JOSHUA W. LANZINGER (0069260)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Appellee Administrator, Ohio

Bureau of Workers' Compensation

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
ARGUMENT	1-9
 <u>Proposition of Law No. I:</u>	
THE ONLY ISSUE(S) TO BE CONSIDERED IN AN R.C. 4123.512	
APPEAL OF A "VALIDITY" DENIAL ARE THOSE WHICH WERE	
DETERMINED IN THE ADMINISTRATIVE ORDER	
APPEALED.....	1-9
CONCLUSION	10
PROOF OF SERVICE	11

TABLE OF AUTHORITIES

CASES:

Page

<i>Arline v. Administrator, Bureau of Workers' Compensation</i> 00-LW-4516, Court of Appeals, 10 th District, Franklin (2000).....	6
<i>Mims v. Lennox Halderman Co.</i> (1964), 8 Ohio App.2d 226, 228-229	1
<i>Starkey v. Builders FirstSource Ohio Valley LLC</i> 130 Ohio St.3d 114, 2011-Ohio-3278.....	5-7
<i>Ward v. Kroger Co.</i> 106 Ohio St.3d 35, 2005-Ohio-3560	<i>passim</i>

STATUTES:

R.C. 4123.01(C)	4
R.C. 4123.512	<i>passim</i>
R.C. 4123.95.....	9
O.A.C. 4123-3-9 (2)	7

**REPLY TO APPELLEE'S ARGUMENT OF
OF PROPOSITION OF LAW NO. I**

THE ONLY ISSUE(S) TO BE CONSIDERED IN AN R.C. 4123.512 APPEAL OF A
"VALIDITY" DENIAL ARE THOSE WHICH WERE DETERMINED IN THE
ADMINISTRATIVE ORDER APPEALED.

The Administrator in his Argument asserts that Bennett's "...reliance on *Ward* is misplaced." (Merit Brief of Defendant-Appellee, p. 6). The Administrator does not elaborate on this bare assertion. On the contrary, the *Ward* decision, Ohio St. 3rd 37, adopted the analysis in *Mims v. Lennox-Halderman Co.* (1964), 8 Ohio App 2d 226, 228-229 that:

When a claimant appeals from an order of the Industrial Commission under Section 4123.519, Revised Code, it must be presupposed that the issue decided adversely to the claimant Before the Industrial Commission is the only issue Before the Court of Common Pleas.¹

Here the only question decided by the Industrial Commission was that Mr. Bennett was not in the "course of scope of his employment". This was a "validity" decision only. Mr. Bennett's Petition clearly identifies that this validity issue was the sole issue in the R.C. 4123.512 appeal. (Appellant's Supplement, p. 12-14.)

The Administrator proceeds to argue even if *Ward* is construed by this Court to mean what it says that such an interpretation "...would be inconsistent with the statutory framework..." (Defendant/Appellee Merit Brief, p. 6). Again the Administrator offers no explanation or support for this sweeping statement. *Ward* however clearly establishes that medical conditions "...be presented in the first instance for administrative determination is a necessary and inherent part of the overall adjudicative framework of the Workers' Compensation Act" and to allow medical conditions "...to originate at the

¹ R.C. 4123.519 was amended and renumbered R.C. 4123.512 on 10/20/1993. All references hereinafter refer to R.C. 4123.512 as 512.

judicial level is inconsistent with the statutory scheme because it usurps the Commission's authority as the initial adjudicator of claims..." (*Ward*, p. 37.)

Finally, in his first argument, the Administrator alleges without any explanation that the trial court's review of only the "validity" decision "...in a 512 action would result in needless duplication and expense for future claimants." (Defendant/Appellee Merit Brief, p. 6). To the contrary, there is no duplication because the BWC never considered Mr. Bennett's injury or medical condition. Further, to require a claimant to produce expert medical evidence at the 512 hearing when he has been denied participation solely on "validity" grounds requires the claimant to gamble that he will prevail on the "validity" issue. If he does not win on the "validity" denial, he has incurred the expense of the medical experts for nothing. The Administrator's position would therefore create a chilling effect on any claimant's challenge of a "validity" determination. Likewise the Administrator's argument would require the State to also incur the expense of expert medical testimony which will be irrelevant in the event that the claimant loses on the "validity" denial. Additionally, the Administrator's position would lead to the judge and/or jury wasting a great deal of time receiving the medical testimony and evidence if the "validity" denial is affirmed.

The Administrator in his argument A of his Proposition of Law cites only to cases where the issues in the 512 appeal were medical and had been administratively considered, determined and specifically identified in the Industrial Commission (IC) order appealed. As demonstrated, Mr. Bennett's case is entirely different. He was denied participation at the very initial step. Mr. Bennett's injuries or their causal connection were never administratively considered nor were they a part of the order appealed.

In *Ward*, this Court established that in the 512 proceeding only what was “...addressed in the administrative order from which the appeal is taken” is to be considered by the trial court. (*Ward*, syllabus). Mr. Bennett’s presentation of his injuries for the first time in the 512 trial would be the same conduct prohibited by *Ward*; that is the raising of a medical condition not determined in the administrative process or contained in the order appealed.

The Administrator in his A.1. argument continues to ignore the difference between a 512 appeal of a medical condition and an appeal of a “validity” order. The Administrator does not explain the inconsistencies of his position in the 512 proceedings when he filed a motion to exclude the presentation of any medical evidence by Mr. Bennett (TCR #38, p.1) or sought summary judgment because the only issue was the “coming and going rule” (TCR #29, p. 1 & 8; TCR #25, p. 6). The Administrator is being disingenuous when he argues Mr. Bennett’s lack of proof on a “precise medical condition”. The Administrator acknowledges he received all the medical records of Mr. Bennett after the 512 appeal was filed, but these records were never before the Bureau of Workers’ Compensation. The Administrator does not claim that there was any dispute about Mr. Bennett’s injuries; and although the Administrator now claims medical expert testimony was required in the 512 hearing, the Administrator had no medical witness. (TCR #30).

In the Administrator’s argument, labeled 2, he makes his own determination as to what Mr. Bennett’s injuries were and declares them to be “...soft tissue of the neck and back”. This was not a finding made by BWC. This was not a determination of the

Industrial Commission order that was appealed by Mr. Bennett. The argument is a red herring.

The Administrator attempts to compare the proof of auto accident injuries with the procedure required under the Workers' Compensation system. However the difference is that in motor vehicle accident cases there is not a statute that requires the "injury(s)" (R.C. 4123.01(C)) be decided first by an administrative agency. Further, unlike an injured motorist, the employee relinquishes his right to pain and suffering and recovery of all his damages for the expediency and less expensive procedures of the Workers' Compensation system.

Under the Administrator's argument 3 he uses the false premise that Mr. Bennett should have proved his medical condition despite the fact that the IC order appealed never included that issue. The Administrator criticizes the Appellant for maintaining a consistent position as to the issue to be decided was the "validity" order denying participation because of the coming and going rule. On the other hand, as the Administrator admits, his position has not been consistent.

Under B. the Administrator declares, "The pronouncement in *Ward* prevents claimants from circumventing the administrative process by barring the presentation of claims for benefits based on new *medical conditions* not previously presented to the Industrial Commission" (Appellee's Merit Brief, p. 11). Appellant agrees.

First, Mr. Bennett did not circumvent the administrative process. In fact he was prevented from being able to utilize the administrative process to have his injuries or medical condition investigated and decided. It is the Administrator that is advocating that

the administrative process be “circumvented” and the 512 judge become the initial claims adjuster.

Secondly, the Administrator ignores that part of his statement that bars evidence in the 512 case of a medical condition “...not previously presented to the Industrial Commission”. Again, in Mr. Bennett’s case his medical conditions were never presented to the Industrial Commission nor were they a part of the order appealed. Therefore, applying the Administrator’s statement Mr. Bennett would be barred from presenting evidence in the 512 hearing of his medical conditions which had not been presented or decided by the BWC or the Industrial Commission.

The Administrator next claims *Ward* “says nothing about how the Industrial Commission processes claims” (Appellee Merit Brief, p. 11). On the contrary, *Ward* is very explicit that each “...claim must proceed through the administrative process in order to be subject to review” (*Id.*, at Ohio St.3d 38, ¶11) and that “...RC 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level” (*Id.*). The Administrator advocates that in this case the administrative order should be amended in the 512 proceedings to include “medical conditions” never considered or identified by the Bureau of Workers’ Compensation or the Industrial Commission.

The Administrator in his argument refers to *Starkey* as support for his position. *Starkey*, however, provides that a claimant can present a different theory of the causation of his medical condition in the 512 hearing if **the “medical condition...[has already] been addressed administratively”** (*Starkey, Syllabus 2*, emphasis added). Here the medical condition of Mr. Bennett had never been addressed administratively.

In *Starkey*, the BWC's position was "...that a common pleas court may consider only those medical conditions that have been considered at the administrative level" (*Id* at ¶9). Here the Administrator takes the opposite position and advocates that the medical issues be considered for the first time in the 512 trial.

Under C. the Administrator makes sweeping and unsupported assertions about the expense of limiting the 512 appeal of "validity" denials to that sole issue administratively decided. First, when the BWC denies the application on "validity" grounds it does not investigate and decide what injuries or medical conditions resulted; that would be a waste of time and money. Since the BWC did not investigate and decide the injury, the return of the case to this stage would not be a waste of time or money because it had not previously conducted this step. On the other hand, requiring a claimant denied on "validity" grounds to present expert medical evidence in the 512 hearing would be costly to the claimant and the State and potentially totally irrelevant if the claimant does not obtain a reversal of the "validity" denial. Further, for the same reason it would be a waste of time of the judge and/or jury to receive all the expert medical evidence of both sides if the "validity" denial is affirmed.

The Administrator cites to *Arline v. Administrator, Bureau of Workers' Compensation* which was a "validity" case because the claimant was denied participation by BWC because of "timeliness". In *Arline*, the court of appeals reversed the BWC order and instructed the trial court "...to remand the case to the commission to enter a finding [of timeliness and thus "validity"] and for further appropriate proceedings to determine if she has a right to participate in the workers' compensation fund" (at p. 6). This is a

logical resolution of a “validity” denial that is judicially reversed and in accord with R.C. 4123.512(G).

The Administrator suggests that a 512 appeal is “*de novo*” as to all issues.

However as noted by Justice O’Donnell in his dissent in *Starkey* at ¶27:

...the Workers’ Compensation Act provides the Industrial Commission with the exclusive authority to perform an initial review of claims pursuant to RC 5123.511 and also affords the common pleas court a limited right to conduct a *de novo* review of those claims pursuant to R.C. 4123.512 after the Industrial Commission completes its evaluation. (emphasis added.)

The *Ward* and *Starkey* cases are explicit that a R.C. 4123.512 appeal is jurisdictionally limited to the issue “...addressed in the administrative order from which the appeal is taken” (*Ward*, Syllabus) or have been “already...addressed administratively” (*Starkey*, Syllabus 2).

The Administrator claims “the General Assembly contemplated a single administrative proceeding to determine a claimant’s right to obtain benefits, subject to independent judicial review.” Not only does *Arline*, cited by the Administrator in the same paragraph, disprove the statement; the clear language of R.C. 4123.512 (G) provides after the 512 decision “...the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission...”.

In a “validity” case that means the claim returns to the BWC to investigate and determine the “injury”. (OAC 4123-3-9(2)). That is the function of the BWC, not the Court. The statutory scheme is for the Court to only consider the issue(s) that have “been addressed administratively” (*Starkey*, Syllabus 2) or “addressed in the administrative order from which the appeal is taken” (*Ward*, Syllabus).

The Administrator claims that the 512 appeal is “*de novo*”. However, as he further acknowledges, a 512 appeal is *de novo* in that the Court decides the issue “...without reference to the administrative claim file or consideration of the results of the administrative hearing” (Appellee’s Merit Brief, p. 13, citing *Robinson v. B.O.C. Group*).

De novo, as the Administrator attempts to assert, does not alter the fact that like all appeals the order appealed frames the issues of fact and law to be decided. Mr. Bennett presented all the evidence necessary to establish that he was not barred by the IC order from participation by the coming and going rule and the 512 court so ruled.

The Administrator then leaps to an argument of an issue of his own creation about “remand”. Mr. Bennett sought a determination that the I.C. denial of the “validity” of his claim on the basis of the coming and going rule was in error and should not prevent his participation. The 512 Court in its Conclusions of Law, found “...the coming and going rule would not apply to preclude workers’ compensation benefits for Mr. Bennett.” (Appellant’s Appendix, p. 17 and 18). This part of the judgment is a finding of the right to participate. The 512 Court per R.C. 4123.512 (E) certifies its decision to the I.C. and “...the commission and the administrator shall therefore proceed in the matter of the claim as if the judgment were the decision of the commission...” (R.C. 4123.512(G)). To characterize this as a “remand” in the general sense that the claim returns to point in the administrative process where the error occurred is in accordance with the statute. The “remand” that the Administrator argues involves cases being sent back to the I.C. and BWC to reconsider the facts and/or law that had been appealed. That is not the case here, Mr. Bennett simply seeks the BWC to proceed with his claim because its “validity”

determination denying him participation had been reversed by the decision of the 512 court.

The Administrator states that it would be “untenable” for the BWC or IC to have to “...consider and resolve every possible issue related to a claim...if it disposes of the claim on ‘validity’ grounds”. Conversely, it is more “untenable” for a 512 court to resolve the “injury” issue if it finds that the only basis for the denial of participation on “validity” grounds was erroneously decided by the BWC.

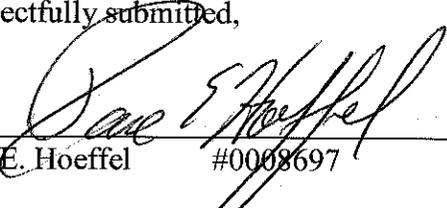
The Administrator asks this Court to ignore any sympathy for Mr. Bennett who has battled and won on the issue, that he was denied participation on the basis of the coming and going rule, but denied relief because he did not present expert evidence on the issue of “injury” which had never been administratively considered or decided.

Construing R.C. 4123.512 in such a fashion would be contrary to the mandate of R.C. 4123.95 that provides that Chapter 4123 “...shall be liberally construed in favor of employees...”.

CONCLUSION

When, as here, a claimant is wrongfully denied participation solely on a “validity” basis the statutory remedy is by judicial review. That review rationally and economically must be limited to that “validity” decision and not abrogate the claimant’s right to have his injury or medical conditions determined through the administrative process established by the legislature.

Respectfully submitted,



Paul E. Hoeffel #0008697

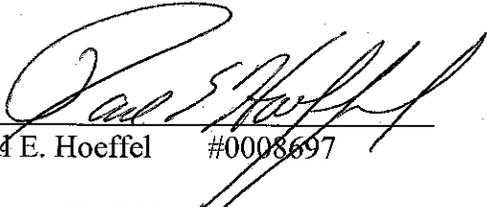
COUNSEL FOR APPELLANT,
MARK A. BENNETT

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Appellant Mark A. Bennett was sent by ordinary U.S. mail to the following on March 5th, 2012:

Alexandra T. Schimmer
Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
COUNSEL OF RECORD FOR APPELLEE, ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION

Roman Arce
Marshall & Melhorn, LLC
Four SeaGate, Eighth Floor
Toledo, OH 43604
COUNSEL FOR APPELLEE,
GOODREMONT'S INC.



Paul E. Hoeffel #0008697

COUNSEL FOR APPELLANT,
MARK A. BENNETT