ORIGINAL

In the
Supreme Court of Ohio

VISITING NURSE ASSOCIATION OF MID-OHIO, et al.,	:	Case No. 2013-0892
	:	
Appellant,	:	On Appeal from the Richland County Court of Appeals, Fifth Appellate District
v.	:	Case No: 2012-CA-56
TAMARA FRIEBEL,	:	
and	:	
ADMINISTRATOR BUREAU OF WORKERS' COMPENSATION,	:	
Appellees.	:	

MEMORANDUM CONTRA OF, ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION, IN RESPONSE TO APPELLEE FRIEBEL'S MOTION TO STRIKE

TIMOTHY A. MARCOVY (0006518)
MICHAEL S. LEWIS, ESQ. (0079101)
WILLACY, LOPRESTI & MARCOVY
1468 West Ninth Street, Suite 330
Cleveland, Ohio 44113
(216) 241-7740 – Tel
(216) 241-6031 – Fax
tam@wlmlaw.com / msl@wlmlaw.com

Counsel for Appellant,
Visiting Nurse Association of Mid-Ohio

FRANK L. GALLUCCI, ESQ. (0072680)
PLEVIN & GALLUCCI
55 Public Square
Suite 2222
Cleveland, Ohio 44113
(216) 861-0804 – Tel
(216) 861-5322 – Fax

Counsel for Appellee,
Tamara Friebel

MICHAEL DEWINE (0009181)
Ohio Attorney General

KEVIN J. REIS* (0008669)
Assistant Attorney General
**Counsel of Record*
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
(614) 466-6696 – Tel
(614) 728-9535 – Fax
Kevin.Reis@OhioAttorneyGeneral.gov

Counsel for
Administrator, Ohio Bureau of Workers' Compensation

PAUL W. FLOWERS, ESQ. (0046625)
PAUL W. FLOWERS, CO., LPA
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393 – Tel
(216) 344-9395 – Fax
pwf@pwfco.com

Counsel for Appellee,
Tamara Friebel

FILED
JUL 10 2013
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM CONTRA OF ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION, IN RESPONSE TO APPELLEE FRIEBEL'S MOTION TO STRIKE

For several reasons, the Court should deny Appellee Tamara Friebel's ("Friebel") Motion to Strike the Memorandum in Response to Jurisdiction, filed by the Administrator of the Bureau of Workers' Compensation ("Administrator"). Although the Administrator is in one sense an appellant (he supports reversal of the judgment below), in another sense, he is an appellee. The Administrator is like an appellee because he acknowledges that with the correct legal standard applied on remand, Friebel could prevail. Friebel can prevail if she shows that her injury was causally related to the activities, conditions and environment of her employment.

The Administrator did not appeal to the court of appeals from the summary judgment granted in favor of the employer, VNA. However, because the Administrator and the Industrial Commission of Ohio ("commission") allowed Friebel's claim at the administrative level, the Administrator never opposed Friebel's efforts to prove her right to participate in the workers' compensation system before the common pleas court or the court of appeal proceedings. Likewise, the Administrator's memorandum filed in this Court does not oppose Friebel's right to prove her entitlement to participate in the benefits of the workers' compensation system.

At the same time, however, the Administrator is duty bound to advise the Court of errors of law which adversely affect the meaning and application of Ohio's workers' compensation law regardless of how the parties may have been positioned in prior proceedings. Consequently, the Administrator should be designated an appellant for purposes of briefing the merits of this appeal should the Court accept jurisdiction.

The Administrator's brief, and request to be designated as an appellant if the Court accepts jurisdiction, do not prejudice Friebel. The employer has already filed a brief opposing the "dual-

intent" doctrine. Friebel thus knew that the basis of her victory in the Fifth District would be challenged in this appeal, well before the Administrator filed his memorandum in response.

Ohio's workers' compensation statutory scheme is unique because, unlike the typical personal injury court case with two parties, in all workers compensation court cases there are three parties: the injured worker, the employer, and the Administrator. Even though the primary adversaries are the injured worker and the employer, in all cases appealed to the common pleas court under R.C. 4123.512, the Administrator is always a party defendant. The Administrator's primary obligation is to administer and maintain the state insurance fund. For instance, if the claimant and the employer want to settle the court case, they must obtain the Administrator's agreement to the settlement amount to be paid from the state fund. See, e.g., R.C. 4123.65. As the state agency responsible for administering and maintaining Ohio's workers' compensation insurance fund, the Administrator must make every effort to inform the Court as to the applicable law.

Friebel essentially argues that the Administrator must support her claim or legal arguments because the commission decided in Friebel's favor at the administrative level. However, the proceedings in the common pleas court under R.C. 4123.512 are de novo. Therefore, the decision or order of the commission in favor of the claimant is *not admissible* as evidence during the trial on the claimant's "right to participate." Furthermore, the evidence presented in the common pleas court is not necessarily the same evidence presented at the administrative level. In the court proceedings here, for instance, counsel took depositions to further develop the facts.

The Administrator does not take an active role in *employer appeal* cases. In those cases, the Administrator or the commission has allowed the claimant's claim or medical condition at the administrative level. Even though the Administrator or the commission ruled in favor of the

claimant, the claimant must file a Complaint in response to the employer's appeal. In that Complaint, the claimant is always the named plaintiff and the employer and the Administrator are always the named defendants. The Administrator does not represent the claimant or the employer in court proceedings. In this case, as in other employer appeal cases, because the commission allowed the claim, the Administrator does not oppose Friebel's right to prove her entitlement to benefits in the common pleas court or the court of appeals.

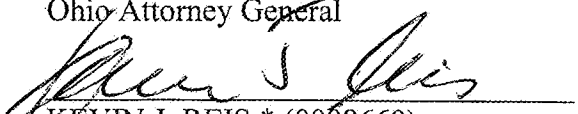
In an employer's appeal, the Administrator's role is limited to monitoring the case. The Administrator does not actively participate unless there is an unusual issue of law, one which would affect the meaning and application of workers' compensation law in the state of Ohio. Throughout the court proceedings before both the trial court and the court of appeals, counsel for the injured worker and the employer cited the applicable law. There were no unusual statements of law until the court of appeals' decision adopted or announced a so-called "dual intent" doctrine.

The Administrator's interest in the case is limited to the so-called doctrine of "dual intent." Therefore, if the Court accepts jurisdiction, the Administrator should be designated as an "appellant."

For all these reasons, the Court should not strike the Administrator's Memorandum in Response to Jurisdiction.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



KEVIN J. REIS * (0008669)
Assistant Attorney General
*Counsel of Record
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
(614) 466-6730 – Tel
(614) 728-9535 – Fax
Kevin.Reis@OhioAttorneyGeneral.gov

Counsel for
Administrator, Ohio Bureau of Workers' Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on this 18th day of July, 2013, to:

Via U.S. Mail

Timothy A. Marcovy, Esq.
Michael S. Lewis, Esq.
Willacy, Lopresti & Marcovy
1468 West Ninth Street, Suite 330
Cleveland, Ohio 44113

Counsel for Apellant

Frank L. Galluci, Esq
Plevin & Gallucci
55 Public Square
Suite 2222
Cleveland, Ohio 44113

Counsel for Appellee

Paul W. Flowers, Esq.
Paul W. Flowers, Co., LPA
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113

Counsel for Appellee

KEVIN J.REIS
Assistant Attorney General