
In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO
CASE NO. E-14-009**

**MICHAEL P. ONDERKO,
*Plaintiff-Appellee,***

v.

**SIERRA LOBO, INC.
*Defendant-Appellant.***

MERIT BRIEF OF APPELLANT SIERRA LOBO, INC.

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INTRODUCTION

This appeal focuses upon the elements required to establish a *prima facie* claim for retaliatory discharge under R.C. 4123.90. Specifically, this case presents the following critical issue: whether or not a plaintiff bringing a claim under R.C. 4123.90 must prove that he or she suffered a workplace injury. Stated differently, can an employee pursue a R.C. 4123.90 retaliation claim after the Ohio Industrial Commission (“OIC”) has conclusively adjudicated that the employee did not suffer a work-related injury?

In *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985) (syllabus), this Court held that “[a] complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee *was injured on the job*, filed a claim for workers’ compensation, and was discharged by that employer in contravention of R.C. 4123.90.” (emphasis added).

Despite the above-cited language, the Court of Appeals found that Appellee, Michael P. Onderko (“Onderko”) did not need to prove that he suffered a workplace injury, but rather, that he only need demonstrate that he had filed a Workers’ Compensation claim. The Court of Appeals issued this ruling despite the fact that, prior to Onderko’s filing of his intentional discharge lawsuit, the OIC had already ruled, clearly and unequivocally, that the injury for which Onderko filed his retaliation claim was not work-related. Further, Onderko’s employer, Appellant Sierra Lobo, Inc. (“Sierra Lobo”) did not terminate him until after the OIC’s adjudication became final.

The Court of Appeals reached its decision by, in effect, eliminating a key element of the three element test set forth in R.C. 4123.90 and articulated by this Court in *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985) (syllabus). Put simply, contrary to the plain language of the statute, the Court of Appeals has improperly broadened the scope of R.C. 4123.90 protections to

include any employee who files a Workers' Compensation claim, even where, as a matter of law, the employee was not injured on the job. This overreaching protection is not something that either the General Assembly or this Court ever intended. As shown below, the General Assembly placed specific language in R.C. 4123.90 requiring an on the job injury. The *Wilson* court underscored and approved the plain language of the statute. But here, the Court of Appeals ruled that the third element of the statute – requiring an on-the-job injury – is somehow “redundant” and, therefore, can be ignored. (See Court of Appeals Opinion at ¶ 25, App. 19-20.)

Indeed, the Court of Appeals' decision eviscerates an entire phrase of the statute. In holding that R.C. 4123.90 is “ambiguous,” the Court of Appeals determined that the phrase “injury or occupational disease which occurred in the course of and arising out of his employment,” was unnecessary, because “all claims under the Workers' Compensation Act are for injuries arising out of the course of employment.” (*Id.* at App. 19-20.) This interpretation wrongly assumes that all claims brought under the Act must involve injuries which were suffered on the job, an interpretation that naively assumes that no one ever files a false claim, as was the case here. This interpretation also fails to give effect to all the words in the statute, as required by Ohio law. See *East Ohio Gas Co. v. Public Utilities Comm. of Ohio*, 39 Ohio St.3d 295, 530 N.E.2d 875, 879 (1988). Finally, if the General Assembly intended the statute to read as the court below has interpreted it, they could have simply ended the verbiage after the word “act.”

Allowing such an erroneous interpretation to stand would undermine well-established rules of statutory construction and would open the door to myriad meritless – yet nevertheless expensive to defend – claims against Ohio employers. It is thus critical that this Court protect employers from such claims and reverse the Court of Appeals' decision in order to preserve the law of correct statutory construction, keep intact the first element of the test announced by this Court in *Wilson*.

STATEMENT OF FACTS

On November 15, 2010, Onderko was hired by Sierra Lobo as an at-will Engineering Tech IV at its plant located in Milan, Ohio. (See ¶ 1 of App. 34 and ¶ 2 of App. 36.¹) On August 9, 2012, at 5:45 p.m., Onderko appeared at the Emergency Room of the Mercy Regional Medical Center and presented with right knee pain that he had had for a couple of weeks. During that visit, he told the Emergency Room staff that he had taken a step off a curb and heard a “pop.” (See the top of p. 2 of App. 41 and ¶s 1 and 2 of App. 38-39.)

The next day, August 10, 2012, Onderko presented at the offices of Jeffrey A. Biro, D.O., at the Cleveland Clinic’s Department of Orthopaedics in Lorain County, Ohio, and complained of right knee instability. Dr. Biro’s records reflect that Onderko reported that he had fallen and incurred the injury 6 weeks prior to the office visit, and that his knee had “completely let go” causing a second fall after he climbed a curb. (See App. 50 and ¶s 1 and 3 of App. 38-39.)

In the late afternoon of August 10, 2012, Onderko telephoned April Reeves of Sierra Lobo’s Human Resource Department and told her that he blew out his ACL and that he would be having surgery. Reeves asked Onderko if it happened at work and Onderko responded that it did not. Onderko also told Reeves that he had been having problems with it, [the right knee] for a while. (See ¶ 4 of App. 36, App. 51 and ¶s 1 and 4 of App. 38-39.)

On August 13, 2012, at approximately 9:00 a.m., Onderko was told by Sierra Lobo’s David Hamrick that he could not return to work on light duty because of the medication he was taking. (See ¶ 2 of App. 34.) Less than two hours later, at 10:38 a.m., Onderko electronically filed an Ohio Bureau of Workers’ Compensation (“BWC”) First Report of an Injury, Occupational Disease or Death, which was assigned Claim No. 12-840216. In that form,

¹ All documents numbered App. 34–69 were attached to Sierra Lobo’s Motion for Summary Judgment filed on October 4, 2013 and verified in ¶ 1 of the affidavit attached hereto at App. 38-39.

Onderko claimed for the first time that his injury was work-related, in direct contrast to his earlier admissions, both to his physician and to Sierra Lobo, that it was not work-related. (See App. 52 and ¶s 1 and 5 of App. 38-39.) On August 17, 2012, in furtherance of his attempt to replace his lost income, Onderko filed a Request for Temporary Total Compensation. (See App. 53 and ¶s 1 and 7 of App. 38-39.)

On August 28, 2012, Onderko filed another First Report of an Injury, Occupational Disease or Death form alleging a work-related right knee sprain/strain injury. (See App. 54 and ¶s 1 and 8 of App. 38-39.) The BWC joined this form with the August 13, 2012 filing. (These two forms are collectively referred herein to as the “Claim”).

On September 10, 2012, the BWC mailed its decision, which disallowed the Claim because the medical records from Dr. Biro and Mercy Hospital did not indicate a work relationship with the injury. (See App. 55-58 and ¶s 1 and 9 of App. 38-39.) However, on September 11, 2012, and September 21, 2012, the BWC reversed itself and allowed the Claim. (See App. 59-64 and ¶s 1 and 10 of App. 38-39.) Sierra Lobo appealed those decisions. (See App. 65 and ¶s 1 and 11 of App. 38-39.)

On October 31, 2012, District Hearing Officer Peggy Marting (“DHO Marting”) of the Ohio Industrial Commission (“OIC”) heard Sierra Lobo’s appeal of the BWC’s allowance of the Claim. On November 6, 2012, DHO Marting mailed her decision, which denied Onderko’s Claim. In that decision, DHO Marting specifically found that Onderko did not sustain a work-related injury. DHO Marting advised the parties that an appeal from the decision could be filed within 14 days of its receipt. (See App. 66-68 and ¶s 1 and 12 of App. 38-39.) Onderko did not appeal the decision. (See Onderko’s Response to Request for Admission No. 9 at App. 69 and ¶s 1 and 13 of App. 38-39.)

On December 12, 2012, Onderko was terminated from his position at Sierra Lobo for his deceptive attempt to obtain BWC benefits for an injury which he had admitted was not work-related. (See ¶ 5 of App. 34-35.)

STATEMENT OF THE CASE

On March 8, 2013, Onderko filed suit in the Erie County Court of Common Pleas, claiming that Sierra Lobo violated R.C. 4123.90 because it discharged him from his employment after he had filed a Workers' Compensation claim alleging a work-related right knee injury. Onderko also claimed that his discharge constituted intentional infliction of emotional distress.

On October 4, 2013, Sierra Lobo moved for summary judgment on both counts of Onderko's Complaint ("Motion"). Sierra Lobo maintained that in November, 2012, the OIC had determined that Onderko's alleged right knee injury was not work-related. Onderko did not appeal that decision. Under the doctrine of res judicata, as a matter of law, Onderko was precluded from establishing the threshold element of a retaliation claim under R.C. 4123.90, in that he did not suffer a work-related injury. On October 14, 2013 Sierra Lobo filed a Motion for Summary Judgment and argued that the discharge of Onderko, an at-will employee, could not, as a matter of law, satisfy the "extreme and outrageous" element of the tort of intentional infliction of emotional distress.

On January 31, 2014, the trial court's Opinion and Judgment Entry granting Sierra Lobo's Motion on both counts of Onderko's Complaint was entered on the court's docket ("Trial Court Decision"). The trial court held that Onderko did not suffer a work-related injury and that he knowingly misrepresented facts when he stated that his injury was work-related. The trial court further found that Sierra Lobo did not terminate Onderko for merely filing the Workers' Compensation claim, but for misrepresenting his injury as work-related. The trial court also

agreed that Onderko could not establish that his termination under these circumstances was extreme and outrageous conduct.

On February 19, 2014, Onderko appealed the Trial Court Decision to the Sixth District Court of Appeals (“Court of Appeals”). On September 19, 2014, the Court of Appeals reversed the Trial Court Decision with respect to Onderko’s claim under R.C. 4123.90. The Court of Appeals held that Onderko was not required to demonstrate that his injury was work-related in order to prove a prima facie claim under R.C. 4123.90, but rather, was only required to show that he filed a Workers’ Compensation claim. (The Court of Appeals affirmed the Trial Court’s decision that Sierra Lobo’s actions in terminating Onderko could not support a claim for intentional infliction of emotional distress. Onderko did not cross-appeal that decision, and that issue is not before this Court.)

On September 25, 2014, Sierra Lobo filed a Motion to Certify a Conflict in the Court of Appeals. On October 30, 2014, Sierra Lobo filed its Notice of Appeal to this Court and its Memorandum in Support of Jurisdiction. On November 5, 2014, the Court of Appeals granted the Motion to Certify.

On January 28, 2015, this Court issued a Notice of Certified Conflict and directed the parties to brief the following issue: “Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, plaintiff must prove that he or she suffered a workplace injury.” This Court also accepted the Appeal instituted by Sierra Lobo on October 30, 2014.

On February 11, 2015, the Court of Appeals transmitted and certified the record from below.

LAW AND ARGUMENT

Proposition of Law No. 1: As an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

Both R.C. 4123.90 and this Court's decision in *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985), provide that an employee bringing a claim for Workers' Compensation retaliation must prove that "the employee *was injured on the job*, filed a claim for workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90." *Wilson*, 18 Ohio St.3d 9 (1985) (syllabus) (emphasis added). To eliminate the first prong of that test – as the Court of Appeals did here – would eviscerate the very purpose of the Workers' Compensation program, and would completely rewrite and/or ignore the plain language of the statute.

A. The entire Workers' Compensation system is predicated on compensating only those workers who are injured on the job.

The Workers' Compensation system is designed to provide compensation and protection only for those employees who are injured on the job. Indeed, Section 35, Article II, Ohio Constitution provides in part as follows:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom."

See also *Phelps v. Positive Action Tool Co.*, 26 Ohio St.3d 142, 144, 497 N.E.2d 969 (1986). In that regard, R.C. 4123.54 demonstrates that only those employees who suffer occupational injury or disease will be eligible for benefits under the Workers' Compensation system. R.C. 4123.54(A) provides that:

A) Except as otherwise provided in divisions (I) and (K) of this section, every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who

is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not:

(1) Purposely self-inflicted; or

(2) Caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of the controlled substance not prescribed by a physician was the proximate cause of the injury, is entitled to receive, either directly from the employee's self-insuring employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, the compensation for loss sustained on account of the injury, occupational disease, or death, and the medical, nurse, and hospital services and medicines, and the amount of funeral expenses in case of death, as are provided by this chapter.

R.C. 4123.54(A) (emphasis added). Thus, both the Ohio Constitution and this statute demonstrate that only workers who are injured on the job fall within the protections of the Workers' Compensation system. "To accomplish that purpose, the workers' compensation legislation balances the rights and duties of employers and employees by striking a bargain between them." *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, 2001 WL 1286419, at *9. Therefore, as a threshold matter, if an employee, such as Onderko, has a final adjudication that he did not suffer a workplace injury, he should not be permitted to file a R.C. 4123.90 retaliation claim and his employer should not be subjected to litigation for terminating him after such a final determination of the nature of his injury has been made.

B. The plain language of R.C. 4123.90 demonstrates that an on-the-job injury is required for a retaliation claim.

R.C. 4123.90 codifies a public policy requiring that employers not retaliate against employees who are injured on the job and seek Workers' Compensation benefits as a result. This statute provides protection for those employees filing legitimate Workers' Compensation

claims. However, there is no public policy requiring protection of employees seeking to take advantage of the system by filing false Workers' Compensation claims. Indeed, an employee who has already been found to have filed a deceptive claim for Workers' Compensation benefits cannot bring a lawsuit for retaliation under R.C. 4123.90. *See, e.g., Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 338 (5th Dist. 1997).

The very language of R.C. 4123.90 also mandates this interpretation. It states, in pertinent part, that:

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act **for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.**

(Emphasis added). Thus, as this Court held in *Wilson*, by the very words of the statute, a plaintiff must demonstrate that he or she actually suffered a workplace injury. This interpretation of the statute strikes the appropriate balance between employer and employee rights. It provides protection to employees with legitimate workplace injuries, while at the same time allowing employers the right to properly discipline or terminate those who sought to defraud the system.

In this case, the Sixth District Court of Appeals took a different view, finding that an employee need only prove that they filed a claim, not that they actually suffered a workplace injury. But this interpretation of R.C. 4123.90 and *Wilson* in this case, would eviscerate the purpose of the Act and R.C. 4123.90 by effectively imposing a duty on employers to refrain from disciplining or discharging **any** employee who has been adjudicated to have filed a false Workers' Compensation claim even where, as here, the employer has already proven that the Claim was fraudulent. Such a result should not be permitted.

Seeking to minimize the potential impact on this state's employers, the Court of Appeals noted that "[o]ur holding today, however, does not grant employees the power to file frivolous workers' compensation claims with impunity" because employers can still show that Workers' Compensation fraud is a legitimate, non-retaliatory reason for discharge. (Court of Appeals Opinion, ¶¶ 29-30 at App. 22-23). However, the Court of Appeals' interpretation of *Wilson* and R.C. 4123.90 does just that – it allows employees to file retaliation claims, even when, as here, they did not even suffer an on-the-job injury. While it is true that an employer could still rebut such a claim with evidence that the employee committed fraud, this places an onerous – and expensive – burden on the employer, who must now defend a new claim brought by an employee, such as *Onderko*, who has already been adjudicated to have wrongfully sought benefits under the Act arising out of the same facts against which the employer has already successfully defended. Any employee fired for such deception will now be permitted to file a R.C. 4123.90 retaliation claim, regardless of its merits, knowing that the employer may be thus leveraged into paying a settlement in order to avoid the expense of litigation. The fact is, if an employer has legitimate and substantial evidence that the employee filed a fraudulent claim, and especially where, as here, there is already a binding, legal determination of deceptive conduct, the employer should be free to discharge the employee without fear of incurring costly R.C. 4123.90 litigation. The opinion of the Court of Appeals denies Ohio employers that freedom and thereby burdens Ohio employers in a way that the General Assembly and this Court never intended.

In its opinion, the Court of Appeals notes that “the basic purpose of the anti-retaliation provision in R.C. 4123.90 is ‘to enable employees to freely exercise their rights without fear of retribution from their employers.’” (Court of Appeals Opinion ¶ 27 at App. 20-21, *quoting Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 22).

The Court of Appeals asserted that requiring an employee to prove a workplace injury in order to have a claim under R.C. 4123.90 would have a chilling effect on the employee's exercise of rights if they do not know the cause of their injury. *Id.* However, in reality, the only "chilling effect" would be to deter employees from making false claims for Workers' Compensation for an injury sustained outside the scope of their employment, and would preclude employees from seeking nuisance-value settlements by bringing meritless claims of retaliation, knowing that their burden of proof included an actual workplace injury. Those employees with legitimate injuries of unclear origin would not be deterred because their injuries will be assessed by their physicians, medical providers and/or State doctors, who will opine as to whether they have sustained an on-the-job injury. Even if the decision of the Court of Appeals is reversed, employers must still tread lightly when considering discipline against an employee whose good faith effort to obtain Workers' Compensation benefits was found to be unsuccessful. This is the balance of rights between employers and employees that the statute intended.

Moreover, the Court of Appeals' interpretation of R.C. 4123.90 ignores the plain statutory language, or alternatively inserts words that are not present in the statute. The very words of the statute set forth that a plaintiff must demonstrate that he or she actually suffered "an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." R.C. 4123.90. This provides protection to employees with legitimate workplace injuries, while at the same time allowing employers the right to properly discipline or terminate those employees who sought to defraud the system.

The Court of Appeals was uncomfortable with the plain language of the statute, claiming that the language of R.C. 4123.90 was ambiguous and redundant. (Court of Appeals Opinion ¶ 25 at App. 19-20). The Court of Appeals held that:

Here, appellee, through its position, advances the interpretation that the phrase “injury or occupational disease which occurred in the course of and arising out of his employment” limits the type of claim and proceedings for which there is protection, and that the limitation is separate and in addition to the limitation that the claim or proceeding must be under the Workers’ Compensation Act. This interpretation results in the conclusion that an employee must prove both that the claim or proceedings are under the Workers’ Compensation Act, and that the claim or proceedings are for an injury that definitively occurred in the course of and arising out of the employment. An at least equally reasonable interpretation, however, is that the phrase is a continuation of the single limiting factor that the claim or proceeding be under the Workers’ Compensation Act, since all claims under the Workers’ Compensation Act are for injuries arising out of the course of employment. Thus, under this interpretation, an employee must prove only that he or she filed a claim or initiated proceedings under the Workers’ Compensation Act.

Id. Through this interpretation, the Court of Appeals reads ambiguity into R.C. 4123.90 where there is none.² As this Court held in *East Ohio Gas Co. v. Public Utilities Comm. of Ohio*, 39 Ohio St.3d 295, 530 N.E.2d 875, 879 (1988), “words in statutes should not be construed to be redundant, nor should any words be ignored.” Here, the Court of Appeals did just that – it interpreted the phrase “injury or occupational disease which occurred in the course of and arising out of his employment” as being nothing more than a “redundant” continuation of the requirement that the claim or proceeding be under the Act. But, this last phrase is not superfluous. It clearly and unequivocally establishes that a workplace injury is an element of a retaliation action without which the claim cannot proceed.

² The Court of Appeals relied heavily upon the 10th District Court of Appeals’ similar opinion in *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111 when reaching its decision. While *Sidenstricker* contains a similar (and erroneous) interpretation to that employed by the appeals court here, it is worth noting that the plaintiff in *Sidenstricker* had not, like Onderko, been finally adjudicated as having not suffered a workplace injury. In *Sidenstricker*, the issue had not been conclusively decided prior to the plaintiff’s termination.

If the General Assembly had intended to allow a R.C. 4123.90 claim for any employee simply filing a Workers' Compensation claim, whether in good faith or not, it could have simply ended the statutory provision after the word "act." That would have given the statute the exact meaning that the Court of Appeals propounds, by prohibiting employers from retaliating against an employee "because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." But the General Assembly did not write the statute that way. Such judicial rewriting of statutes is not permissible. *East Ohio Gas Co. v. Public Utilities Comm. of Ohio*, 39 Ohio St.3d 295, 530 N.E.2d 875, 879 (1988). The phrase was placed in the statute by the General Assembly for a reason, and the language enacted must be given its full meaning and effect.³

For all of the foregoing reasons, this Court should find, as it did in *Wilson*, that in order to establish a *prima facie* case for retaliation under R.C. 4123.90, a plaintiff must prove (1) that an on-the-job injury was suffered⁴; (2) that a Workers' Compensation claim was filed; and that (3) there was retaliation in contravention of R.C. 4123.90.

Proposition of Law No. 2: As a matter of law, an employee who fails to appeal a decision of the Industrial Commission that his or her injury was not work-related cannot bring a R.C. 4123.90 retaliation claim based upon that claimed injury

³ Although R.C. 4123.95 states that the Workers' Compensation Act should be liberally construed in favor of employees, as shown above liberal and/or reasonable statutory construction does not include ignoring statutory limitations or, by "judicial gloss," inserting new words into a statute as the Court of Appeals below and the *Sidenstricker* Court did.

⁴ Many other states have recognized that a plaintiff must prove that he or she suffered a workplace injury in order to succeed on a retaliatory discharge claim. Alabama, Oklahoma, West Virginia, Wisconsin, and Wyoming all include a workplace injury as an element of a workers' compensation retaliation claim. See *Ford v. Carylton Corp., Inc.*, 937 So.2d 491, 499 (Ala. 2006); *Johnston v. St. Simeon's Episcopal Home, Inc.*, 270 P.3d 197, 199-200 (Okla. App. 2011); *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717, 721 (W.Va. 1991); *Ray Hutson Chevrolet, Inc. v. LIRC*, 519 N.W.2d 713, 715-16 (Wis. Ct. App. 1994); *Cardwell v. American Linen Supply*, 843 P.2d 596, 599 (Wyo. 1992).

In this case, the OIC conclusively found that Onderko's knee injury was not work-related. Onderko did not appeal that decision. Thereafter, Sierra Lobo discharged Onderko for his deceptive conduct in seeking Workers' Compensation benefits for a non-work-related injury. As a result, after Onderko filed his R.C. 4123.90 retaliation claim, the trial court correctly determined that, as a matter of law, Onderko could not establish a work-related injury as required by that statute.⁵

The Court of Appeals' ruling that the mere filing of a Workers' Compensation claim triggers a blanket and unyielding protection from discharge under R.C. 4123.90 is misplaced. While it is true that the protections of R.C. 4123.90 are triggered at the filing of a Workers' Compensation claim, this protection is not absolute. If it is later conclusively proven that an employee submitted a falsified claim, an employer can be justified in terminating that employee. *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332 (5th Dist. 1997). To find otherwise would mean that any employee filing a Workers' Compensation claim, truthful or otherwise, would be protected from termination. Such a result would be unjust and unreasonable and ignores the doctrine of *res judicata*.

An employer should not be forced to weigh the potential costs of litigation when deciding whether to terminate an employee who is the subject of a *res judicata* finding that the underlying Workers' Compensation claim was based on an injury that occurred outside of work. While the protection of employees from retaliation for legitimate claims under the Act is important, this protection should not and cannot be allowed to extend to employees who seek to exploit and defraud the system. This is what the Court of Appeals' interpretation of R.C. 4123.90 would allow. Where, as here, there is a legally-binding determination that an employee sought

⁵ It is well established that the doctrines of *res judicata* and *collateral estoppel* apply to the decisions of the OIC. See, e.g., *Ammon v. Fresh Mark, Inc.*, 7th Dist. No. 94-C-46, 1995 WL 472301 (Aug. 9, 1995).

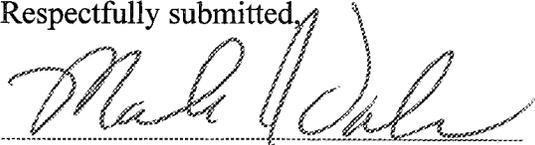
Workers' Compensation benefits for a non-work-related injury, an employer should be permitted to discharge that employee after that determination without fear of liability under R.C. 4123.90.

The Court of Appeals' conclusion that the burden-shifting framework of R.C. 4123.90, which gives an employer the opportunity to show that it terminated an employee for a legitimate reason, does not suffice. This improperly puts an onerous burden on the employer to defend an unjustified lawsuit and again to prove what it has already proven -- that the employee's claim was based on a non-work-related injury. Where, as here, there is a legally-binding determination that the employee filed a deceitful claim, an employer should not be required to defend subsequent additional litigation for retaliation under R.C. 4123.90 simply because a defense exists. Such a result would create double exposure and significant unnecessary expense, where there ought to be none.

CONCLUSION

As found by the trial court, the unambiguous language of Revised Code § 4123.90 requires the existence of a work-related injury in order for a plaintiff to prosecute a claim for retaliation. The Court of Appeals simply ignored that critical phrase in the statute which, under the facts of this case, was particularly erroneous given that Onderko's injury had already been conclusively adjudicated as being non-work-related before he filed his retaliation claim. For these reasons the decision below should be reversed and judgment entered in favor of the Appellant, Sierra Lobo, Inc.

Respectfully submitted,



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I certify that a copy of Appellant Sierra Lobo, Inc.'s Merit Brief was sent by ordinary U.S. mail, pursuant to Civ.R. 5(B)(2)(c), this 19 day of March, 2015 to the following counsel:

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In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO
CASE NO. E-14-009

MICHAEL P. ONDERKO,
Plaintiff-Appellee,

v.

SIERRA LOBO, INC.
Defendant-Appellant.

INDEX TO APPENDIX AND SUPPLEMENT TO APPELLANT SIERRA LOBO, INC.'S MERIT BRIEF

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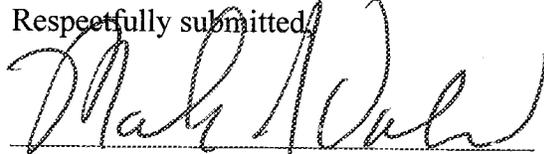
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Document Description	Date	Page Nos.
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In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO
CASE NO. E-14-009

MICHAEL P. ONDERKO,
Plaintiff-Appellee,

v.

SIERRA LOBO, INC.
Defendant-Appellant.

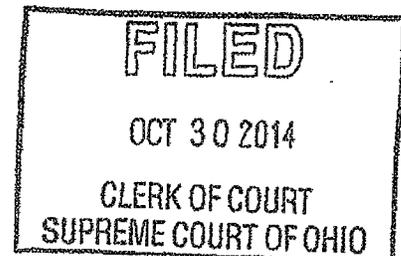
**NOTICE OF APPEAL OF
APPELLANT SIERRA LOBO, INC.**

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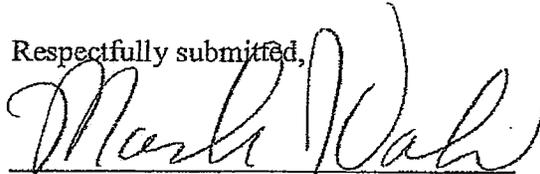
COUNSEL FOR APPELLANT SIERRA
LOBO, INC.



Appellant Sierra Lobo, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Erie County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. E-14-009 on September 19, 2014.

This case is one of public or great general interest for the reasons set forth in the Memorandum in Support of Jurisdiction being filed concurrently herewith. Appellant has also timely filed a motion to certify a conflict under App.R. 25 with the Court of Appeals, and a Notice of Pending Motion to Certify a Conflict is also being filed concurrently with this Notice of Appeal.

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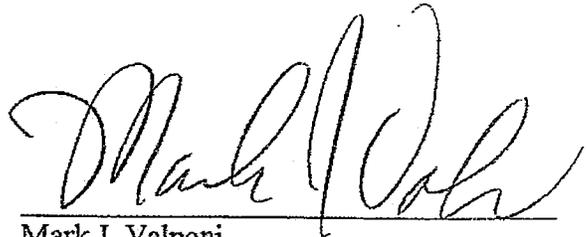
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I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, pursuant to Civ.R. 5(B)(2)(c), this 29 day of October 2014 to the following counsel:

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided: NOV 05 2014

* * * * *

This matter is before the court on the App.R. 25 motion of appellee, Sierra Lobo, Inc., to certify a conflict between our court's decision in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, and the decisions of several other district courts on the following question:

In *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985) (syllabus), the Ohio Supreme Court held that "[a] complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for

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workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90." Based upon this holding, must a plaintiff pursuing a claim for retaliatory discharge under R.C. 4123.90 prove that he suffered a workplace injury?

Appellant, Michael Onderko, has filed a response in opposition to appellee's motion.

Article IV, Section 3(B)(4) of the Ohio Constitution provides, "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has set forth three conditions that must be met before the certification of a conflict:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Upon careful consideration, we find that motion to certify the conflict must be granted.

In its motion, appellee argues that our decision is in conflict with *Young v. Stetter & Brinck, Ltd.*, 174 Ohio App.3d 221, 2007-Ohio-6510, 881 N.E.2d 874 (1st Dist.), *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), *Lawrence v. Youngstown*, 7th Dist. Mahoning No. 09 MA 189, 2012-Ohio-6237, *Balog v. Matteo Aluminum, Inc.*, 8th Dist. Cuyahoga No. 82090, 2003-Ohio-4937, *Goersmeyer v. General Parts, Inc.*, 9th Dist. Medina No. 06CA00045-M, 2006-Ohio-6674, *Brannon v. City of Warren*, 11th Dist. Trumbull No. 2003-T-0077, 2004-Ohio-5105.

We initially note that the decisions of the First, Seventh, Eighth, Ninth, and Eleventh Districts do not directly consider the issue of whether the failure to prove a workplace injury prevents a plaintiff from establishing a prima facie case of retaliatory discharge under R.C. 4123.90. In particular, the decisions of the First, Seventh, Eighth, and Ninth Districts involved situations where it was undisputed that the plaintiff suffered a workplace injury. Further, in the Eleventh District's decision, although the court noted that the plaintiff *allegedly* suffered a workplace injury, it did not address that issue in its analysis, instead focusing on the plaintiff's failure to show that the employer's proffered legitimate, non-retaliatory reason for discharge was merely pretext. Thus, even though those cases recited the language from *Wilson*, because the issue of a workplace injury was not addressed or determinative of the outcome, we do not find a conflict between those decisions and ours.

However, the Fifth District directly addressed the issue of whether proof of a workplace injury is a necessary element of a prima facie case of retaliatory discharge. In *Kilbarger*, the plaintiff's first assignment of error was that the trial court "applied an incorrect burden of proof by requiring [the plaintiff] to prove that he was injured at work." *Kilbarger* at 338. The Fifth District overruled this assignment of error, stating that the plaintiff had the burden to prove all the elements of the case at trial, and that the plaintiff failed to satisfy his burden to prove that he was injured at work. *Id.* at 338-339.

Therefore, upon due consideration, we find appellee's motion to certify a conflict well-taken. Our holding in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, is in conflict with the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997). Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

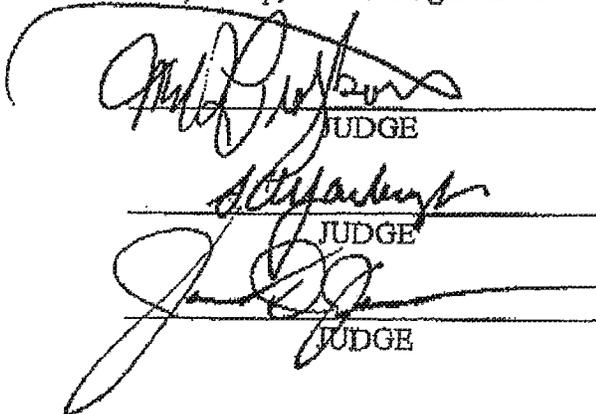
Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

The parties are directed to S.Ct.Prac.R. 8.01, et seq., for further guidance.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.



JUDGE
JUDGE
JUDGE

MANDATE

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided:

SEP 19 2014

Margaret O'Bryon, for appellant.

Mark P. Valponi and Brian E. Ambrosia, for appellee.

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee, Sierra Lobo, Inc., on plaintiff-appellant's, Michael Onderko, claims for retaliatory discharge and

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intentional infliction of emotional distress. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} On Thursday, August 9, 2012, appellant was moving a table and some cabinets in the course of his employment as an engineering tech for appellee when he felt some pain in his right knee. Appellant states that because of the pain, he left work early that day. On his way home, appellant stopped at a gas station. As he was stepping off a curb, his right knee “gave out.” Consequently, he went to the hospital. The handwritten notes from the emergency room records document that “[appellant] had R knee pain for a couple weeks, but today took a step off the curb & heard a ‘pop.’ Now painful to bear weight.” Appellant states that the emergency room doctor then recommended that he follow up with an orthopedic doctor.

{¶ 3} The next day, appellant saw Dr. Biro. A clinic note from Dr. Biro indicates that appellant had injured his right knee six weeks earlier, which injury resolved itself after several weeks of ice, rest, and walking on crutches. The note further indicates that appellant continued with daily living until the knee “completely let go” when he was climbing a curb.

{¶ 4} Notably, neither the hospital records nor Dr. Biro’s notes included any mention by appellant that he suffered an injury while at work. Appellant states in his affidavit that he did not mention work to the emergency room doctor because he was afraid of being fired since it was known that appellee was very concerned about its safety

record. In addition, appellant states that Dr. Biro's clinic note contained incorrect information in that appellant did not have a prior injury to his right knee, but rather had a prior injury to his left knee. Appellant also states that he tried to contact Dr. Biro to correct the clinic note, but that Dr. Biro refused to see him once Dr. Biro found out that it was a workers' compensation injury.

{¶ 5} Following his doctor visits, appellant contacted April Reeves, an employee in appellee's human resources department, and told her that he tore his right ACL.¹ Reeves states in her affidavit that appellant told her the injury did not occur at work, but appellant disputes Reeves' statement in his own affidavit. On August 13, 2012, after speaking with Reeves, appellant then contacted Dave Hamrick, appellee's corporate director of human resources, and inquired about receiving light-duty work. Hamrick informed appellant that appellant could not return to work due to the pain medication appellant was taking.

{¶ 6} Thereafter, still on August 13, 2012, appellant filed a First Report of Injury with the Bureau of Workers' Compensation ("BWC"). Appellant states in his affidavit that he filed the report because Hamrick told him he did not have a work injury but appellant wanted to ensure that it was filed as a work injury. The August 13, 2012 report claims a torn right ACL caused by lifting and pushing equipment. On August 28, 2012, appellant filed a second First Report of Injury, this time claiming a right knee sprain/strain. The BWC initially disallowed appellant's claim, but later vacated that

¹ Nothing in the record supports a medical diagnosis of a torn right ACL.

decision and entered a new decision that allowed appellant's claim on the medical condition of a right knee sprain.

{¶ 7} Appellee appealed the BWC's decision to the Industrial Commission. After a hearing, the Industrial Commission reversed BWC's decision and denied appellant's workers' compensation claim on November 6, 2012. In her decision, the Industrial Commission District Hearing Officer found that appellant's injury was not sustained in the course of his employment. Appellant did not appeal the November 6, 2012 decision. He states that he did not file an appeal because he was already back at work and just wanted the ordeal to be over.

{¶ 8} One month later, on December 12, 2012, appellee terminated appellant's employment. Prior to his termination, appellant had received three performance bonuses, had no discipline write-ups, and had no unexcused absences. Appellant states that Hamrick told him he was being terminated due to the workers' compensation outcome. Hamrick, for his part, states in his affidavit that appellant was terminated "for his deceptive attempt to obtain Workers' Compensation benefits for a non-work related injury."

{¶ 9} On March 8, 2013, appellant initiated his present claims for retaliatory discharge in violation of R.C. 4123.90, and for intentional infliction of emotional distress. As to the claim for retaliatory discharge, appellee moved for summary judgment solely on the basis that appellant could not satisfy the required element of having suffered a workplace injury. Specifically, appellee argued that the Industrial Commission

determined that the injury did not occur at the workplace, and that such decision was binding on appellant through the doctrines of res judicata and collateral estoppel. Thus, appellee concluded it was entitled to judgment as a matter of law. Appellant, on the other hand, argued that having an allowable workers' compensation claim is not a required element of retaliatory discharge under R.C. 4123.90. Rather, citing *Ammon v. Fresh Mark, Inc.*, 7th Dist. Columbiana No. 94-C-46, 1995 WL 472301 (Aug. 9, 1995), appellant contended it is the "mere filing of a compensation claim [that] trigger[s] the statutory protection from discharge."

{¶ 10} As to the claim for intentional infliction of emotional distress, appellee argued that it is entitled to summary judgment because its act of terminating appellant for deceptively attempting to collect benefits for a non-work-related injury is not "extreme and outrageous" conduct, especially where appellant is employed "at-will." Appellant responded by arguing that he did not lie about his workers' compensation claim, and that his claim was supported by the medical report of Dr. Ahn, and by the statements of three co-workers who reported that appellant told them he had aggravated his knee while moving cabinets in the shop.

{¶ 11} The trial court, in granting summary judgment to appellee, agreed that res judicata and collateral estoppel precluded appellant from re-litigating whether he suffered a workplace injury. Further, the trial court determined that "[appellee] did not terminate [appellant] for merely filing a workers' compensation claim and subsequently being denied benefits. Instead, [appellee] terminated [appellant] for engaging in deceptive

practices: engaging in deceptive behavior when he attempted to obtain BWC benefits for an injury that was not work related.” The court concluded,

Therefore, even in holding the evidence most favorable to [appellant], reasonable minds can only come to the conclusion that [appellee] did not violate R.C. 4123.90 as [appellant] did not suffer a work related injury and that [appellee] has proven with clear and convincing evidence that [appellee] terminated [appellant] for misrepresenting his injury as a work related injury. [Appellant] cannot bring forth a prima facie case of retaliatory firing.

{¶ 12} Finally, as it pertains to appellant’s intentional infliction of emotional distress claim, the trial court held that appellant could not prove that appellee’s conduct was extreme and outrageous. As support for its conclusion, the trial court noted that appellant did not suffer a work injury and appellee chose to terminate appellant based upon lawful reasons, i.e., “[appellant’s] dishonesty in filing a workers’ compensation claim for an injury that did not occur at work.”

B. Assignments of Error

{¶ 13} On appeal, appellant presents two assignments of error for our review:

1. The Trial Court Committed Error in Granting Appellee’s Motion for Summary Judgment on the Basis that *Res Judicata* and *Collateral Estoppel* prohibited Appellant from Prevailing on a Retaliatory Discharge Claim Regarding a Work Related Injury.

2. The Trial Court Committed Error in Granting Appellee's Motion for Summary Judgment on the Basis that the Employer's Conduct was not Extreme and Outrageous.

II. Analysis

{¶ 14} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Retaliatory Discharge

{¶ 15} A claim for retaliatory discharge under R.C. 4123.90 involves a burden shifting analysis. Initially, the employee bears the burden of establishing a prima facie case of retaliatory discharge. *Napier v. Roadway Freight, Inc.*, 6th Dist. Lucas No. L-06-1181, 2007-Ohio-1326, ¶ 12. Once an employee has set forth a prima facie case, the burden then shifts to the defendant to set forth a legitimate, non-retaliatory reason for the discharge. *Id.* "If the employer sets forth a legitimate, non-retaliatory reason, the burden again shifts to the employee to 'specifically show' that the employer's purported reason is pretextual and that the real reason the employer discharged the employee was because

the employee engaged in activity that is protected under the Ohio Workers' Compensation Act." *Id.*

{¶ 16} Here, the threshold issue we must decide in appellant's first assignment of error is what elements are required to prove a prima facie claim for retaliatory discharge under R.C. 4123.90. Specifically, we must determine whether appellant must prove that he suffered a workplace injury. We hold that he does not.

{¶ 17} Our analysis centers on R.C. 4123.90, which provides, in relevant part,

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

{¶ 18} Appellee argues that the statute requires proof of three elements: (1) the employee was injured on the job, (2) the employee filed a claim for workers' compensation, and (3) the employee was discharged by the employer in contravention of R.C. 4123.90. Similarly, our court on several occasions has stated the elements as, "(1) the employee suffered an occupational injury; (2) the employee filed a workers' compensation claim; and (3) the employee was subsequently demoted or discharged from her employment in retaliation for the filing of the claim for benefits." *E.g., Huth v. Shinner's Meats, Inc.*, 6th Dist. Lucas No. L-05-1182, 2006-Ohio-860, ¶ 17. This formulation of the elements derives from *Wilson v. Riverside Hosp.*, 18 Ohio St.3d 8, 10,

479 N.E.2d 275 (1985), in which the Ohio Supreme Court held “a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.”

{¶ 19} However, the Tenth District, in *Sidenstricker v. Miller Pavement Maint., Inc.*, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, ¶ 58, restated the elements of a prima facie case for retaliatory discharge under R.C. 4123.90 as: (1) the employee was engaged in a protected activity, (2) he or she was the subject of an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. *See also Ferguson v. SanMar Corp.*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132, ¶ 17 (adopting the Tenth District’s approach). An employee engages in a protected activity when he or she “file[s] a workers’ compensation claim or institute[s], pursue[s] or testify[s] in a workers’ compensation proceeding regarding a workers’ compensation claim.” *Sidenstricker* at ¶ 58.

{¶ 20} In reformulating the elements of a prima facie claim under R.C. 4123.90 to clarify that proof of a workplace injury is not required, the Tenth District reasoned first that *Wilson* did not hold that proof of injury on the job is a necessary element of a retaliatory discharge claim. In *Wilson*, the parties did not dispute that the plaintiff was injured in a fall at her place of employment. *Wilson* at 8. As a result of her injury, the plaintiff was unable to work for 11 months. When she notified her employer of her

intention to return to work, the employer informed her that she no longer had a job. The employer explained in a letter that its leave of absence policy only guaranteed a position for ten weeks. Since the plaintiff had been gone for over eleven months, the employer had filled her position. *Id.*

{¶ 21} The plaintiff then filed a complaint against her employer, alleging a violation of R.C. 4123.90. Attached to the complaint was the letter from the employer explaining its leave of absence policy. The employer moved to dismiss the complaint under Civ.R. 12(B)(6) on the grounds that the complaint did not “specifically allege that the discharge was in retaliation for plaintiff’s workers’ compensation claim.” *Id.* On appeal to the Ohio Supreme Court, the employer argued that the attached letter demonstrates that the plaintiff was terminated pursuant to the leave of absence policy and that there was no retaliatory motive. *Id.* at 10. The Ohio Supreme Court rejected this argument, reasoning that the plaintiff’s material allegation with respect to the letter was that her employment relationship was terminated; the complaint did not allege that the plaintiff was discharged because of the leave of absence policy. Thus, the leave of absence policy could not be considered in determining whether the motion to dismiss should be granted. *Id.* The court continued, stating that the material allegations in the complaint were that the plaintiff “was employed by [the employer], she was injured on the job, she received workers’ compensation, she attempted to return to her job after recovering from the work-related injury, and she was discharged in contravention of R.C. 4123.90.” *Id.* The court concluded that “[b]y referring to R.C. 4123.90 in the complaint,

appellant sufficiently complied with the notice pleading requirements of Civ.R. 8(A).”

Id. Thus, the court held “that a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.” *Id.*

{¶ 22} A close examination of *Wilson* reveals that the element of “injury on the job” was not the focal point of the decision, as it was undisputed that the plaintiff suffered such an injury. Rather, the focus of the holding was that a reference to R.C. 4123.90 in a complaint for retaliatory discharge was sufficient to satisfy the notice pleading requirements, and that the plaintiff was not required to specifically allege that the discharge was in retaliation for her filing of a workers’ compensation claim.

{¶ 23} The Tenth District in *Sidenstricker* further noted that, although Ohio courts frequently cite *Wilson* for the elements of a retaliatory discharge claim under R.C. 4123.90, only one has directly addressed the element of “injury on the job.” In that single case, *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the Fifth District held that the employee failed to satisfy the element of injury on the job, but also held that the employee failed to prove that the employer’s legitimate reason for discharge was pretextual. Thus, no Ohio case has been decided solely on the issue of injury on the job, as appellee requests that we do here.

{¶ 24} After examining *Wilson*, the Tenth District next looked to the language of the statute itself. In examining a statute, the initial question that must be resolved in

determining the intent of the legislature is whether the language is ambiguous. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. “However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction.” *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991).

{¶ 25} Here, appellee, through its position, advances the interpretation that the phrase “injury or occupational disease which occurred in the course of and arising out of his employment” limits the type of claim and proceedings for which there is protection, and that the limitation is separate and in addition to the limitation that the claim or proceeding must be under the Workers’ Compensation Act. This interpretation results in the conclusion that an employee must prove both that the claim or proceedings are under the Workers’ Compensation Act, and that the claim or proceedings are for an injury that definitively occurred in the course of and arising out of the employment. An at least equally reasonable interpretation, however, is that the phrase is a continuation of the single limiting factor that the claim or proceeding be under the Workers’ Compensation Act, since all claims under the Workers’ Compensation Act are for injuries arising out of the course of employment. Thus, under this interpretation, an employee must prove only

that he or she filed a claim or initiated proceedings under the Workers' Compensation Act.

{¶ 26} Because there are two reasonable interpretations, we must turn to the rules of statutory construction, bearing in mind that “[t]he primary rule in statutory construction is to give effect to the legislature’s intention.” *Cline* at 97. Initially, we note that, in dealing with ambiguity, the legislature has stated its intention that “where a section of the Workmen’s Compensation Act will bear two reasonable but opposing interpretations, the one favoring the claimant must be adopted.” *State ex rel. Sayre v. Indus. Comm.*, 17 Ohio St.2d 57, 62, 245 N.E.2d 827 (1969), citing R.C. 4123.95 (“Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.”).

{¶ 27} One of the aids of construction in determining the intent of the legislature is the object sought to be attained by the statute. R.C. 1.49(A). To that end, the Ohio Supreme Court has stated that the basic purpose of the anti-retaliation provision in R.C. 4123.90 is “to enable employees to freely exercise their rights without fear of retribution from their employers.” *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 22, quoting *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, ¶ 43. Under appellee’s interpretation, that purpose would be frustrated in situations such as this where the precise cause of the injury is unknown at the time, and multiple incidents may have substantially aggravated a condition resulting in an injury. Requiring an employee to successfully prove that the

injury occurred at work for purposes of a retaliatory discharge claim would have a chilling effect on the exercise of his or her rights because the employee would be forced to choose between a continuation of employment and the submission of a workers' compensation claim. This choice must be made by the employee knowing that if he or she fails to prove that the cause of the injury was work related, not only will his or her claim be denied, but the employer would then be free to terminate the employment simply because the claim was filed. As recognized by the Nevada Supreme Court, "In the absence of an injury resulting in permanent total disability, most employees would be constrained to forego their entitlement to industrial compensation in favor of the economic necessity of retaining their jobs." *Hansen v. Harrah's*, 100 Nev. 60, 64, 675 P.2d 394 (1984).

{¶ 28} Therefore, in accordance with R.C. 4123.95 and the basic purpose of the anti-retaliation provision, we construe R.C. 4123.90 to require that an employee must prove only that he or she "filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." The employee is not required to prove definitively that the injury occurred and arose out of the course of employment. In so doing, we agree with the reasoning of the Tenth District, and adopt its holding that to prove a prima facie case of retaliatory discharge, the employee must show:

- (1) the employee filed a workers' compensation claim or instituted, pursued or testified in a workers' compensation proceeding regarding a workers' compensation claim (the "protected activity"),
- (2) the employer discharged,

demoted, reassigned or took punitive action against the employee (an “adverse employment action”), and (3) a causal link existed between the employee’s filing or pursuit of a workers’ compensation claim and the adverse employment action by the employer (“retaliatory motive”).

Sidenstricker, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111 at ¶ 58.

{¶ 29} Our holding today, however, does not grant employees the power to file frivolous workers’ compensation claims with impunity. “The scope of R.C. 4123.90 is narrow and protects only against adverse employment actions in direct response to the filing or pursuit of a workers’ compensation claim.” *Ayers v. Progressive RSC, Inc.*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687, ¶ 14; *see also Oliver v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 02AP-229, 2002-Ohio-5005, ¶ 10. “R.C. 4123.90 does not prohibit a discharge for just and legitimate termination of employment. It does not suspend the rights of an employer, nor insulate an employee from an otherwise just and lawful discharge.” *Markham v. Earle M. Jorgensen Co.*, 138 Ohio App.3d 484, 493, 741 N.E.2d 618 (8th Dist.2000), quoting *Brown v. Whirlpool Corp.*, 3d Dist. Marion No. 9-86-20, 1987 WL 16261 (Sept. 1, 1987).

{¶ 30} Several Ohio courts have found that committing fraud in the pursuit of a workers’ compensation claim is a legitimate, non-retaliatory reason for discharge. In *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the employer terminated the employee for falsification of records in

connection with the filing of a workers' compensation claim. In that case, the employee's ex-girlfriend testified that the employee injured himself while painting houses during the plant's summer shutdown, but told her that he would claim the injury occurred while carrying buckets at the plant. Following a bench trial, the trial court found in favor of the employer on the employee's claim for retaliatory discharge, which the Fifth District affirmed. *Id.* at 336, 343. In *Kent v. Chester Labs Inc.*, 144 Ohio App.3d 587, 761 N.E.2d 60 (1st Dist.2001), the employer terminated the employee for dishonesty based on the statement of the employee's co-worker that her injury "was fake as fake could be," and on the fact that the employee had previously injured herself while lifting a bale of newspapers outside of work. The trial court granted summary judgment in favor of the employer, but the First District reversed, and remanded the matter for a trial to determine the motive for the discharge. *Id.* at 593-594. In another case from the First District, *Kelly v. Coca-Cola Bottling Co.*, 1st Dist. Hamilton No. C-030770, 2004-Ohio-3500, the employer fired the employee for dishonesty relating to lifting weights in excess of the doctor's recommendation. The trial court granted summary judgment, but the First District reversed, finding that a genuine issue of material fact existed on whether the employer's stated reason for termination was pre-textual. *Id.* at ¶ 42. Finally, in *Ayers, supra*, the employer terminated the employee for violating the company's code of conduct policy against deceit. In that case, the employee answered on a workers' compensation questionnaire that she had never been involved in an automobile accident. However, the employee had actually been involved in at least five automobile accidents.

Further, testimony was presented that the employee called the doctor's office directly to reschedule her independent medical examination, in violation of the company policy that only the employer can reschedule an examination, and that the employee represented herself as someone else in order to reschedule. The trial court granted summary judgment in favor of the employer, and the Eighth District affirmed finding that the employee failed to establish a prima facie case and failed to demonstrate that the stated reason for discharge was mere pretext. *Ayers*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687 at ¶ 18.

{¶ 31} These cases are informative in that in each of them, the question of the employee's honesty regarding the workers' compensation claim was determined within the framework of the burden shifting analysis pertaining to the true motivation behind the adverse employment action. If the employer can show that the basis of the discharge was fraud or dishonesty, the employee has the opportunity to prove that the stated reason is pretextual, and that the true motivation was the filing of the workers' compensation claim itself. An employee can prove pretext by showing that the employer's proffered reason "(1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action." *Ferguson*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132 at ¶ 21, citing *Wysong v. Jo-Ann Stores, Inc.*, 2d Dist. Montgomery No. 21412, 2006-Ohio-4644, ¶ 13; *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4724, 898 N.E.2d 56, ¶ 9 (1st Dist.). We think that such an approach is appropriate in this situation as well.

{¶ 32} However, we do not reach the issue of whether appellee put forth a legitimate, non-retaliatory reason for discharge, or whether appellant demonstrated that the proffered reason was pretext through evidence showing that he did not in fact lie or commit fraud in the filing of his workers' compensation claims. It is well-settled in Ohio that "a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of *informing the trial court of the basis for the motion*, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." (Emphasis added.) *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *see also Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus ("A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher* at 293. Here, with respect to the retaliatory discharge claim, appellee made no argument that it provided a legitimate, non-retaliatory reason for discharge or that appellant failed to provide evidence demonstrating that the reason was merely pretext. Instead, appellee argued solely that by failing to appeal the Industrial Commission's decision disallowing benefits, appellant was collaterally estopped or barred by *res judicata* from establishing the workplace injury element of his claim. Because we have determined that a workplace injury is not a required element of a retaliatory discharge claim under R.C. 4123.90, and because no

other grounds were offered, we conclude that summary judgment for appellee on the retaliatory discharge claim was inappropriate.

{¶ 33} Accordingly, appellant's first assignment of error is well-taken.

B. Intentional Infliction of Emotional Distress

{¶ 34} "In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).

{¶ 35} In its motion for summary judgment, appellee argued that it was entitled to judgment because its conduct was not extreme and outrageous as a matter of law.

Extreme and outrageous conduct has been described as:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community

would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts, Section 46(1), Comment d (1965).

{¶ 36} In particular, appellee contended that appellant did not pursue a valid workers' compensation claim, but rather attempted to collect benefits for a non-work related injury. Appellee stated that "[s]uch deceptive conduct constituted a legitimate, non-discriminatory, non-retaliatory business reason to terminate [appellant's] employment and cannot be found to be 'extreme and outrageous' conduct," so as to support an intentional infliction of emotional distress claim. Further, appellee contended that the termination of an at-will employee is an exercise of the employer's legal rights and does not constitute extreme or outrageous conduct. Appellee relies on *Jones v. Wheelersburg Local School Dist.*, 4th Dist. Scioto No. 12CA3513, 2013-Ohio-3685, ¶ 42, for the proposition that

"Termination of employment, without more, does not constitute the outrageous conduct required to establish a claim of intentional infliction of emotional distress, even when the employer knew that the decision was likely to upset the employee." * * * Moreover, an employer is not liable for a plaintiff's emotional distress if the employer does no more than "insist upon his legal rights in a permissible way, even though he is well aware

that such insistence is certain to cause emotional distress.” (Internal citations omitted.)

{¶ 37} Appellant responded by arguing that he never lied about his workers’ compensation claim, and that his claim was supported by the medical report of Dr. Ahn, who examined him as part of his workers’ compensation claim, and by three employees who acknowledged that appellant said he aggravated his knee while moving cabinets at work.

{¶ 38} Upon our review of the facts, viewed in the light most favorable to appellant, we conclude that no reasonable fact-finder could find that appellee’s conduct rises to the level of outrageousness sufficient to support a claim for intentional infliction of emotional distress. We hold that, under the circumstances, appellee’s actions in terminating an at-will employee do not go beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Therefore, appellee’s actions are not extreme and outrageous as a matter of law, and summary judgment in favor of appellee on appellant’s intentional infliction of emotional distress claim is appropriate.

{¶ 39} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 40} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded to the

trial court for further proceedings on appellant's claim for retaliatory discharge under R.C. 4123.90. Costs of this appeal are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

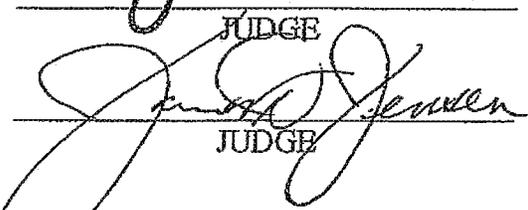
Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.



JUDGE

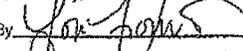


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE
A TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE.

LUVADA S. WILSON/CLERK OF COURTS
Erie County, Ohio

By 

Ohio Industrial Commission
RECORD OF PROCEEDINGS

Claim Number: 12-840216 Claims Heard: 12-840216
LT-ACC-OSIF-COV
PCN: 2122841 Michael P. Onderko

MICHAEL P. ONDERKO
14217 KNEISEL RD
VERMILION OH 44089-9201

Date of Injury: 8/09/2012 Risk Number: 1140673-0

This claim has been previously allowed for: SPRAIN RIGHT KNEE & LEG.

This matter was heard on 10/31/2012 before District Hearing Officer Peggy Marting pursuant to the provisions of R.C. Sections 4121.34 and 4123.511 on the following:

APPEAL filed by Employer on 10/04/2012 from the order of the Administrator issued 09/21/2012.

Issue: 1) Injury Or Occupational Disease Allowance
2) Temporary Total Disability
3) Full Weekly Wages/Average Weekly Wages

Notices were mailed to the injured worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not fewer than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Onderko
APPEARANCE FOR THE EMPLOYER: Mr. Kurtz
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the Administrator, dated 09/21/2012, is vacated.

The District Hearing Officer finds that Mr. Onderko did not sustain an injury in the course of arising out of his employment as alleged. Therefore, this claim is DENIED in its entirety.

At the hearing, Mr. Onderko testified that he was involved in rearranging the shop in his capacity as a mechanic. He stated that his right knee hurt. He testified he never had any problems with his right knee prior to this alleged incident.

On the date in question, Mr. Onderko stated he was moving a table when his right knee and leg started bothering him. Therefore, he told co-workers he was going home early. On the way home, according to his testimony, he stopped to purchase gasoline for his vehicle and stepped on the island curb and felt his knee give way.

The medical records on file indicate that Mr. Onderko was seen at Mercy Hospital in Lorain, Ohio on 08/09/2012. The handwritten history within Mercy Hospital's records documents that Mr. Onderko had had right knee pain for "a couple of weeks, but today took a step off the curb and heard a pop." The District Hearing Officer notes that there is no reference whatsoever to a work related injury within the Mercy Regional Medical Center Records.

There is an office from Dr. Biro dated 08/10/2012, wherein Dr. Biro indicates

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 12-840216

that Mr. Onderko sustained an injury to his knee approximately six weeks prior to the 08/10/2012 visit. The chief complain is listed as right knee instability. Dr. Biro's office note describes the prior injury in detail, noting that Mr. Onderko "incurred an injury wherein the knee was flexed, internally rotated and the patient fell." The history indicates that Mr. Onderko "self-treated with ice, relative rest, crutch walking with resolution after several weeks time." This note then indicates that Mr. Onderko "ended up climbing a curb when the knee "completely let go," causing a second fall. [emphasis added] The same progress report indicates that the Emergency Room visit of 08/09/2012 resulted in Mr. Onderko being "placed back on crutches." [emphasis added]

Mr. Onderko testified that the remarks in Dr. Biro's office note of 08/10/2012 were inaccurate. He stated he had contacted Dr. Biro's office and requested that Dr. Biro correct this office note because Mr. Onderko maintains he never had right knee injury or symptoms prior to this alleged industrial injury. However, there are multiple witness statements on file from co-workers that indicate that Mr. Onderko had told co-workers about previous problems with his right knee.

The District Hearing Officer is not persuaded that the comments in Dr. Biro's office notes are inaccurate based on contemporaneous reports from co-workers that Mr. Onderko had problems with his right knee prior to 08/09/2012.

Additionally, the District Hearing Officer has reviewed a report from Dr. Biro dated 08/17/2012. This is a follow-up office visit for a review of Mr. Onderko's MRI study. This report indicates that Mr. Onderko has determined to proceed with this "under Bureau of Workers' Compensation Mantle." However, this office note also indicates that it was not known prior to 08/17/2012 that Mr. Onderko intended this as a work-related injury. Accordingly, the District Hearing Officer concludes that Mr. Onderko did not tell Dr. Biro that he was injured at work.

Other records on file indicate that Mr. Onderko had called his Employer requesting modified duty on 8/10/12 and was dissatisfied when those arrangements could not be made for him. It was after this that Mr. Onderko filed a Workers' Compensation claim.

The District Hearing Officer has reviewed and considered all available evidence prior to rendering this decision. This decision is based upon the records from Dr. Biro dated 08/10/2012 and 08/17/2012 as well as the records from Mercy Hospital Emergency Room 08/09/2012, Mr. Onderko's testimony at hearing, and various witness statements filed on 10/26/2012. The District Hearing Officer has reviewed and noted the additional statement from Mr. Onderko dated 10/29/2012.

An IC-12 Appeal from this order may be filed within fourteen (14) days of the receipt of the order. The IC-12 may be filed online at www.ohioic.com or the IC-12 may be sent to the Industrial Commission of Ohio, Mansfield District Office, 240 Tappan Drive North, Suite A, Ontario, OH 44906.

Typed By: tlh
Date Typed: 11/02/2012
Findings Mailed: 11/06/2012

Peggy Marting
District Hearing Officer

Electronically signed by
Peggy Marting

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 12-840216

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

12-840216
Michael P. Onderko
14217 Kneisel Rd
Vermilion OH 44089-9201

Risk No: 1140673-0
Sierra Lobo Inc
11401 Hoover Rd
Milan OH 44846-9711

ID No: 900-80
Compmanagement, Inc.
PO Box 884
Dublin OH 43017-6884

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

4123.90 Discrimination against alien dependents unlawful.

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children, or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Effective Date: 11-03-1989

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

MICHAEL P. ONDERKO,)	CASE NO. 2013CV0187
)	
Plaintiff,)	JUDGE TYGH TONE
)	
V.)	
)	<u>AFFIDAVIT OF DAVID HAMRICK</u>
SIERRA LOBO, INC.,)	
)	
Defendant.)	
)	
)	

David Hamrick, after being duly sworn, deposes and states that he is the Corporate Director of Human Resources for Sierra Lobo, Inc. ("SLI") and that he has personal knowledge of the factual statements in this Affidavit.

1. Michael P. Onderko was hired by SLI on November 15, 2010 as an Engineering Tech IV in its Milan, Ohio, plant.
2. On Monday, August 13, 2012, at approximately 9:00 a.m., Onderko asked me if he could return to work on light duty status. I told him he could not return to work because of the medication he was currently taking.
3. In September of 2012, SLI appealed the Bureau of Workers' Compensation decision in Onderko's Claim No. 12-840216 ("Claim").

4. In November of 2012, SLI received the Ohio Industrial Commission's decision which denied the Claim in its entirety because the injury was not work related.

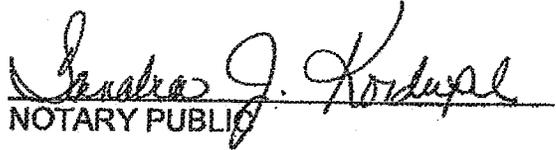
5. On December 12, 2012, Onderko was terminated from SLI for his deceptive attempt to obtain Workers' Compensation benefits for a non-work-related injury.

FURTHER AFFIANT SAYETH NAUGHT.



DAVID HAMRICK

SWORN TO BEFORE ME and subscribed in my presence this 20 day of September, 2013.



NOTARY PUBLIC

Sandra J. Kordupel
Notary Public, State of Ohio
My Commission Expires June 14, 2015

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

MICHAEL P. ONDERKO,)
) CASE NO. 2013CV0187
)
 Plaintiff,)
) JUDGE TYGH TONE
)
 V.)
)
) AFFIDAVIT OF APRIL REEVES
 SIERRA LOBO, INC.,)
)
)
 Defendant.)
)
)

April Reeves, after being duly sworn, depose and state that I have personal knowledge of the factual assertions contained in this Affidavit.

1. I am employed by Sierra Lobo, Inc. in the Human Resources Department as a Human Resources Generalist and have been since March 8, 2010.

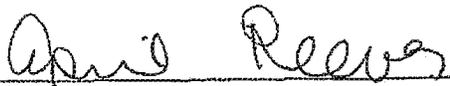
2. On the afternoon of August 10, 2012, I received a telephone call from Michael Onderko ("Onderko"), an at-will Engineering Tech 4 who worked for Sierra Lobo, Inc.

3. Onderko told me that he needed to talk to someone about light duty work. I asked him why he needed light duty work.

4. Onderko told me that he blew out his ACL and he would be having surgery. I asked him if it happened at work and he said it did not and that he had been having problems with it for a while now.

5. Attached to Sierra Lobo, Inc.'s Motion for Summary Judgment as Exhibit C to the Mark J. Valponi Affidavit is a true and accurate copy of a memo I wrote after the telephone call mentioned above.

FURTHER AFFIANT SAYETH NAUGHT.


APRIL REEVES

SWORN TO BEFORE ME and subscribed in my presence this 27th day of September, 2013.


NOTARY PUBLIC

State of Ohio - Ottawa County
Sworn and subscribed on Date 9-27-13
APRIL REEVES personally
appeared before me and took an oath under penalties
of perjury that the foregoing statement is true and correct.
GLADYS M. CURTIS, Notary Public Comm. # 2013-RE-448010
My Commission Expires January 21, 2018

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

MICHAEL P. ONDERKO,)
) CASE NO. 2013CV0187
)
 Plaintiff,)
) JUDGE TYGH TONE
)
 V.)
)
) AFFIDAVIT OF MARK J. VALPONI
 SIERRA LOBO, INC.,)
)
)
 Defendant.)

Mark J. Valponi, after being duly sworn, deposes and states I am one of the counsel of record for Sierra Lobo, Inc. ("SLI") in the above-captioned case. I have personal knowledge of the factual assertions contained in this Affidavit.

1. Tabs A through K of this Affidavit, as more fully described below, are true and accurate copies of documents obtained by the undersigned from the record of the Ohio Bureau of Workers' Compensation ("BWC") maintained for Claim No. 12-840216 ("Claim") filed by Michael P. Onderko ("Onderko") on August 13, 2012 and August 28, 2012.

2. Tab A is the August 9, 2012 Emergency Room record of Onderko's visit to Mercy Regional Medical Center.

3. Tab B is the August 10, 2012 office note of Onderko's visit to Dr. Jeffrey A. Biro.

4. Tab C is a memorandum from SLI's April Reeves regarding an August 10, 2012 telephone call she received from Onderko.

5. Tab D is the First Report of an Injury, Occupational Disease or Death filed electronically by Onderko on August 13, 2012.

6. Tab E is the result of an MRI administered on August 16, 2012 to Onderko's right knee.

7. Tab F is the Request for Temporary Total Compensation filed by Onderko on August 17, 2012.

8. Tab G is a second First Report of an Injury, Occupational Disease or Death filed by Onderko on August 28, 2012 regarding his right knee injury.

9. Tab H is the decision of the BWC mailed on September 10, 2012 disallowing the Claim.

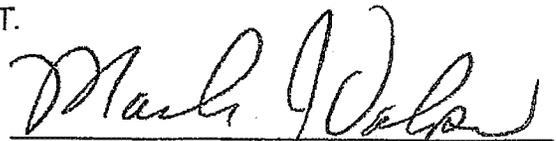
10. Tab I contains the decisions of the BWC mailed on September 11, 2012 and September 21, 2012 vacating its earlier decision and allowing the Claim with modified temporary total disability payments.

11. Tab J is SLI's September 24, 2012 appeal of the decision set forth in Tab H to the Ohio Industrial Commission.

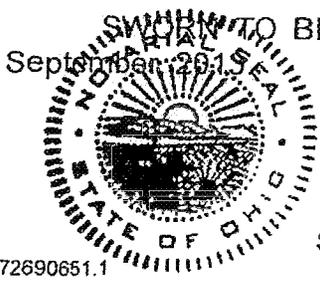
12. Tab K is the decision of District Hearing Officer Peggy Marting mailed on November 6, 2012 denying the Claim in its entirety because the right knee injury alleged by Onderko was not work-related.

13. Tab L is a true and accurate copy of Onderko's Response to SLI's First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents Propounded Upon Plaintiff Michael P. Onderko (exclusive of documents produced).

FURTHER AFFIANT SAYETH NAUGHT.


MARK J. VALPONI

SWORN TO BEFORE ME and subscribed in my presence this 11 day of September, 2012.



BRIAN E. AMBROSIA
Attorney At Law
NOTARY PUBLIC
STATE OF OHIO
My Commission
Has No Exp. Date
Section 147.03 O.R.C. 2


NOTARY PUBLIC

72690651.1

AUG. 17. 2012 4:27PM
MERCY
 Can you believe it?

Mercy Regional Medical Center
EMERGENCY

No. 7975 P. 2
 00375813

Patient Name/Address ONDERKO, MICHAEL 14217 KNEISEL ROAD		Social Security # OH 44089-0000	Room/Bed/Room ED 01401
Billing Number 730090490		Medical Record Number 00875813	Admission Date 08/09/12
Admission Time 16:55		Sex M	Age 51
Race W		Marital Status M	Religion ROMAN CATHOLIC
Ethnicity N		Language English	Congregation NONE
Corp ID 3000194280		P.T. E	Hosp. Svc. EMR
Date of Birth: 12/16/1960		Diagnosis/Complaint RT KNEE CALF THIGH PAIN	
Attending Physician ROMITO, BRIAN Dr. Type: S		Primary Care Physician DINGER, GARY W	
Admitting Physician ROMITO, BRIAN		ID/INS VERBS	
Accident Information	Injury/Illness N	Date	Patient Employer SIERRA LOBO INC
	Location	Time	
Description		Phone	
Patient ONDERKO, MICHAEL 14217 KNEISEL ROAD VERMILION OH 44089-0000 Phone: 440-320-8728 Date of Birth:		Guarantor Employer SIERRA LOBO INC Contact	
Relationship Self		Phone	
Social Security #		NPP Y	
Primary Emergency Contact ONDERKO, SONIA 14217 KNEISEL ROAD VERMILION OH Phone: 440-320-8732		Date 11/16/05	
Relationship Spouse		Reason N	
Secondary Emergency Contact		Comments/Notes	
Relationship		Notes	
Phone			
Cell			
INSURANCE	Insurance Company GTE UNITED HEALTHCARE PO BOX 740800	Name of Insured/MCR Dates/Ins. Company Ph# ONDERKO, MICHAEL ATLANTA GA 30374-0800	Claim Number/Prior Auth. Number/Grp Number/Grp Name 871784855 1 0362050
	Insurance Company	Name of Insured/MCR Dates/Ins. Company Ph#	Claim Number/Prior Auth. Number/Grp Number/Grp Name
	Insurance Company	Name of Insured/MCR Dates/Ins. Company Ph#	Claim Number/Prior Auth. Number/Grp Number/Grp Name
	Insurance Company	Name of Insured/MCR Dates/Ins. Company Ph#	Claim Number/Prior Auth. Number/Grp Number/Grp Name
07300-80499		Paid from HCPC 1:11630 REF 79-96021 22' ONLY BASIC KNEE SPLINT	

CODED

1828

Aug. 17, 2012 4:27PM

Meroy
Lorain, Ohio

073 No. 7975 P. 30469
DINDERKO, MICHAEL
08375813
ROMITO, BRIAN
DINGER, GARY W
DOB -> 08/09/72
DOB -> 12/15/1980
51 Y 56X M

EMERGENCY DEPARTMENT MEDICAL RECORD

HISTORIAN: Patient Family Myself Other
 Interpreter N/A EMS

TIME SEEN: 1745 NURSES NOTES REVIEWED

CHIEF COMPLAINT: ① knee pain

HPI: 51 yr old male presents w/ ① post knee pain. It has
had ① knee pain for a couple weeks, but today
had a stab at the curb of road w/ "pop". Now unable
to bear wght.

ASSOC SX: None <input type="checkbox"/> Sx RPI Myalgias Fatigue Fever / Chills Swelling Headache Sore Throat Nasal / Sinus / URI Cough SOB Constipat	Abdominal pain N+V/D Constipation Hemoptysis Hematochezia Melena Frequency / Urgency Dysuria / Hematuria Vag. discharge Vag bleed Back Pain / Flank Pain Rash	WORSENER BY: <u>Noblog</u> Change position Movement Deep breath Supine Upright Walking Cough Faps Touch	RELIEVED BY: <u>Noblog</u> Supine Sitting Rest Antacid RTG	MEDICATIONS: None See attached list ASA Acetaminophen OTC's Ibuprofen Counadin Oral Contraceptive	ALLERGIES: NKDA Sx NH See attached list IVP Dye PCN ASA Sulfa Cefadine NSAIDS
---	--	---	--	---	--

TIME COURSE: Sx RPI progress Onset Worse Similar to previously Continuous Intermittent	SEVERITY: Resolved / 10 (pain scale) Mild Moderate Severe	FOR INJURY: Occured Just PTA Today Yesterday _____ days PTA	IS SEE HW Location: Home Work School Street	Mechanism of injury: Fall Direct blow GSW Twisted	Location Stab wound MVC Burn Lacer
QUALITY: Pain Aching Sharp Pressure Lifting	Dull Stabbing Swooping Swooping radiates to	Bubbling Cramping Tightness	Fullness Heaviness	LOC: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Dazed Amnesia	Dom. Violence <input type="checkbox"/> Yes <input type="checkbox"/> No

ROS: Uacile to obtain due to: <input type="checkbox"/> LOC <input type="checkbox"/> Acute <input type="checkbox"/> & HS <input type="checkbox"/> Nonverbal Constitutional: Weight loss / Weight gain Anorexia Exhaustion Fever Myalgias Night sweats	Female Reproductive: LMP: _____ G _____ P _____ Vaginal discharge Heavy / Spont / Vag Bleeding Misced Menstr Post-menopausal Breasts:	PAST HISTORY: <input type="checkbox"/> Negative <input type="checkbox"/> See Nurses Notes <input type="checkbox"/> See Attached Anemia Asthma / A / B Atrial Asthma / Reactive Airway Bronchitis / Bronchitis / RSV CAD / Angina / MI Cancer CHF Chronic Pain / Fibromyalgia COPD GVA / TIA Colitis / IBS Old Insulin Dep Oral Agent Diet DVT Dyslipidemia / Dyslipidemia Gallstones / Biliary Calc HTN Hypertension	Kidney stones / Renal Calc Migraine / Chronic HN's Chronic cystic PID Pancreatitis Papile ulcer / GERD Pneumonia Pneumothorax PSYCH: Anxiety / Depression / Bipolar Pulmonary Embol Pneumonia / Insufficiency Salivary Stable Calc: Disease Trail Thyroid: Hypo Hyper UTI / Pyelo	
HEENT: Vision change Hearing loss Sore Throat Ear Pain Nosebleeds Hemoptysis Nasal congestion Post Nasal Drip Sinus pressure Tinnitus	Skin / Lymph / MS / Hematologic: Rash Burn Laceration Finger <u>① knee</u> Bruising Back pain Neck pain Joint pain Myalgias Other <u>① knee pain post</u>	Hospitalizations:	SURGERY / PROCEDURES: <input type="checkbox"/> Negative <input type="checkbox"/> See Nurses Notes <input type="checkbox"/> See Attached Angioplasty / Stents Appendectomy CABG Catheter cath (+) (+) Cholecystectomy C-section Ectopic	Hemita Hysterectomy Mastectomy RL Tonsillectomy Tubal ligation Tumor Other

PULM/CVS: Cough Hemoptysis Chest pain Dyspnea / Wheezing Palpitations Ankle edema	PSYCH: Anxiety Depression <input type="checkbox"/> Suicidal <input type="checkbox"/> Homicidal Hallucinating: <input type="checkbox"/> Audil <input type="checkbox"/> Visual Mood Changes	NEURO: & MS Headache Syncope Parestis / paralysis Incontinence Parosmia Diplopia Seizures	ENDO: Polydipsia / Polyuria / Polydipsia Hot / Cold intolerance / nervousness Skin / hair changes	SOCIAL HISTORY: Coronary risk: HTN / DM / Cholesterol / Smoker / FH <input type="checkbox"/> Smoker _____ packs per day <input type="checkbox"/> Non-smoker <input type="checkbox"/> Alcohol <input type="checkbox"/> Occasional <input type="checkbox"/> Heavy <input type="checkbox"/> Non-drinker <input type="checkbox"/> Drug Use / Abuse <input type="checkbox"/> Immunizations: UTI	Lives with _____ <input type="checkbox"/> Lives in ECF Occupation _____ <input type="checkbox"/> OC Student
GI: Abdominal pain N+V/D Constipation / flat BM Melena / Hematochezia Hemoptysis	GU: Urgecy Frequency Dysuria Hematuria Flank Pain R L Urthral Discharge Incontinence Testic Pain	ROB limited due to: <input checked="" type="checkbox"/> ROS otherwise negative	FAMILY HISTORY: <input type="checkbox"/> Negative <input type="checkbox"/> Non-consultatory <input type="checkbox"/> DM <input type="checkbox"/> CAD <input type="checkbox"/> Blood Clots <input type="checkbox"/> Gallstones <input type="checkbox"/> HTN <input type="checkbox"/> Cancer <input type="checkbox"/> Ulcers		

Aug. 17. 2012 4:27PM
 Mercy
 Lorain, Ohio

No. 7975 P. 5

EMERGENCY DEPARTMENT MEDICAL RECORD

ONDERKO, MICHAEL
 00375013
 ROMITO, BRIAN
 DINGER, GARY W

730090499
 DOB -> 08/08/12
 DOB -> 12/15/1980
 51 Y SEX M

MEDICAL DECISION MAKING / ED ATTENDING PHYSICIAN NOTES:

PHYSICIAN ASSISTANT (PA) SUPERVISORY NOTE:
 I have seen and examined the patient with the PA. I have made all evaluation, treatment, and disposition decisions and agree with the PA note.

Labs reviewed and abnormalities noted (see nursing notes).

- Knee Immobilizer (pt is on antich)
 - Fluor Salvo in arm (pt pref)

EKG Interpretation: _____
 Rhythm Strip Interpretation: _____
 CXR: _____
 Abdominal X-ray: _____
 Other X-rays: _____
 CT head Abd/Pelvis Chest Spine
 (Other X-ray - no studies by max)
 Ultrasound: _____
 Blood Cultures x2 done prior to antibiotics
 Antibiotics given within 0 hours of arrival
 Antibiotic selection based on CAP ICU Adm.
 Pseudomonas Risk Hospital Acquired
 Other _____
 There was a delay in diagnosis because the initial clinical picture did not suggest pneumonia
 Other _____

Chrg transferred to Dr _____ @ _____ hrs

DIAGNOSIS

DX1: Knee Injury (R)
 DX2: _____
 DX3: _____
 DX4: _____
 DX5: _____

CHIEF COMPLAINT

DISPOSITION

TREAT AND RELEASE
 Diagnosis, Treatment and Disposition discussed with:
 Patient Family Interpreter Other
 Condition on Discharge:
 Good Fair Poor Left AMA with / without instructions
Discharge Instructions:
 See I/C sheet Verbal instructions Written instructions
 If worse or condition changes, RETURN TO ER IMMEDIATELY

ADMISSION TRANSFER

Condition upon admission Good Fair Poor Critical
 Medical Necessity for Admission:
 Unstable VS IV meds required Multi-system disease
 Cardiac monitor & Mental Status Can't ambulate
 Hypoxia Other _____

Follow up in _____ days @ _____
 Take RX's as prescribed See additional Patient Education sheet

Admitting Doctor: _____
ADMITTED: IWS TELE ICU Peds OB
TRANSFERRED to: _____

1. Naprosyn
 2. Vicodin
 3. _____
 Physician Sig: _____

Condition: Stable Fair Guarded Critical
 Accepting Physician: _____
 DATE: 8/9/12 TIME: 1800
 See additional notes on page 4

PA-C/ NP Signature: _____
 Physician Sig: _____
 PA-C/ NP Signature: _____

Aug. 17. 2012 4:27PM

No. 7975 P. 6

MERCY REGIONAL MEDICAL CENTER
PRIMARY

Onderko, Michael
DOB: 12/15/1960 MS1
Wt/Ht: 108.9 Kg
MedRec: 00375613
AcctNum: 730090499

Patient Data

Complaint: Rt Knee Calf Thigh Pain
Triage Time: Thu Aug 09, 2012 17:15
Urgency: Level 4
Bed: ED SFT
Initial Vital Signs: 8/9/2012 17:08
BP: 142/91
P: 85
O2 sat: 98 on ra

ED Attending:
Primary RN:

R: 14
T: 98
Pain: 10

KNOWN ALLERGIES

Flexeril
NKDA (Unconfirmed)

TRIAGE (Thu Aug 09, 2012 17:15 CAME)

NURSING HPI: To ER with c/o pain in right calf to behind knee x couple weeks. Stopped off curb at 1600 and heard a snap. Cannot put weight on leg. Had ice on area. No SOIL. No fever chills.

ASSESSMENT: 51 yo male. AandOX3. Skin pwd. resp reg easy. Right leg without redness swelling. Pulses strong. Has crutches with him, in a wheelchair for comfort.

DOMESTIC VIOLENCE: Patient does feel safe at home.

INFECTION CONTROL: Patient or someone close to them has not been out of the country in the last ten days.

ADVANCED DIRECTIVES: Patient does not have one.

COMPLAINT: Rt Knee Calf Thigh Pain.

ADMISSION: URGENCY: Level 4, TRANSPORT: Walk in, BED: WAIT.

PATIENT: NAME: Onderko, Michael, AGE: 51, GENDER: male, DOB: Thu Dec 15, 1960, TIME

OF GREET: Thu Aug 09, 2012 16:55, KG WEIGHT: 108.9, MEDICAL RECORD NUMBER: 00375613,

ACCOUNT NUMBER: 730090499, PERSON ID: 3000194280, Attending: Romito, Brian., Referring:

Dinger, Gary W.,

PREVIOUS VISIT ALLERGIES: Nkda.

VITAL SIGNS: BP 142/91, Pulse 85, Resp 14, Temp 98, Pain 10, O2 Sat 98, on ra, Time 8/9/2012 17:08.

ALLERGY (17:16 CAME)

Flexeril

CURRENT MEDICATIONS (17:17 CAME)

Bentcar: once a day.

AmLODIPine Besylate: once a day.

Requip: -once a day.

PAST MEDICAL HISTORY (Thu Aug 09, 2012 17:15 CAME)

MEDICAL HISTORY: History of hypertension.

SURGICAL HISTORY: History of orthopedic, left, knee, History of tonsillectomy.

PSYCHIATRIC HISTORY: No previous psychiatric history.

SOCIAL HISTORY: Denies alcohol abuse, Denies tobacco abuse, Denies drug abuse.

MEDICATION SERVICE (17:46 RT)

Ketorolac Tromethamine: Order: Ketorolac Tromethamine -- Dose: 60 mg ; IM

Ordered by: Nina Thomas

Entered by: Nina Thomas Thu Aug 09, 2012 17:46

Documented as given by: Marilyn Pratt Thu Aug 09, 2012 17:55

Patient, Medication, Dose, Route and Time verified prior to administration.

IM medication, Amount given: 60mg, Medication administered to right hip, Correct patient, time, route,

dose and medication confirmed prior to administration, Patient advised of actions and side-effects

prior to administration, Allergies confirmed and medications reviewed prior to administration,

Prepared: Thu Aug 09, 2012 18:31 by PRAM Page: 1 of 2

Aug. 17. 2012 4:27PM

No. 7975 P. 7

**MERCY REGIONAL MEDICAL CENTER
PRIMARY**

Onderko, Michael
DOB: 12/15/1960 M51
Wt/Ht: 108.9 Kg
MedRec: 00375613
AcctNum: 730090499

Administered by marilyn pratt lpn.

DISPOSITION

PATIENT: Disposition: Discharge, Disposition Transport: Family/Friend, Condition: Fair.

(GRANDT)

Patient left the department. (PRAM)

PRESCRIPTION (GRANDT)

Naprosyn: Tablet : 500 Mg : Oral : Quantity: *** 1 *** Unit: Route: Oral Schedule: every 12 hours Dispense: *** 14 ***

POTENTIAL SEVERE INTERACTION: Ketorolac Tromethamine
Override Rationale: Benefits outweigh risk. Reviewed with patient.

NOTES: Dr. Brian Romito, DO FR0557100

Generic OK.

Vicodin: Tablet : 500 Mg-5 Mg : Oral : Quantity: *** 1 *** Unit: tab(s) Route: Oral Schedule: every 6 hours Dispense: *** 10 ***

NOTES: PRN PAIN

Dr. Brian Romito, DO FR0557100

Generic OK.

INSTRUCTION (GRANDT)

DISCHARGE: KNEE IMMOBILIZER, EASY-TO-READ, KNEE PAIN, EASY-TO-READ, CRUTCHES, USE OF, EASY-TO-READ.

FOLLOWUP: Dinger DO, Gary W., Family Practice, 5172 Leavitt Rd., Lorain Oh 44053, 4402827420, Sabo MD, Frank, Orthopedic Surgery, CHP Physician Offices West, 3600 Kolba Rd. 100, Lorain Oh 44053, 4402822800.

SPECIAL: Follow up with your private MD in the AM. Return to ED if worse.
Ice and elevate.

DIAGNOSIS (GRANDT)

FINAL- PRIMARY: Knee injury [unspecified].

VITAL SIGNS (Thu Aug 09, 2012 17:08 CAML)

VITAL SIGNS: BP: 142/91, Pulse: 85, Resp: 14, Temp: 98, Pain: 10, O2 sat: 98 on ra, Time: 8/9/2012 17:08.

Key:

CAML=Campbell, Lisa NT=Flontas, Nina PRAM=Pratt, Marilyn

Prepared: Thu Aug 09, 2012 18:31 by PRAM Page: 2 of 2

Aug. 17, 2012 4:28PM
Lorain, Ohio

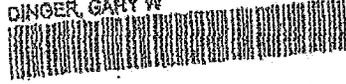
3

No. 7975 P. 8

ONDERKO, MICHAEL
00375813
ROMITO, BRIAN
DINGER, GARY W

730090499
DCS → 08/09/12
DOB → 12/15/1960
51 Y SEX M

**EMERGENCY DEPARTMENT
NURSING ASSESSMENT**



DATE/TIME	TEMP	PULSE	RESP	B P	SPO ₂	PAIN SCALE	EMERGENCY DEPARTMENT PATIENT FLOWSHEET
							<input type="checkbox"/> Electronic Triage Completed
NURSING PROGRESS NOTES							
1720							FA 5ft 3W
1725							Admitted Pt - Care
1800							To R in w/c
1810							Returned
1819							MSP's intact, intact prior to knee immobilizer, pt status "Pt full ok" MSP intact & immobilizer, pedal pulse present, feet, toes pink warm & mobile. Cap refill WNL.
1828							5/10 D/C. not given to understanding Pt remains in w/c. All questions - concerns addressed. Immobilizer on & feels good pt status. Pt taken out to car in w/c → mp

INTRAVENOUS								IV INTAKE	OUTPUT		
Start Time	Stop Time	#	Sol'n / Admixture	Rate	Size	Site	Int.	Amount Infused	Time	Amt.	Type

Time	Medication	Route	Comments	Init.	SIGN

Sign Documents

Mercy Regional Medical Center
Marilyn Pfall 18:21

<input checked="" type="checkbox"/> (75) Main		Chart	Triage	Allergies	Current Meds	Beds	Med SVC	Forms	Documents	Dispo	Reports	My Charts			
		Archive	Mail	Display	Admission Req	All	Help	Logout							
Onderko, Michael	Bed: SFT 3	Complaint: Rt Knee Calf Thigh Pain	BP: 142/91	Resp: 14	O2 sat: 98 on ra	MRN: 00375813	Snd/Agar: M81 (12/15/1860)	Orders:	Pulse: 88	Temp: 98	Pain: 10	Acct: 730090489	Wt/Ht: 108.9 kg	Donor: DVA	Comment:

DISCHARGE INSTRUCTIONS

FINAL DIAGNOSIS

Knee Injury [unspecified]

FOLLOWUP CONTACTS

Dinger DO, Gary W., Family Practice
6172 Leavitt Rd.
Lorain Oh 44053
Phone: 4402827420

Sabo MD, Frank, Orthopedic Surgery
CHP Physician Offices West
3600 Kolbe Rd. 100
Lorain Oh 44053
Phone: 4402822800

SPECIAL INSTRUCTIONS

Follow up with your private MD in the AM. Return to ED if worse.
Ice and elevate

MEDICAL INSTRUCTIONS

KNEE IMMOBILIZER, EASY-TO-READ

KNEE PAIN, EASY-TO-READ

CRUTCHES, USE OF, EASY-TO-READ

PRESCRIPTIONS

Vicodin : Tablet : 500 Mg-5 Mg : Oral
Dispense: 10, Quantity: 1, Unit: tab(s), Route: Oral, Schedule: every 6 hours

Naprosyn : Tablet : 500 Mg : Oral
Dispense: 14, Quantity: 1, Unit: *, Route: Oral, Schedule: every 12 hours

Patient voiced understanding of discharge instructions and no further questions or concerns voiced at this time.

Manlynn Prath

Michael P. Underko

8/10



07300-90499

ONDERKO, MICHAEL	730090499
00375813	DOS -> 08/09/12
ROMITO, BRIAN	DOB -> 12/15/1960
DINGER, GARY W	51 Y SEX M



Aug. 17. 2012 4:28PM

No. 7975 Page 111

 Print this Page

Onderko, Michael Sex: M BD: 12/15/1960 MR#: 00375613
Rm/Bed: 01401 Clinic: Ched Visit Dt/Tm: 08/09/2012 16:55

PT#: 730090499
Visit#: 1386878

KNEE RT

Aug 09, 2012 18:05

RIGHT KNEE RADIOGRAPHS -- 4 VIEWS

INDICATION Knee pain.

COMPARISON None available.

FINDINGS There is no acute osseous, articular, or soft tissue abnormality. There is no joint effusion.

Degenerative changes are a few, greatest in the medial compartment

IMPRESSION NO ACUTE RADIOGRAPHIC FINDINGS IN THE RIGHT KNEE.

DEGENERATIVE DISEASE IS MILD

Transcriptionist- RADWHERE
Read By- FREDRICH H DENGEL M.D.
Released By- FREDRICH H DENGEL M.D.
Released Date Time- 08/10/12 1251

This document has been electronically signed.

SFT. 3

Page created: Friday, August 17, 2012 4:17 PM For: HAWES00

Top of Page

THE CLEVELAND CLINIC FOUNDATION
9500 Euclid Ave. Cleveland, Ohio 44195.

CLINIC NOTE
Department of Orthopaedics - Lorain
Jeffrey A. Biro, D.O.

NAME: Onderko, Michael P
CLINIC NO.: 2-858-081-9
DATE OF SERVICE: 08/10/2012

CHIEF COMPLAINT: Right knee instability.

HISTORY: Some 6 weeks prior to office visit patient incurred an injury wherein the knee was flexed, internally rotated and the patient fell. Post fall there was a knee effusion, ecchymosis and severe pain. For this he self treated with ice, relative rest, crutch walking with resolution after several weeks time. The patient then went on with activities of daily living and ended up climbing a curb when the knee "completely let go" causing a second fall.

The patient was seen in the emergency room. This occurred last p.m. (09/09/2012). The clinical diagnosis at that point was internal derangement of knee. To this end, he was placed back on crutches along with icing maneuvers and a knee immobilizer.

EXAM: Today the knee is graded S3, T3, L3. There is significant anterior drawer as well as positive McMurray on the medial aspect.

PLAN: As the patient has tried and failed conservative venues, we will proceed forward to MRI examination, continue with the clinical treatment of RICE and have the patient followup post MRI examination in order to ascertain the correct surgical manipulation which will be required for restoration of functional capacity. The patient is aware and agrees with above game plan. Thus, we will followup post MRI to plan next step in care.

Dictated By: Jeffrey A. Biro, D.O.

Date Dictated: 08/10/2012
Date Typed: jd 08/12/2012
LWCODE:CNEC
BC:03525:EPICARE

12-840216

On Friday, August 10th, I received a phone call from Mike Onderko, in the late afternoon. Mike wanted to talk to someone about light duty work. I asked Mike what happened, that he needed light duty work. Mike told me that he blew out his ACL, and he would be having surgery. I asked Mike if this happened at work. Mike said it did not. He went on to say that he had been having problems with it for a while now. He said he thought he might have aggravated it moving some things at work, but he had been having problems for a while now.

I informed Mike that we could not accommodate light duty, as we did not have any light duty work available. I had not seen any documentation, but Mike informed me that he could not lift anything at all, and couldn't walk up or down any steps.

Mike did not like my response, and informed me that he would just call Tony Skaff or Marty Offinger. It was at that point that I transferred the phone call to my manager, Dave Hamrick.

-April Reeves

1509 25 10 01 12
SEARCHED
SERIALIZED
INDEXED
FILED

Claim Number: 12-840216

Ohio

Bureau of Workers' Compensation

First Report of an Injury, Occupational Disease or Death

Tear off this sheet and return the completed form to your employer's managed care organization (MCO) or to your local BWC customer service office.

By signing this form, I:

- I elect to only receive compensation and/or benefits that are provided for in this claim under Ohio workers' compensation laws;
I affirm and release my right to receive compensation and benefits under the workers' compensation laws of another state for the injury or occupational disease, or death resulting from an injury or occupational disease, for which I am filing this claim;
I agree that I have not or do not plan to file a claim in another state for the injury or occupational disease or death resulting from an injury or occupational disease for which I am filing this claim;
I confirm that I have not received compensation and/or benefits under the workers' compensation laws of another state for this claim, and that I will notify BWC immediately upon receiving any compensation or benefits from any source for this claim.

WARNING:

Any person who obtains compensation from BWC or self-insuring employers by knowingly misrepresenting or concealing facts, making false statements or accepting compensation to which he or she is not entitled, is subject to felony criminal prosecution for fraud.

(B.C. 2913.48)

Employee information section including Last name, first name, middle initial, Social Security number, Marital status, Date of birth, Home mailing address, City, State, 9-digit ZIP code, Country if different from USA, Wage rate, Hours, Days of the week do you usually work?, Regular work hours, and Have you been offered or do you expect to receive payment or wages for this claim from anyone other than the Ohio Bureau of Workers' Compensation?

Employer information section including Employer name, Mailing address number and street, city or town, state, ZIP code and county, Location, if different from mailing address, Was the place of accident or exposure on an employer's premises?, and Date of injury/disease.

Accident details section including Description of accident, Time of injury, Date last worked, and Date returned to work.

Medical and injury details section including Description of injury/disease and parts of body affected, and Details application release of information.

Health care provider information section including Health care provider name, Telephone number, Fax number, Initial treatment date, Street address, City, State, 9-digit ZIP code, and Diagnosis(es).

Employer information section including Employer policy number, Telephone number, Fax number, Email address, Federal ID number, and Manual number.

Employer certification section including Was employee treated in an emergency room?, Was employee hospitalized overnight as an inpatient?, and Certification/Rejection statements.

Employer signature section including Employer signature and title, Date, and OSHA case number.

BWC-1101 (Rev. 12/02/2010)
FROI-1 (Combines C-1, C-2, C-3, C-6, C-50, OD-1, OD-1-22)
Web, 8/13/2012 10:38:01 AM [Eastern Time]

This form meets OSHA 301 requirements

SL1000004



Bureau of Workers' Compensation

3 total pages

Request for Temporary Total Compensation

Injured worker demographics

Name MICHAEL P. ONDERKO	Claim number 12-840216	Date of injury 8-9-2012
Address 14217 KNEISEL ROAD	City VERMILION	State OHIO
Email address (optional) MFONDERKO@YH400.COM	Home phone number -	Cell phone number 440-320-8728
Nine-digit ZIP code 44089-9201		

Disability information

- Is this application requesting a new period of temporary total compensation or an extension? New Extension
- If this is a new period, what was the last date worked due to the current period of work-related disability? **08/09/12**
- List all providers currently treating you for this work-related disability claim. **MERCY REGIONAL Medical CENTER (ER, VISIT) CLEVELAND CLINIC ORTHOPAEDICS**

Employment information

What was your occupation at the time of the injury/disease? **ENGINEERING Tech 4**

- Do you have a job to return to? Yes No I don't know
 - If yes, who is your employer? **SIERRA LOBO INC.**
 - If yes, does your employer offer modified (light-duty) work? Yes No I don't know
 - If yes, do you feel capable of performing any of your job duties at this time? Yes No
 - If yes, what duties? **ALL LIGHT HEAVY LIFTING (NOTHING OVER 40 LBS)**
- Working includes full or part-time, self-employment, income-producing hobbies, commission work, or unpaid activities that are not minimal and directly earn income for a taxable wage.
 - Are you currently working in any capacity (as defined above)? Yes No
 - If yes, who is your employer?
 - Have you previously worked in any capacity (as defined above) during this requested period of disability? Yes No
 - If yes, who is your employer?
 - If no, when was the last date you worked anywhere? **08/09/2012** Reason for leaving _____
- What do you feel is preventing you from returning to work at this time? Please describe physical, employment and personal barriers.
SIERRA LOBO IS PREVENTING ME FROM RETURNING

Vocational rehabilitation information

Vocational rehabilitation is an individualized and voluntary program for an eligible injured worker who needs assistance in safely returning to work or in retaining employment. This program can be tailored around an injured worker's restrictions and may provide job-seeking skills or necessary retraining.

- If appropriate, would you consider participating in vocational rehabilitation? Yes No If no, why not? _____

Benefits/earnings received or requested during the period of disability

Type of benefit	Receiving	Beginning date of benefit
Unemployment If yes, from which state are you receiving benefits?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Social Security retirement	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Public assistance If yes, include case number:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Sick leave If yes, name of company paying the benefit:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Wage/salary continuation If yes, name of company paying the benefit:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Disability If yes, name of company paying the benefit:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Earnings (to include full or part time, self employment, income-producing hobbies or commission work) If yes, name of employer and job duties:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Injured worker signature

I understand I am not permitted to work while receiving temporary total compensation. I have answered the foregoing questions truthfully and completely. I am aware that any person who knowingly makes a false statement, misrepresentation, concealment of fact or any other act of fraud to obtain compensation as provided by BWC or who knowingly accepts compensation to which that person is not entitled is subject to felony criminal prosecution and may, under appropriate criminal provisions, be punished by a fine, imprisonment or both.

Signature **Michael P. Onderko** Date **08/17/2012**

C-84 BWC-1205 (Rev. 6/28/2012)

Ohio Bureau of Workers' Compensation

First Report of an Injury, Occupational Disease or Death

Tear off this sheet and return the completed form to your employer's managed care organization (MCO) or to your local BWC customer service office.

By signing this form, I:

- Elect to only receive compensation and/or benefits that are provided for in this claim under Ohio workers' compensation laws;
- Waive and release my right to receive compensation and benefits under the workers' compensation laws of another state for the injury or occupational disease, or death, resulting from an injury or occupational disease, for which I am filing this claim;
- Agree that I have not and will not file a claim in another state for the injury or occupational disease or death resulting from an injury or occupational disease for which I am filing this claim;
- Consent that I have not received compensation and/or benefits under the workers' compensation laws of another state for this claim, and that I will notify BWC immediately upon receiving any compensation or benefits from any source for this claim.

WARNING:
 Any person who obtains compensation from BWC or self-insuring employers by knowingly misrepresenting or concealing facts, making false statements or receiving compensation which he or she is not entitled, is subject to felony criminal prosecution for fraud.
 (R.C. 2913.09)

Last name, first name, middle initial ONDERKO Michael		Social Security number	Marital status <input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Separated <input type="checkbox"/> Widowed	Date of birth 12-15-60
Home mailing address 14217 KNOX RD		City VERMILION	State OH	9-digit ZIP code 44089
Wage rate 33.75	Per: <input checked="" type="checkbox"/> Hour <input type="checkbox"/> Day <input type="checkbox"/> Month <input type="checkbox"/> Year	Country if different from USA	What days of the week do you usually work? <input type="checkbox"/> Sun <input checked="" type="checkbox"/> Mon <input checked="" type="checkbox"/> Tues <input checked="" type="checkbox"/> Wed <input checked="" type="checkbox"/> Thur <input checked="" type="checkbox"/> Fri <input type="checkbox"/> Sat	Regular work hours From 7:00 to 3:30
Have you been offered or do you expect to receive payment or wages for this claim from anyone other than the Ohio Bureau of Workers' Compensation? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No. If yes, please explain.				
Employer name SICRA Loko INC.				
Mailing address (number and street, city or town, state, ZIP code and county) 11401 HADLEY ROAD, MILAN OHIO 44846				
Location, if different from mailing address				
Was the place of accident or exposure on employer's premises? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If no, give accident location, street address, city, state and ZIP code				
Date of injury/disease 08/09/2012	Time of injury 11:00 a.m.	If fatal, give date of death	Time employee began work 7:00 a.m.	Date last worked 08/09/12
Date hired 11-15-2010	State where hired	Date employer notified	Date returned to work	
Description of accident (Describe the sequence of events that directly injured the employee, or caused the disease or death.) LIFTED 3'x7' TABLE, FELL FROM RT KNEE. RAN ON CABINETS FELL FROM RT. KNEE			Type of injury/disease and parts of body affected (For example: sprain of lower left back) RIGHT KNEE	
I certify under penalty of perjury that I am an employer for whom the Ohio Bureau of Workers' Compensation has provided compensation and benefits for my claim, and I hereby release my right to the full and complete compensation and benefits under the laws of any other state for this claim. I request payment for compensation and/or medical benefits as provided, and authorize direct payment to my medical provider. I permit and authorize my provider who attends, treats or examines me, and the Ohio Rehabilitation Services Commission (where relevant) to release medical, psychological, psychiatric, vocational or social information that is essential or historically related to my physical or mental injuries relevant to issues necessary for the administration of my claim to BWC, the Industrial Commission of Ohio, the employer's BWC managed care organization and any authorized representative. My previous or future BWC claims may affect decisions made in this claim. Proper administration of the program may require BWC to share information with the employer, or record for their authorized representative and/or my authorized representative for any and all such previous or future claims. The released claims information may include any record maintained during claim file. 220-8228				
Injured worker signature Michael Onderko		Date 08/29/12	E-mail address Michael.Onderko@Sicra.com	Work number

Health care provider name Andrew Matko, D.O.		Telephone number 440-282-2800	Fax number 440-282-4895	Initial assessment date 8-29-12
Street address 3600 Kolbe Road, Suite 100		City Lorain	State OH	9-digit ZIP code 44053
Diagnosis(es) include (ICD code(s)) right knee sprain/ strain 844.9				
Was the incident caused by the injured worker to miss eight or more days of work? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Is the injury causally related to the industrial incident? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Health care provider signature Andrew Matko		ICD-9 BWC provider number 34-071458500	Date 8/29/12	

Employer policy number	Employer is self-insuring <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Injured worker is owner/partner/member of firm <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Telephone number	Fax number	E-mail address
Federal ID number	Manual number	
Was employee treated in an emergency room? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Was employee hospitalized overnight as an inpatient? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If treatment was given away from work site, provide the facility name, street address, city, state and ZIP code		
<input checked="" type="checkbox"/> Certification - The employer certifies that the facts in this application are correct and valid.	<input type="checkbox"/> Rejection - The employer rejects the validity of this claim for the reason(s) listed below:	Classification - The employer certifies and allows the claim for the condition(s) below: <input type="checkbox"/> Medical only <input type="checkbox"/> Last three
Employer signature and title	Date	OSHA case number

BWC-1101 (Rev. 1/31/2011) FROI-1 (Combines C-1, C-2, C-3, C-6, C-50, OD-1, OD-1-22)
 This form meets OSHA 301 requirements

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-840216
DOI: 08/09/2012

#BWNFVSQ
#IWS1122260755107#

09/10/2012
Date Mailed

MICHAEL P ONDERKO
14217 KNEISEL RD
VERMILION OH 44089-9201

Injured worker: MICHAEL P ONDERKO
Claim number: 12-840216 Employer's name: SIERRA LOBO INC
Injury date: 08/09/2012 Policy number: 1140673-0
Claim type: Accident Manual number: 8601

An application for workers' compensation benefits was filed 08/13/2012 on behalf of the injured worker requesting the allowance of this claim for the following injury descriptions:

The injured worker lifted a 3x7 table and felt a pain in right knee. Pushed on cabinets and felt pain in right knee.

The claim is DISALLOWED for the following medical condition(s):

Code	Description	Body Location	Part of Body
844.9	SPRAIN OF KNEE & LEG NOS	RIGHT	

The employee has not met his or her burden of proof.

This decision is based on:

Initial office notes from Dr. Biro 8/10/12 & 8/17/12 do not indicate a work relationship nor does the ER report on 8/9/12 from Mercy Hospital. Dr. Biro was to send a corrected statement and BWC has not received this information. Physician review on claim allowance has not been received.

Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. If the injured worker and employer agree with this decision, the 14 day appeal period may be waived. Both parties may submit a signed waiver of appeal to BWC. The Request for Waiver of Appeal (C108) is available through your local customer service office. Or you can log on to www.ohioBWC.com, select Injured worker; then click on Forms.

If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order. Appeals are filed with the Industrial Commission of Ohio (IC), either via the Internet at www.ohioic.com or at the following IC office:

IC MANSFIELD DISTRICT OFFICE
240 TAPPAN DRIVE NORTH

MANSFIELD OH 44906

If there are any questions concerning this claim decision, contact the BWC representative listed below. However, a telephone call cannot

1

BWC Use Only
09/02/02

| previous | next |

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-840216
DOI: 08/09/2012

take the place of a written appeal.

THIS DECISION BECOMES FINAL IF A WRITTEN APPEAL IS NOT RECEIVED WITHIN
14 DAYS OF RECEIVING THIS NOTICE.

LISA K
MANSFIELD SERVICE OFFICE
240 TAPPAN DR N STE A
ONTARIO OH 44906-1366

Team number: 02
Phone number: (419) 529-7656
Fax number: (866) 336-8350

Claim number: 12-840216

CC:
SIERRA LOBO INC
COMPMANAGEMENT, INC.

| previous |

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-840216
DOI: 08/09/2012

#BWNFVSQ
#IWS1122260755107#

09/11/2012
Date Mailed

MICHAEL P ONDERKO
14217 KNEISEL RD
VERMILTON OH 44089-9201

Injured worker: MICHAEL P ONDERKO
Claim number: 12-840216 Employer's name: SIERRA LOBO INC
Injury date: 08/09/2012 Policy number: 1140673-0
Claim type: Accident Manual number: 8601

This order replaces the BWC order dated 09-10-2012, which has been vacated for the following reason: A previously disallowed medical condition(s) is being allowed.

The decision to vacate the previous order is based on:
Physician review not available to support allowance at the time the order was done.

An application for workers' compensation benefits was filed 08/13/2012 on behalf of the injured worker, requesting the allowance of this claim for the following injury description:

Lifted 3x7 table, felt pain in right knee. Pushed on cabinets felt pain in right knee.

The claim is ALLOWED for the following medical condition(s):

Code	Description	Body Location	Part of Body
844.9	SPRAIN OF KNEE & LEG NOS	RIGHT	

The following medical condition(s) will be considered upon submission of supporting medical documentation.

tear meniscus

This decision is based on:
Physician review by Dr. Ahn on 9/6/12.

Medical benefits will be paid in accordance with the Ohio Bureau of Workers' Compensation (BWC) rules and guidelines. The injured worker is encouraged to forward the information above to all health care providers involved in this claim.

BWC will consider compensation benefits based on medical evidence of continued disability and/or wage information.

The injured worker may be eligible for rehabilitation services, which may help him or her return to work more quickly and safely. Please

contact either BWC or your managed care organization for more information regarding rehabilitation services.

The full weekly wage for this claim is set at \$ 1,352.66. The first

1

BWC Use Only

09/02/02

! previous | next !

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-840216
DOI: 08/09/2012

12 weeks of temporary total compensation is payable at the rate of \$ 809.00. This rate is 72 percent of the full weekly wage or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect on the date of injury.

The average weekly wage for this claim is set at \$ 1,361.35. After the first 12 weeks of temporary total compensation, additional temporary total compensation will be paid at the rate of \$ 809.00. This rate is 66 2/3 percent of the average weekly wage or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect on the date of injury.

BWC may reconsider the Full or Average Weekly Wage based upon information currently on file or submission of additional information.

Wages are set based on wage information submitted by the Injured worker on 8/30/12.

This decision is based on:
Compensation will be addressed upon a completed medcol4 by the physician of record.

This order is subject to any current family support order(s).

Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. If the injured worker and employer agree with this decision, the 14 day appeal period may be waived. Both parties may submit a signed waiver of appeal to BWC. The Request for Waiver of Appeal (C108) is available through your local customer service office. Or you can log on to www.ohioBWC.com, select Injured worker, then click on Forms.

If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order. Appeals are filed with the Industrial Commission of Ohio (IC), either via the Internet at www.ohioic.com or at the following IC office:

IC MANSFIELD DISTRICT OFFICE
240 TAPPAN DRIVE NORTH
MANSFIELD OH 44906

If there are any further questions concerning this decision, contact the BWC representative listed below. However, a telephone call cannot take the place of a written appeal.

THIS DECISION BECOMES FINAL IF A WRITTEN APPEAL IS NOT RECEIVED WITHIN 14 DAYS OF RECEIVING THIS NOTICE.

LISA K
MANSFIELD SERVICE OFFICE
240 TAPPAN DR N STE A
ONTARIO OH 44906-1366

Team number: 02
Phone number: (419) 529-7656
Fax number: (866) 336-8350

Claim number: 12-840216

CC:
SIERRA LOBO INC
COMPMANAGEMENT, INC.

2

BWC Use Only
09/02/02

[| previous |](#)

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-8402
DOI: 08/09/2012

#BWNFVSQ
#IWS1122260755107#

09/21/2012
Date Mailed

MICHAEL P ONDERKO
14217 KNEISRL RD
VERMILLION OH 44089-9201

Injured worker: MICHAEL P ONDERKO
Claim number: 12-840216 Employer's name: SIERRA LOBO INC
Injury date: 08/09/2012 Policy number: 1140673-0
Claim type: Accident Manual number: 8601

This order replaces the BWC order dated 09-11-2012, which has been vacated for the following reason: The type of compensation identified on the previous order is being modified.

The decision to vacate the previous order is based on:
Previous order did not address lost wages, Medcol4 now received.

An application for workers' compensation benefits was filed 08/13/2012 on behalf of the injured worker, requesting the allowance of this claim for the following injury description:

Lifted a 3x7 table, felt pain in right knee. Pushed on cabinets felt pain in right knee.

The claim is ALLOWED for the following medical condition(s):

Code	Description	Body Location	Part of Body
844.9	SPRAIN OF KNEE & LEG NOS	RIGHT	

The following medical condition(s) will be considered upon submission of supporting medical documentation.

Tear meniscus.

This decision is based on:
Physician review by Dr. Ahn on 9/6/12.

Medical benefits will be paid in accordance with the Ohio Bureau of Workers' Compensation (BWC) rules and guidelines. The injured worker is encouraged to forward the information above to all health care providers involved in this claim.

BWC grants temporary total disability payments (TT) from 08/10/2012 to 08/28/2012. The injured worker was released to return to work on 08/29/2012.

The injured worker may be eligible for rehabilitation services, which may help him or her return to work more quickly and safely. Please contact either BWC or your managed care organization for more information regarding rehabilitation services.

The full weekly wage for this claim is set at \$ 1,352.66. The first

Injured worker: MICHAEL P. ONDERKO
OhioBWC - Common - Service: (Correspondence)

Claim #: 12-840216
DOI: 08/09/2012

12 weeks of temporary total compensation is payable at the rate of \$ 809.00. This rate is 72 percent of the full weekly wage or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect on the date of injury.

The average weekly wage for this claim is set at \$ 1,361.35. After the first 12 weeks of temporary total compensation, additional temporary total compensation will be paid at the rate of \$ 809.00. This rate is 66 2/3 percent of the average weekly wage or is the maximum or minimum allowable amount based on the statewide average weekly wage in effect on the date of injury.

BWC may reconsider the Full or Average Weekly Wage based upon information currently on file or submission of additional information.

Wages set based on payroll information submitted by the injured worker on 8/30/12.

This decision is based on:
CB4 front received 8/30/12 and signed by the injured worker on 8/17/12. Medcol4 received 9/19/12 and signed 9/17/12.

This order is subject to any current family support order(s).

Ohio law requires that BWC allow the injured worker or employer 14 days from the receipt of this order to file an appeal. If the injured worker and employer agree with this decision, the 14 day appeal period may be waived. Both parties may submit a signed waiver of appeal to BWC. The Request for Waiver of Appeal (C108) is available through your local customer service office. Or you can log on to www.ohioBWC.com, select Injured worker, then click on Forms.

If the injured worker or the employer disagrees with this decision, either may file an appeal within 14 days of receipt of this order. Appeals are filed with the Industrial Commission of Ohio (IC), either via the Internet at www.ohioic.com or at the following IC office:

IC MANSFIELD DISTRICT OFFICE
240 TAPPAN DRIVE NORTH
MANSFIELD OH 44906

If there are any further questions concerning this decision, contact the BWC representative listed below. However, a telephone call cannot take the place of a written appeal.

THIS DECISION BECOMES FINAL IF A WRITTEN APPEAL IS NOT RECEIVED WITHIN 14 DAYS OF RECEIVING THIS NOTICE.

LISA K
MANSFIELD SERVICE OFFICE
240 TAPPAN DR N STE A
MANSFIELD OH 44906-1366

Team number: 02
Phone number: (419) 529-7656
Fax number: (866) 336-8350

Claim number: 12-840216

CC:
SIERRA LOBO INC
COMPANAGEMENT, INC.

**INDUSTRIAL COMMISSION OF OHIO
ONLINE APPEAL**

Claim: 12-840216 Michael P. Onderko

Employer: 1140673-0
Sierra Lobo Inc

An appeal was filed for this claim using the Industrial Commission's I.C.O.N. system. This appeal was filed for:

Order mailed date: 9/21/2012

Order receive date: 9/24/2012

Reason for Appeal: The employer respectfully disagrees with the bwc order dated 9/21/2012

Additional medical evidence will be submitted.

Notice of this appeal was given to injured worker's rep or injured worker by regular U.S. mail on 10/04/2012.

Filed by Employer on 10/04/2012.

Entered by Rep 900-80 (Compmanagement, Inc.) on 10/04/2012 at 8:02 AM.

Representative 900-80 (Compmanagement, Inc.) is a non-attorney representative who has been authorized and directed to file this appeal by the Employer.

This appeal has been assigned number 201227850. Please use this number when making inquiries about this appeal.

Ohio Industrial Commission
RECORD OF PROCEEDINGS

Claim Number: 12-840216 Claims Heard: 12-840215
 LT-ACC-OSIF-COV
 PCN: 2122841 Michael P. Onderko

MICHAEL P. ONDERKO
 14217 KNEISSEL RD
 VERMILION OH 44089-9201

Date of Injury: 8/09/2012 Risk Number: 1140673-0

This claim has been previously allowed for: SPRAIN RIGHT KNEE & LEG.

This matter was heard on 10/31/2012 before District Hearing Officer Peggy Martling pursuant to the provisions of R.C. Sections 4121.34 and 4123.511 on the following:

APPEAL filed by Employer on 10/04/2012 from the order of the Administrator issued 09/21/2012.

Issue: 1) Injury Or Occupational Disease Allowance
 2) Temporary Total Disability
 3) Full Weekly Wages/Average Weekly Wages

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not fewer than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Onderko
 APPEARANCE FOR THE EMPLOYER: Mr. Kurtz
 APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the Administrator, dated 09/21/2012, is vacated.

The District Hearing Officer finds that Mr. Onderko did not sustain an injury in the course of arising out of his employment as alleged. Therefore, this claim is DENIED in its entirety.

At the hearing, Mr. Onderko testified that he was involved in rearranging the shop in his capacity as a mechanic. He stated that his right knee hurt. He testified he never had any problems with his right knee prior to this alleged incident.

On the date in question, Mr. Onderko stated he was moving a table when his right knee and leg started bothering him. Therefore, he told co-workers he was going home early. On the way home, according to his testimony, he stopped to purchase gasoline for his vehicle and stopped on the island curb and felt his knee give way.

The medical records on file indicate that Mr. Onderko was seen at Mercy Hospital in Lorain, Ohio on 08/09/2012. The handwritten history within Mercy Hospital's records documents that Mr. Onderko had had right knee pain for "a couple of weeks, but today took a step off the curb and heard a pop." The District Hearing Officer notes that there is no reference whatsoever to a work related injury within the Mercy Regional Medical Center Records.

There is an office from Dr. Biro dated 08/10/2012, wherein Dr. Biro indicates

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 12-840216

that Mr. Onderko sustained an injury to his knee approximately six weeks prior to the 08/10/2012 visit. The chief complaint is listed as right knee instability. Dr. Biro's office note describes the prior injury in detail, noting that Mr. Onderko "incurred an injury wherein the knee was flexed, internally rotated and the patient fell." The history indicates that Mr. Onderko "self-treated with ice, relative rest, crutch walking with resolution after several weeks time." This note then indicates that Mr. Onderko "ended up climbing a curb when the knee "completely let go," causing a second fall. [emphasis added] The same progress report indicates that the Emergency Room visit of 08/09/2012 resulted in Mr. Onderko being "placed back on crutches." [emphasis added]

Mr. Onderko testified that the remarks in Dr. Biro's office note of 08/10/2012 were inaccurate. He stated he had contacted Dr. Biro's office and requested that Dr. Biro correct this office note because Mr. Onderko maintains he never had right knee injury or symptoms prior to this alleged industrial injury. However, there are multiple witness statements on file from co-workers that indicate that Mr. Onderko had told co-workers about previous problems with his right knee.

The District Hearing Officer is not persuaded that the comments in Dr. Biro's office notes are inaccurate based on contemporaneous reports from co-workers that Mr. Onderko had problems with his right knee prior to 08/09/2012.

Additionally, the District Hearing Officer has reviewed a report from Dr. Biro dated 08/17/2012. This is a follow-up office visit for a review of Mr. Onderko's MRI study. This report indicates that Mr. Onderko has determined to proceed with this "under Bureau of Workers' Compensation Mantle." However, this office note also indicates that it was not known prior to 08/17/2012 that Mr. Onderko intended this as a work-related injury. Accordingly, the District Hearing Officer concludes that Mr. Onderko did not tell Dr. Biro that he was injured at work.

Other records on file indicate that Mr. Onderko had called his Employer requesting modified duty on 8/10/12 and was dissatisfied when those arrangements could not be made for him. It was after this that Mr. Onderko filed a Workers' Compensation claim.

The District Hearing Officer has reviewed and considered all available evidence prior to rendering this decision. This decision is based upon the records from Dr. Biro dated 08/10/2012 and 08/17/2012 as well as the records from Mercy Hospital Emergency Room 08/09/2012, Mr. Onderko's testimony at hearing, and various witness statements filed on 10/26/2012. The District Hearing Officer has reviewed and noted the additional statement from Mr. Onderko dated 10/29/2012.

An IC-12 Appeal from this order may be filed within fourteen (14) days of the receipt of the order. The IC-12 may be filed online at www.ohioic.com or the IC-12 may be sent to the Industrial Commission of Ohio, Mansfield District Office, 240 Tappan Drive North, Suite A, Ontario, OH 44906.

Typed By: tlh
Date Typed: 11/02/2012
Findings mailed: 11/06/2012

Peggy Marting
District Hearing Officer

Electronically signed by
Peggy Marting

Ohio Industrial Commission
RECORD OF PROCEEDINGS

Claim Number: 12-840216

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

12-840216
 Michael P. Ondorko
 14217 Kneisel Rd
 Vermilion OH 44089-9201

Risk No: 1140673-0
 Sierra Lobo Inc
 11401 Hoover Rd
 Milan OH 44846-9711

ID No: 900-80
 Compmangement, Inc.
 PO Box 884
 Dublin OH 43017-6884

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com. ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

REQUEST FOR ADMISSION NO. 8: Admit that you were terminated from Sierra Lobo on December 12, 2012, after the Ohio Industrial Commission issued the denial of the Claim attached hereto as Exhibit C.

RESPONSE: Admit

REQUEST FOR ADMISSION NO. 9: Admit that you did not appeal the decision of the Ohio Industrial Commission referenced in Request for Admission No. 7.

RESPONSE:

Admit

REQUEST FOR ADMISSION NO. 10: Admit that on August 13, 2012, you applied for short term disability benefits through UNUM due to your alleged injury of August 9, 2012.

RESPONSE: Admit at the request of the employer.

REQUEST FOR ADMISSION NO. 11: Admit that in September of 2012, you received and cashed a short term disability check from UNUM in the gross amount of \$2,198.57.

RESPONSE:

Admit.

In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO
CASE NO. E-14-009**

MICHAEL P. ONDERKO,
Plaintiff-Appellee,

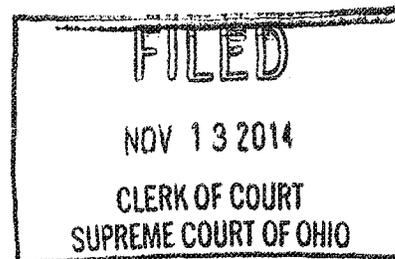
v.

SIERRA LOBO, INC.
Defendant-Appellant.

NOTICE OF CERTIFIED CONFLICT

Mark J. Valponi (0009527)(Counsel of Record)	Margaret A. O'Bryon (0062047)
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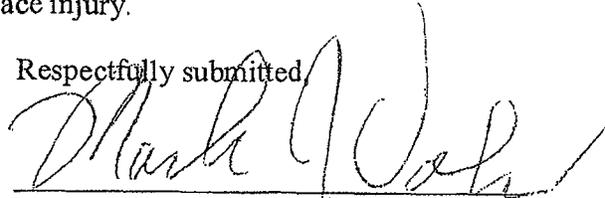
Appellant Sierra Lobo, Inc. hereby gives notice that on November 5, 2014, the Erie County Court of Appeals, Sixth Appellate District certified a conflict on a rule of law between its merit decision in *Michael P. Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, ---N.E.3d ---, and the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist. 1997).

The November 5, 2014 decision and judgment of the Sixth District Court of Appeals granting Appellant's motion to certify a conflict is attached hereto as Exhibit A. Copies of the conflicting decisions of the Sixth District Court of Appeals' decision in *Michael P. Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, ---N.E.3d ---, and the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist. 1997), are attached hereto as Exhibit B and Exhibit C respectively.

The legal issue certified by the Sixth District Court is as follows:

Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

Respectfully submitted



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail, pursuant to Civ.R. 5(B)(2)(c), this 11th day of November 2014 to the following counsel:

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EXHIBIT A

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2014 NOV -5 AM 10:06
LUVADA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided: NOV 05 2014

* * * * *

This matter is before the court on the App.R. 25 motion of appellee, Sierra Lobo, Inc., to certify a conflict between our court's decision in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, and the decisions of several other district courts on the following question:

In *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985) (syllabus), the Ohio Supreme Court held that "[a] complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for

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workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90." Based upon this holding, must a plaintiff pursuing a claim for retaliatory discharge under R.C. 4123.90 prove that he suffered a workplace injury?

Appellant, Michael Onderko, has filed a response in opposition to appellee's motion.

Article IV, Section 3(B)(4) of the Ohio Constitution provides, "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has set forth three conditions that must be met before the certification of a conflict:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Upon careful consideration, we find that motion to certify the conflict must be granted.

In its motion, appellee argues that our decision is in conflict with *Young v. Stelter & Brinck, Ltd.*, 174 Ohio App.3d 221, 2007-Ohio-6510, 881 N.E.2d 874 (1st Dist.), *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997); *Lawrence v. Youngstown*, 7th Dist. Mahoning No. 09 MA 189, 2012-Ohio-6237, *Balog v. Matteo Aluminum, Inc.*, 8th Dist. Cuyahoga No. 82090, 2003-Ohio-4937, *Goersmeyer v. General Parts, Inc.*, 9th Dist. Medina No. 06CA00045-M, 2006-Ohio-6674, *Brannon v. City of Warren*, 11th Dist. Trumbull No. 2003-T-0077, 2004-Ohio-5105.

We initially note that the decisions of the First, Seventh, Eighth, Ninth, and Eleventh Districts do not directly consider the issue of whether the failure to prove a workplace injury prevents a plaintiff from establishing a prima facie case of retaliatory discharge under R.C. 4123.90. In particular, the decisions of the First, Seventh, Eighth, and Ninth Districts involved situations where it was undisputed that the plaintiff suffered a workplace injury. Further, in the Eleventh District's decision, although the court noted that the plaintiff *allegedly* suffered a workplace injury, it did not address that issue in its analysis, instead focusing on the plaintiff's failure to show that the employer's proffered legitimate, non-retaliatory reason for discharge was merely pretext. Thus, even though those cases recited the language from *Wilson*, because the issue of a workplace injury was not addressed or determinative of the outcome, we do not find a conflict between those decisions and ours.

However, the Fifth District directly addressed the issue of whether proof of a workplace injury is a necessary element of a prima facie case of retaliatory discharge. In *Kilbarger*, the plaintiff's first assignment of error was that the trial court "applied an incorrect burden of proof by requiring [the plaintiff] to prove that he was injured at work." *Kilbarger* at 338. The Fifth District overruled this assignment of error, stating that the plaintiff had the burden to prove all the elements of the case at trial, and that the plaintiff failed to satisfy his burden to prove that he was injured at work. *Id.* at 338-339.

Therefore, upon due consideration, we find appellee's motion to certify a conflict well-taken. Our holding in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, is in conflict with the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hoeking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997). Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

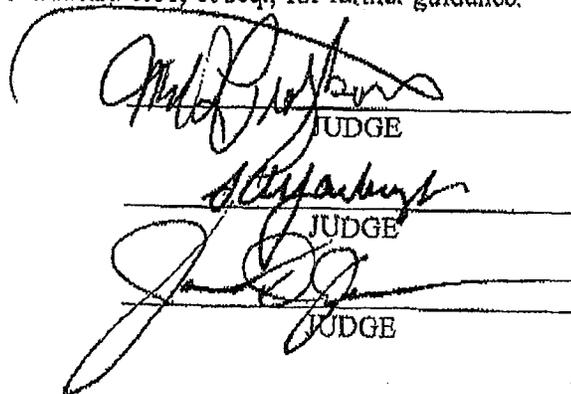
Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

The parties are directed to S.Ct.Prac.R. 8.01, et seq., for further guidance.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.



JUDGE
JUDGE
JUDGE

EXHIBIT B

MANDATE

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO

2014 SEP 19 PM 1:06

LUVADA S. WILSON
CLERK OF COURTS

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO

2014 SEP 19 AM 11:37

LUVADA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided:

SEP 19 2014

Margaret O'Bryon, for appellant.

Mark P. Valponi and Brian E. Ambrosia, for appellee.

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee, Sierra Lobo, Inc., on plaintiff-appellant's, Michael Onderko, claims for retaliatory discharge and

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intentional infliction of emotional distress. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} On Thursday, August 9, 2012, appellant was moving a table and some cabinets in the course of his employment as an engineering tech for appellee when he felt some pain in his right knee. Appellant states that because of the pain, he left work early that day. On his way home, appellant stopped at a gas station. As he was stepping off a curb, his right knee “gave out.” Consequently, he went to the hospital. The handwritten notes from the emergency room records document that “[appellant] had R knee pain for a couple weeks, but today took a step off the curb & heard a ‘pop.’ Now painful to bear weight.” Appellant states that the emergency room doctor then recommended that he follow up with an orthopedic doctor.

{¶ 3} The next day, appellant saw Dr. Biro. A clinic note from Dr. Biro indicates that appellant had injured his right knee six weeks earlier, which injury resolved itself after several weeks of ice, rest, and walking on crutches. The note further indicates that appellant continued with daily living until the knee “completely let go” when he was climbing a curb.

{¶ 4} Notably, neither the hospital records nor Dr. Biro’s notes included any mention by appellant that he suffered an injury while at work. Appellant states in his affidavit that he did not mention work to the emergency room doctor because he was afraid of being fired since it was known that appellee was very concerned about its safety

record. In addition, appellant states that Dr. Biro's clinic note contained incorrect information in that appellant did not have a prior injury to his right knee, but rather had a prior injury to his left knee. Appellant also states that he tried to contact Dr. Biro to correct the clinic note, but that Dr. Biro refused to see him once Dr. Biro found out that it was a workers' compensation injury.

{¶ 5} Following his doctor visits, appellant contacted April Reeves, an employee in appellee's human resources department, and told her that he tore his right ACL.¹ Reeves states in her affidavit that appellant told her the injury did not occur at work, but appellant disputes Reeves' statement in his own affidavit. On August 13, 2012, after speaking with Reeves, appellant then contacted Dave Hamrick, appellee's corporate director of human resources, and inquired about receiving light-duty work. Hamrick informed appellant that appellant could not return to work due to the pain medication appellant was taking.

{¶ 6} Thereafter, still on August 13, 2012, appellant filed a First Report of Injury with the Bureau of Workers' Compensation ("BWC"). Appellant states in his affidavit that he filed the report because Hamrick told him he did not have a work injury but appellant wanted to ensure that it was filed as a work injury. The August 13, 2012 report claims a torn right ACL caused by lifting and pushing equipment. On August 28, 2012, appellant filed a second First Report of Injury, this time claiming a right knee sprain/strain. The BWC initially disallowed appellant's claim, but later vacated that

¹ Nothing in the record supports a medical diagnosis of a torn right ACL.

decision and entered a new decision that allowed appellant's claim on the medical condition of a right knee sprain.

{¶ 7} Appellee appealed the BWC's decision to the Industrial Commission. After a hearing, the Industrial Commission reversed BWC's decision and denied appellant's workers' compensation claim on November 6, 2012. In her decision, the Industrial Commission District Hearing Officer found that appellant's injury was not sustained in the course of his employment. Appellant did not appeal the November 6, 2012 decision. He states that he did not file an appeal because he was already back at work and just wanted the ordeal to be over.

{¶ 8} One month later, on December 12, 2012, appellee terminated appellant's employment. Prior to his termination, appellant had received three performance bonuses, had no discipline write-ups, and had no unexcused absences. Appellant states that Hamrick told him he was being terminated due to the workers' compensation outcome. Hamrick, for his part, states in his affidavit that appellant was terminated "for his deceptive attempt to obtain Workers' Compensation benefits for a non-work related injury."

{¶ 9} On March 8, 2013, appellant initiated his present claims for retaliatory discharge in violation of R.C. 4123.90, and for intentional infliction of emotional distress. As to the claim for retaliatory discharge, appellee moved for summary judgment solely on the basis that appellant could not satisfy the required element of having suffered a workplace injury. Specifically, appellee argued that the Industrial Commission

determined that the injury did not occur at the workplace, and that such decision was binding on appellant through the doctrines of res judicata and collateral estoppel. Thus, appellee concluded it was entitled to judgment as a matter of law. Appellant, on the other hand, argued that having an allowable workers' compensation claim is not a required element of retaliatory discharge under R.C. 4123.90. Rather, citing *Ammon v. Fresh Mark, Inc.*, 7th Dist. Columbiana No. 94-C-46, 1995 WL 472301 (Aug. 9, 1995), appellant contended it is the "mere filing of a compensation claim [that] trigger[s] the statutory protection from discharge."

{¶ 10} As to the claim for intentional infliction of emotional distress, appellee argued that it is entitled to summary judgment because its act of terminating appellant for deceptively attempting to collect benefits for a non-work-related injury is not "extreme and outrageous" conduct, especially where appellant is employed "at-will." Appellant responded by arguing that he did not lie about his workers' compensation claim, and that his claim was supported by the medical report of Dr. Ahn, and by the statements of three co-workers who reported that appellant told them he had aggravated his knee while moving cabinets in the shop.

{¶ 11} The trial court, in granting summary judgment to appellee, agreed that res judicata and collateral estoppel precluded appellant from re-litigating whether he suffered a workplace injury. Further, the trial court determined that "[appellee] did not terminate [appellant] for merely filing a workers' compensation claim and subsequently being denied benefits. Instead, [appellee] terminated [appellant] for engaging in deceptive

practices: engaging in deceptive behavior when he attempted to obtain BWC benefits for an injury that was not work related.” The court concluded,

Therefore, even in holding the evidence most favorable to [appellant], reasonable minds can only come to the conclusion that [appellee] did not violate R.C. 4123.90 as [appellant] did not suffer a work related injury and that [appellee] has proven with clear and convincing evidence that [appellee] terminated [appellant] for misrepresenting his injury as a work related injury. [Appellant] cannot bring forth a prima facie case of retaliatory firing.

{¶ 12} Finally, as it pertains to appellant’s intentional infliction of emotional distress claim, the trial court held that appellant could not prove that appellee’s conduct was extreme and outrageous. As support for its conclusion, the trial court noted that appellant did not suffer a work injury and appellee chose to terminate appellant based upon lawful reasons, i.e., “[appellant’s] dishonesty in filing a workers’ compensation claim for an injury that did not occur at work.”

B. Assignments of Error

{¶ 13} On appeal, appellant presents two assignments of error for our review:

1. The Trial Court Committed Error in Granting Appellee’s Motion for Summary Judgment on the Basis that *Res Judicata* and *Collateral Estoppel* prohibited Appellant from Prevailing on a Retaliatory Discharge Claim Regarding a Work Related Injury.

2. The Trial Court Committed Error in Granting Appellee's Motion for Summary Judgment on the Basis that the Employer's Conduct was not Extreme and Outrageous.

II. Analysis

{¶ 14} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Retaliatory Discharge

{¶ 15} A claim for retaliatory discharge under R.C. 4123.90 involves a burden shifting analysis. Initially, the employee bears the burden of establishing a prima facie case of retaliatory discharge. *Napier v. Roadway Freight, Inc.*, 6th Dist. Lucas No. L-06-1181, 2007-Ohio-1326, ¶ 12. Once an employee has set forth a prima facie case, the burden then shifts to the defendant to set forth a legitimate, non-retaliatory reason for the discharge. *Id.* "If the employer sets forth a legitimate, non-retaliatory reason, the burden again shifts to the employee to 'specifically show' that the employer's purported reason is pretextual and that the real reason the employer discharged the employee was because

the employee engaged in activity that is protected under the Ohio Workers' Compensation Act." *Id.*

{¶ 16} Here, the threshold issue we must decide in appellant's first assignment of error is what elements are required to prove a prima facie claim for retaliatory discharge under R.C. 4123.90. Specifically, we must determine whether appellant must prove that he suffered a workplace injury. We hold that he does not.

{¶ 17} Our analysis centers on R.C. 4123.90, which provides, in relevant part,

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

{¶ 18} Appellee argues that the statute requires proof of three elements: (1) the employee was injured on the job, (2) the employee filed a claim for workers' compensation, and (3) the employee was discharged by the employer in contravention of R.C. 4123.90. Similarly, our court on several occasions has stated the elements as, "(1) the employee suffered an occupational injury; (2) the employee filed a workers' compensation claim; and (3) the employee was subsequently demoted or discharged from her employment in retaliation for the filing of the claim for benefits." *E.g., Huth v. Shinner's Meats, Inc.*, 6th Dist. Lucas No. L-05-1182, 2006-Ohio-860, ¶ 17. This formulation of the elements derives from *Wilson v. Riverside Hosp.*, 18 Ohio St.3d 8, 10,

479 N.E.2d 275 (1985), in which the Ohio Supreme Court held “a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.”

{¶ 19} However, the Tenth District, in *Sidenstricker v. Miller Pavement Maint., Inc.*, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, ¶ 58, restated the elements of a prima facie case for retaliatory discharge under R.C. 4123.90 as: (1) the employee was engaged in a protected activity, (2) he or she was the subject of an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. *See also Ferguson v. SanMar Corp.*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132, ¶ 17 (adopting the Tenth District’s approach). An employee engages in a protected activity when he or she “file[s] a workers’ compensation claim or institute[s], pursue[s] or testifie[s] in a workers’ compensation proceeding regarding a workers’ compensation claim.” *Sidenstricker* at ¶ 58.

{¶ 20} In reformulating the elements of a prima facie claim under R.C. 4123.90 to clarify that proof of a workplace injury is not required, the Tenth District reasoned first that *Wilson* did not hold that proof of injury on the job is a necessary element of a retaliatory discharge claim. In *Wilson*, the parties did not dispute that the plaintiff was injured in a fall at her place of employment. *Wilson* at 8. As a result of her injury, the plaintiff was unable to work for 11 months. When she notified her employer of her

intention to return to work, the employer informed her that she no longer had a job. The employer explained in a letter that its leave of absence policy only guaranteed a position for ten weeks. Since the plaintiff had been gone for over eleven months, the employer had filled her position. *Id.*

{¶ 21} The plaintiff then filed a complaint against her employer, alleging a violation of R.C. 4123.90. Attached to the complaint was the letter from the employer explaining its leave of absence policy. The employer moved to dismiss the complaint under Civ.R. 12(B)(6) on the grounds that the complaint did not “specifically allege that the discharge was in retaliation for plaintiff’s workers’ compensation claim.” *Id.* On appeal to the Ohio Supreme Court, the employer argued that the attached letter demonstrates that the plaintiff was terminated pursuant to the leave of absence policy and that there was no retaliatory motive. *Id.* at 10. The Ohio Supreme Court rejected this argument, reasoning that the plaintiff’s material allegation with respect to the letter was that her employment relationship was terminated; the complaint did not allege that the plaintiff was discharged because of the leave of absence policy. Thus, the leave of absence policy could not be considered in determining whether the motion to dismiss should be granted. *Id.* The court continued, stating that the material allegations in the complaint were that the plaintiff “was employed by [the employer], she was injured on the job, she received workers’ compensation, she attempted to return to her job after recovering from the work-related injury, and she was discharged in contravention of R.C. 4123.90.” *Id.* The court concluded that “[b]y referring to R.C. 4123.90 in the complaint,

appellant sufficiently complied with the notice pleading requirements of Civ.R. 8(A).”
Id. Thus, the court held “that a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.” *Id.*

{¶ 22} A close examination of *Wilson* reveals that the element of “injury on the job” was not the focal point of the decision, as it was undisputed that the plaintiff suffered such an injury. Rather, the focus of the holding was that a reference to R.C. 4123.90 in a complaint for retaliatory discharge was sufficient to satisfy the notice pleading requirements, and that the plaintiff was not required to specifically allege that the discharge was in retaliation for her filing of a workers’ compensation claim.

{¶ 23} The Tenth District in *Sidenstricker* further noted that, although Ohio courts frequently cite *Wilson* for the elements of a retaliatory discharge claim under R.C. 4123.90, only one has directly addressed the element of “injury on the job.” In that single case, *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the Fifth District held that the employee failed to satisfy the element of injury on the job, but also held that the employee failed to prove that the employer’s legitimate reason for discharge was pretextual. Thus, no Ohio case has been decided solely on the issue of injury on the job, as appellee requests that we do here.

{¶ 24} After examining *Wilson*, the Tenth District next looked to the language of the statute itself. In examining a statute, the initial question that must be resolved in

determining the intent of the legislature is whether the language is ambiguous. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. "However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991).

{¶ 25} Here, appellee, through its position, advances the interpretation that the phrase "injury or occupational disease which occurred in the course of and arising out of his employment" limits the type of claim and proceedings for which there is protection, and that the limitation is separate and in addition to the limitation that the claim or proceeding must be under the Workers' Compensation Act. This interpretation results in the conclusion that an employee must prove both that the claim or proceedings are under the Workers' Compensation Act, and that the claim or proceedings are for an injury that definitively occurred in the course of and arising out of the employment. An at least equally reasonable interpretation, however, is that the phrase is a continuation of the single limiting factor that the claim or proceeding be under the Workers' Compensation Act, since all claims under the Workers' Compensation Act are for injuries arising out of the course of employment. Thus, under this interpretation, an employee must prove only

that he or she filed a claim or initiated proceedings under the Workers' Compensation Act.

{¶ 26} Because there are two reasonable interpretations, we must turn to the rules of statutory construction, bearing in mind that “[t]he primary rule in statutory construction is to give effect to the legislature’s intention.” *Cline* at 97. Initially, we note that, in dealing with ambiguity, the legislature has stated its intention that “where a section of the Workmen’s Compensation Act will bear two reasonable but opposing interpretations, the one favoring the claimant must be adopted.” *State ex rel. Sayre v. Indus. Comm.*, 17 Ohio St.2d 57, 62, 245 N.E.2d 827 (1969), citing R.C. 4123.95 (“Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.”).

{¶ 27} One of the aids of construction in determining the intent of the legislature is the object sought to be attained by the statute. R.C. 1.49(A). To that end, the Ohio Supreme Court has stated that the basic purpose of the anti-retaliation provision in R.C. 4123.90 is “to enable employees to freely exercise their rights without fear of retribution from their employers.” *Sutton v. Tomco Machtning, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 22, quoting *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, ¶ 43. Under appellee’s interpretation, that purpose would be frustrated in situations such as this where the precise cause of the injury is unknown at the time, and multiple incidents may have substantially aggravated a condition resulting in an injury. Requiring an employee to successfully prove that the

injury occurred at work for purposes of a retaliatory discharge claim would have a chilling effect on the exercise of his or her rights because the employee would be forced to choose between a continuation of employment and the submission of a workers' compensation claim. This choice must be made by the employee knowing that if he or she fails to prove that the cause of the injury was work related, not only will his or her claim be denied, but the employer would then be free to terminate the employment simply because the claim was filed. As recognized by the Nevada Supreme Court, "In the absence of an injury resulting in permanent total disability, most employees would be constrained to forego their entitlement to industrial compensation in favor of the economic necessity of retaining their jobs." *Hansen v. Harrah's*, 100 Nev. 60, 64, 675 P.2d 394 (1984).

{¶ 28} Therefore, in accordance with R.C. 4123.95 and the basic purpose of the anti-retaliation provision, we construe R.C. 4123.90 to require that an employee must prove only that he or she "filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." The employee is not required to prove definitively that the injury occurred and arose out of the course of employment. In so doing, we agree with the reasoning of the Tenth District, and adopt its holding that to prove a prima facie case of retaliatory discharge, the employee must show:

- (1) the employee filed a workers' compensation claim or instituted, pursued or testified in a workers' compensation proceeding regarding a workers' compensation claim (the "protected activity"),
- (2) the employer discharged,

demoted, reassigned or took punitive action against the employee (an “adverse employment action”), and (3) a causal link existed between the employee’s filing or pursuit of a workers’ compensation claim and the adverse employment action by the employer (“retaliatory motive”).

Sidenstricker, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111 at ¶ 58.

{¶ 29} Our holding today, however, does not grant employees the power to file frivolous workers’ compensation claims with impunity. “The scope of R.C. 4123.90 is narrow and protects only against adverse employment actions in direct response to the filing or pursuit of a workers’ compensation claim.” *Ayers v. Progressive RSC, Inc.*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687, ¶ 14; *see also Oliver v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 02AP-229, 2002-Ohio-5005, ¶ 10. “R.C. 4123.90 does not prohibit a discharge for just and legitimate termination of employment. It does not suspend the rights of an employer, nor insulate an employee from an otherwise just and lawful discharge.” *Markham v. Earle M. Jorgensen Co.*, 138 Ohio App.3d 484, 493, 741 N.E.2d 618 (8th Dist.2000), quoting *Brown v. Whirlpool Corp.*, 3d Dist. Marion No. 9-86-20, 1987 WL 16261 (Sept. 1, 1987).

{¶ 30} Several Ohio courts have found that committing fraud in the pursuit of a workers’ compensation claim is a legitimate, non-retaliatory reason for discharge. In *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the employer terminated the employee for falsification of records in

connection with the filing of a workers' compensation claim. In that case, the employee's ex-girlfriend testified that the employee injured himself while painting houses during the plant's summer shutdown, but told her that he would claim the injury occurred while carrying buckets at the plant. Following a bench trial, the trial court found in favor of the employer on the employee's claim for retaliatory discharge, which the Fifth District affirmed. *Id.* at 336, 343. In *Kent v. Chester Labs Inc.*, 144 Ohio App.3d 587, 761 N.E.2d 60 (1st Dist.2001), the employer terminated the employee for dishonesty based on the statement of the employee's co-worker that her injury "was fake as fake could be," and on the fact that the employee had previously injured herself while lifting a bale of newspapers outside of work. The trial court granted summary judgment in favor of the employer, but the First District reversed, and remanded the matter for a trial to determine the motive for the discharge. *Id.* at 593-594. In another case from the First District, *Kelly v. Coca-Cola Bottling Co.*, 1st Dist. Hamilton No. C-030770, 2004-Ohio-3500, the employer fired the employee for dishonesty relating to lifting weights in excess of the doctor's recommendation. The trial court granted summary judgment, but the First District reversed, finding that a genuine issue of material fact existed on whether the employer's stated reason for termination was pre-textual. *Id.* at ¶ 42. Finally, in *Ayers, supra*, the employer terminated the employee for violating the company's code of conduct policy against deceit. In that case, the employee answered on a workers' compensation questionnaire that she had never been involved in an automobile accident. However, the employee had actually been involved in at least five automobile accidents.

Further, testimony was presented that the employee called the doctor's office directly to reschedule her independent medical examination, in violation of the company policy that only the employer can reschedule an examination, and that the employee represented herself as someone else in order to reschedule. The trial court granted summary judgment in favor of the employer, and the Eighth District affirmed finding that the employee failed to establish a prima facie case and failed to demonstrate that the stated reason for discharge was mere pretext. *Ayers*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687 at ¶ 18.

{¶ 31} These cases are informative in that in each of them, the question of the employee's honesty regarding the workers' compensation claim was determined within the framework of the burden shifting analysis pertaining to the true motivation behind the adverse employment action. If the employer can show that the basis of the discharge was fraud or dishonesty, the employee has the opportunity to prove that the stated reason is pretextual, and that the true motivation was the filing of the workers' compensation claim itself. An employee can prove pretext by showing that the employer's proffered reason "(1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action." *Ferguson*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132 at ¶ 21, citing *Wysong v. Jo-Ann Stores, Inc.*, 2d Dist. Montgomery No. 21412, 2006-Ohio-4644, ¶ 13; *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4724, 898 N.E.2d 56, ¶ 9 (1st Dist.). We think that such an approach is appropriate in this situation as well.

{¶ 32} However, we do not reach the issue of whether appellee put forth a legitimate, non-retaliatory reason for discharge, or whether appellant demonstrated that the proffered reason was pretext through evidence showing that he did not in fact lie or commit fraud in the filing of his workers' compensation claims. It is well-settled in Ohio that "a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of *informing the trial court of the basis for the motion*, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." (Emphasis added.) *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *see also Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus ("A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher* at 293. Here, with respect to the retaliatory discharge claim, appellee made no argument that it provided a legitimate, non-retaliatory reason for discharge or that appellant failed to provide evidence demonstrating that the reason was merely pretext. Instead, appellee argued solely that by failing to appeal the Industrial Commission's decision disallowing benefits, appellant was collaterally estopped or barred by res judicata from establishing the workplace injury element of his claim. Because we have determined that a workplace injury is not a required element of a retaliatory discharge claim under R.C. 4123.90, and because no

other grounds were offered, we conclude that summary judgment for appellee on the retaliatory discharge claim was inappropriate.

{¶ 33} Accordingly, appellant's first assignment of error is well-taken.

B. Intentional Infliction of Emotional Distress

{¶ 34} "In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).

{¶ 35} In its motion for summary judgment, appellee argued that it was entitled to judgment because its conduct was not extreme and outrageous as a matter of law.

Extreme and outrageous conduct has been described as:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community

would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts, Section 46(1), Comment d (1965).

{¶ 36} In particular, appellee contended that appellant did not pursue a valid workers' compensation claim, but rather attempted to collect benefits for a non-work related injury. Appellee stated that "[s]uch deceptive conduct constituted a legitimate, non-discriminatory, non-retaliatory business reason to terminate [appellant's] employment and cannot be found to be 'extreme and outrageous' conduct," so as to support an intentional infliction of emotional distress claim. Further, appellee contended that the termination of an at-will employee is an exercise of the employer's legal rights and does not constitute extreme or outrageous conduct. Appellee relies on *Jones v. Wheelersburg Local School Dist.*, 4th Dist. Scioto No. 12CA3513, 2013-Ohio-3685, ¶ 42, for the proposition that

"Termination of employment, without more, does not constitute the outrageous conduct required to establish a claim of intentional infliction of emotional distress, even when the employer knew that the decision was likely to upset the employee." * * * Moreover, an employer is not liable for a plaintiff's emotional distress if the employer does no more than "insist upon his legal rights in a permissible way, even though he is well aware

that such insistence is certain to cause emotional distress.” (Internal citations omitted.)

{¶ 37} Appellant responded by arguing that he never lied about his workers’ compensation claim, and that his claim was supported by the medical report of Dr. Ahn, who examined him as part of his workers’ compensation claim, and by three employees who acknowledged that appellant said he aggravated his knee while moving cabinets at work.

{¶ 38} Upon our review of the facts, viewed in the light most favorable to appellant, we conclude that no reasonable fact-finder could find that appellee’s conduct rises to the level of outrageousness sufficient to support a claim for intentional infliction of emotional distress. We hold that, under the circumstances, appellee’s actions in terminating an at-will employee do not go beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Therefore, appellee’s actions are not extreme and outrageous as a matter of law, and summary judgment in favor of appellee on appellant’s intentional infliction of emotional distress claim is appropriate.

{¶ 39} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 40} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded to the

trial court for further proceedings on appellant's claim for retaliatory discharge under R.C. 4123.90. Costs of this appeal are to be split evenly between the parties pursuant to App.R. 24.

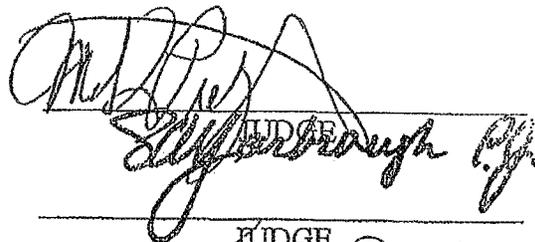
Judgment affirmed, in part,
and reversed, in part.

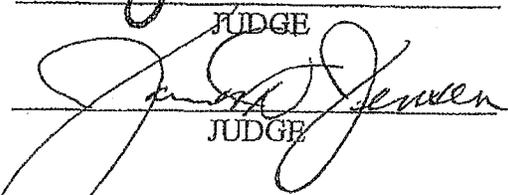
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE
A TRUE COPY OF THE ORIGINAL
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Erie County, Ohio

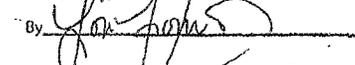
By 

EXHIBIT C

physical harm is implausible. As for using such an "inept" firebomb, the state has no duty to distinguish between intelligent criminal plans and imprudent criminal plans as part of proving intent to commit a criminal act. See *State v. Stoudemire* (1997), 118 Ohio App.3d 752, 694 N.E.2d 86. Defendant did not counter the state's evidence showing a real and immediate threat of serious physical harm presented by the thrown plastic bottle. Accordingly, we find that the state presented sufficient evidence to prove the elements of aggravated arson. The third assignment of error is overruled.

Judgment affirmed.

NAHRA, P.J., and ROCCO, J., concur.



120 Ohio App.3d 332

1332KILBARGER, Appellant,

v.

ANCHOR HOCKING GLASS
COMPANY, Appellee.*

No. 96 CA 44.

Court of Appeals of Ohio,
Fifth District, Fairfield County.

Decided June 20, 1997.

Former employee brought action against his former employer for workers' compensation retaliatory discharge. Summary judgment granted in favor of former employer was reversed, 107 Ohio App.3d 763, 669 N.E.2d 508, and case was remanded. Following bench trial, the Court of Common Pleas, Fairfield County, entered judgment in favor of former employer. Former employee appealed. The Court of Appeals, Wise, J., held that: (1) former employee had burden of

* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in

proving at trial that he was injured at work; (2) former employee failed to establish that former employer's proffered reasons for discharging him were pretext for retaliation; (3) testimony concerning former employer's consistent enforcement of work rule regarding falsification of records and that no other employees had been discharged for filing workers' compensation claim was admissible; and (4) it was not abuse of discretion to refuse to allow former employee to review notes used by witness to refresh her memory.

Affirmed.

1332Gwin, P.J., concurred with opinion.

William B. Hoffman, J., concurred with opinion.

1. Master and Servant \Leftrightarrow 43

Trial court's decision concerning claim of workers' compensation retaliatory discharge is question of fact. R.C. § 4123.90.

2. Appeal and Error \Leftrightarrow 1001(1)

Court of Appeals must not substitute its judgment for that of trial court when competent, credible evidence supports trial court's factual findings.

3. Master and Servant \Leftrightarrow 30(6.20)

Initially, employee setting forth claim for workers' compensation retaliatory discharge must plead prima facie case in order to state claim, and this requires employee to allege following elements: (1) that employee was injured on job, (2) that employee filed claim for workers' compensation, and (3) that employee was discharged in contravention of anti-retaliation statute. R.C. § 4123.90.

4. Master and Servant \Leftrightarrow 40(1)

If employee makes prima facie case of workers' compensation retaliatory discharge, burden shifts to employer to set forth nondiscriminatory reason for discharge. R.C. § 4123.90.

(1997), 80 Ohio St.3d 1436, 685 N.E.2d 546.

5. Master and Servant §40(1)

Once employee establishes prima facie case of workers' compensation retaliatory discharge, although employer has burden of setting forth reason for discharge, which it must establish before burden again shifts back to employee, such burden does not require employer to prove absence of retaliatory discharge; rather, it merely requires employer to set forth legitimate, nonretaliatory reason for employee's discharge, and employer does not have to prove this reason. R.C. § 4123.90.

6. Master and Servant §40(1)

In workers' compensation retaliatory discharge case, if employer sets forth legitimate, nonretaliatory reason for discharging employee, burden shifts to employee who must then establish that reason articulated by employer is pretextual and that real reason for discharge was employee's protected activity under Workers' Compensation Act. R.C. § 4123.90.

7. Master and Servant §30(6.20)

If employer fails to set forth legitimate, nonretaliatory reason for employee's discharge, employee can establish claim for workers' compensation retaliatory discharge; however, if employer does set forth legitimate, nonretaliatory reason, and employee is unable to prove that reason articulated by employer was pretextual and that real reason is that employee filed claim for workers' compensation, employee's claim for retaliatory discharge must fail. R.C. § 4123.90.

8. Master and Servant §40(1)

Former employee claiming workers' compensation retaliatory discharge had burden of proving at trial that he was injured at work. R.C. § 4123.90.

9. Master and Servant §40(1)

In workers' compensation retaliatory discharge case, employer's burden does not require employer to prove, by clear and convincing evidence, absence of retaliatory discharge; rather, employer merely has to set forth legitimate, nonretaliatory reason for employee's discharge. R.C. § 4123.90.

10. Master and Servant §40(4)

Former employee claiming workers' compensation retaliatory discharge failed to establish that his former employer's proffered reasons for his discharge were pretext for retaliation by merely attacking validity of such reasons; nothing in record established that proffered reasons were pretextual and that real reason for former employee's discharge was his filing of workers' compensation claim. R.C. § 4123.90.

11. Appeal and Error §1003(7)

In reviewing weight-of-evidence claim, judgment supported by some competent, credible evidence will not be reversed by reviewing court as against manifest weight of evidence.

12. Appeal and Error §994(2), 1003(3)

Court of Appeals defers to findings of trial court since it is in best position to observe witnesses and weigh their credibility.

13. Master and Servant §40(2)

Testimony concerning employer's consistent enforcement of work rule regarding falsification of records and that no other employees had been discharged for filing workers' compensation claim was admissible, in former employee's workers' compensation retaliatory discharge action, to show that employer acted in conformity with such habit or routine practice when dealing with former employee. R.C. § 4123.90; Rules of Evid., Rule 406.

14. Witnesses §256

Trial court acted within its discretion in refusing to allow plaintiff to review notes used by defense witness to refresh her memory, despite plaintiff's claim that discrepancy existed regarding date witness first spoke to certain third party; plaintiff failed to conduct proper discovery prior to trial when he could have clarified dates in question. Rules of Evid., Rule 612.

15. Courts §26

"Abuse of discretion" connotes more than error of law or judgment, it implies

court's attitude is unreasonable, arbitrary or unconscionable.

See publication Words and Phrases for other judicial constructions and definitions.

16. Witnesses $\text{\textcircled{C}}$ 288(2)

Plaintiff's trial counsel's questioning of defense witness, on cross-examination, regarding her opinion as to credibility of certain non-witness opened door to witness' testimony on redirect examination about same issue. Rules of Evid., Rule 608(A).

Perry-Dieterich & Assoc. Co., L.P.A., and Eric R. Dieterich, Columbus, for appellant.

Frost & Jacobs L.L.P., Thomas V. Williams and Jeffrey N. Lindemann, Columbus, for appellee.

WISE, Judge.

Appellant Mark Kilbarger appeals the decision of the Fairfield County Court of Common Pleas that entered judgment in favor of Anchor Hocking Glass Company ("Anchor Hocking") on his claim for retaliatory discharge pursuant to R.C. 4123.90.

Appellant began working for appellee Anchor Hocking in July 1978. In late June 1991, Anchor Hocking began its summer shutdown for three weeks. During that period, appellant worked as a painter helping other family members. Anchor Hocking's summer shutdown ended on July 13, 1991, and appellant returned to work on that date. On July 17, 1991, appellant reported to Anchor Hocking that he had injured his shoulder and upper arm while attempting to move a heavy bucket of "batch," the raw material used to make glass products.

Appellant subsequently filed a workers' compensation claim requesting benefits due to his injury. Anchor Hocking contested appellant's workers' compensation claim because of the manner in which appellant injured himself. In November 1991, Vicky Jarrell, appellant's common-law wife, informed Vern Montgomery, manager of the Mix and Melt Department at Anchor Hocking, that appellant had injured himself during summer shutdown while he was painting a

house with his uncle. Jarrell also stated that appellant told her that he intended to return to work and claim that he had suffered the injury while working at Anchor Hocking, in connection with the use of the buckets.

¹³⁹⁶Karen Feisel, Safety Manager at Anchor Hocking, asked the workers' compensation service company for Anchor Hocking to contact Vicky Jarrell to verify her allegations concerning appellant's injury. Karen Feisel also personally interviewed Vicky Jarrell, on two separate occasions, concerning appellant's statements regarding the workers' compensation claim.

Anchor Hocking contested appellant's workers' compensation claim through all three levels of the administrative hearing procedure based upon the information provided by Vicky Jarrell. However, appellant prevailed at all three levels of the administrative process. Anchor Hocking subsequently appealed the workers' compensation claim to the Fairfield County Court of Common Pleas. A trial was conducted on June 22, 1993. Following deliberations, the jury returned a verdict rejecting appellant's claim that his injury was job-related and therefore determined that appellant was not eligible to participate in the State Insurance Fund.

Following the trial, Anchor Hocking's management conducted a meeting to review appellant's workers' compensation claim. All of the managers at the meeting agreed that appellant should be discharged for falsification of records in connection with his workers' compensation claim. Falsification of records is a violation of Anchor Hocking's Plant Rules, Class 1, Rule 4.

Pursuant to the terms of the collective bargaining agreement, Anchor Hocking suspended appellant for seven days pending discharge. Anchor Hocking informed appellant that the reason for his suspension was for falsification of records. On July 1, 1993, Anchor Hocking informed appellant that he was discharged for record falsification.

On December 21, 1993, appellant filed a complaint in which he alleged that Anchor Hocking had terminated him in violation of R.C. 4123.90 and that Anchor Hocking had wrongfully discharged him. Following dis-

KILBARGER v. ANCHOR HOCKING GLASS CO. Ohio 1083

Cite as 697 N.E.2d 1080 (Ohio App. 5 Dist. 1997)

covery, Anchor Hocking filed a motion for summary judgment. On December 30, 1994, the trial court granted Anchor Hocking's motion. Appellant appealed the trial court's decision to this court. On February 21, 1995, we reversed the trial court's grant of summary judgment, finding that reasonable minds could differ regarding whether or not appellant had been terminated in contravention of R.C. 4123.90. *Kilbarger v. Anchor Hocking Glass Co.* (1995), 107 Ohio App.3d 763, 669 N.E.2d 508

Upon remand to the trial court, a bench trial was conducted on April 25 and 26, 1996. Prior to trial, appellant dismissed the second count of his complaint, which alleged wrongful discharge. The trial court issued its judgment entry on June 4, 1996, finding in favor of Anchor Hocking on appellant's claim for retaliatory discharge.

Appellant timely filed a notice of appeal and sets forth the following assignments of error:

[§§] "I. The trial court applied an incorrect burden of proof on appellant by requiring appellant to prove that he was injured on the job.

"II. The trial court used on [sic] incorrect standard of proof in failing to require appellee to show by clear and convincing evidence that appellant filed a falsified claim.

"III. It was error for the trial court to allow appellee to admit information on other workers' compensation decisions and employee terminations as evidence that appellee did not discharge appellant in violation of 4123.90.

"IV. The trial court committed error by refusing to allow the appellant to inspect the writing used by Karen Feisel to refresh her memory.

"V. The court erred in admitting testimony of witnesses concerning their opinion of Vicky Jarrell's credibility.

"VI. The decision of the trial court is against the manifest weight of the evidence."

Standard of Review

[1, 2] A trial court's decision concerning a claim of retaliatory discharge, pursuant to R.C. 4123.90, is a question of fact. *Eye v.*

Babcock & Wilcox Co. (Dec. 13, 1995), Summit App. No. 17229, unreported, 1995 WL 734027, at 4. As an appellate court, we must not substitute our judgment for that of the trial court when competent, credible evidence supports the trial court's factual findings. *Id.*, citing *Wisintainer v. Elcen Power Strut Co.* (1993), 87 Ohio St.3d 352, 353, 617 N.E.2d 1136, 1137.

Therefore, we must affirm the decision of the Fairfield County Court of Common Pleas, dismissing appellant's cause of action for retaliatory discharge, if the record in this matter contains competent, credible evidence to support the decision. It is upon this standard of review that we analyze appellant's assignments of error.

Burden of Proof

[3] Appellant's first, second and sixth assignments of error each concern the burden of proof used by the trial court. Before we review appellant's assignments of error concerning the burden of proof, we will first address how and when the burden of proof shifts under a claim for retaliatory discharge. Initially, a plaintiff setting forth a claim for retaliatory discharge must plead a prima facie case in order to state a claim under R.C. 4123.90. This requires a plaintiff to allege the following elements: (1) that the employee was injured on the job, (2) that the employee filed a claim for workers' compensation, and (3) that the employee was discharged in contravention of R.C. 4123.90. *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6; 479 N.E.2d 275, syllabus.

[4, 5] If the employee makes a prima facie case, the burden shifts to the employer to set forth a nondiscriminatory reason for the discharge. *Wilson v. Hupp Co.* (Nov. 25, 1987), Cuyahoga App. No. 54176, unreported, 1987 WL 20474, at 4, citing *Butler v. Square D. Co.* (June 29, 1984), Butler App. No. CA84-03-036, unreported, at 6. Although the employer has this burden of proof, which it must establish before the burden again shifts back to the employee, the burden does not require the employer to prove the absence of a retaliatory discharge. *Gallaheir v. W.S. Life Ins. Co.* (Dec. 19, 1986), Hamilton App. No. C-860062, unreported, 1986 WL 14063,

at 4. It merely requires the employer to set forth a legitimate, nonretaliatory reason for the employee's discharge. *Wilson v. Hupp* at 4. The employer does not have to validate this reason.

[6] Finally, if the employer sets forth a legitimate, nonretaliatory reason, the burden once again shifts to the employee. The employee must then establish that the reason articulated by the employer is pretextual and that the real reason for the discharge was the employee's protected activity under the Ohio Workers' Compensation Act. *Wilson* at 4, citing *Butler* at 6.

[7] Therefore, if the employer fails to set forth a legitimate, nonretaliatory reason for the employee's discharge, the employee can establish a claim for retaliatory discharge. However, if the employer does set forth a legitimate, nonretaliatory reason and the employee is unable to prove that the reason articulated by the employer is pretextual and that the real reason is that the employee filed a claim for workers' compensation, the employee's claim for retaliatory discharge must fail. It is under this burden-shifting analysis that we review appellant's first, second, and sixth assignments of error.

I

[8] Appellant contends, in his first assignment of error, that the trial court applied an incorrect burden of proof by requiring appellant to prove that he was injured at work. Specifically, appellant refers to the trial court's judgment entry wherein the trial court found that appellant "failed with his burden of proof to show that the injury occurred at work, consistent with the jury finding in the workers [*sic*] compensation case."

We overrule appellant's first assignment of error. Although appellant pled a prima facie case in his complaint, by alleging the three elements necessary to state a claim under R.C. 4123.90, appellant still had the burden of proving all the ¹²³⁹elements of his case at trial. Appellant failed to establish, at trial, that he was injured at work. The trial court did not apply an incorrect burden of proof.

Appellant's first assignment of error is overruled.

II

Appellant contends, in his second assignment of error, that the trial court used an incorrect burden of proof when it failed to require Anchor Hocking to show, by clear and convincing evidence, that appellant filed a false claim. Appellant argues that although Anchor Hocking set forth a legitimate, nonretaliatory reason for his discharge, it failed to demonstrate that the reason was valid by clear and convincing evidence.

In support of this assignment of error, appellant refers to this court's language in *Kilbarger v. Anchor Hocking Glass Co.* (1995), 107 Ohio App.3d 763, 669 N.E.2d 508, where this court stated:

"At the first trial, appellant was required to prove by a preponderance of the evidence that he was injured on the job. In the case at bar, it will be appellee's burden of proving fraud by clear and convincing evidence." *Id.* at 767, 669 N.E.2d at 511.

[9] In *Kilbarger*, this dicta placed a heavier burden upon Anchor Hocking than is required by law. An employer's burden does not require the employer to prove, by clear and convincing evidence, the absence of retaliatory discharge. *Gallaher* at 4. The employer merely has to set forth a legitimate, nonretaliatory reason for the employee's discharge. *Wilson v. Hupp Co.* at 4, citing *Butler* at 6.

However, even though the trial court applied this more stringent burden upon Anchor Hocking, it still found that appellant failed to establish he was discharged for bringing the workers' compensation action. Specifically, the trial court stated as follows:

"[T]he evidence was clear and convincing that Plaintiff was not fired in retaliation for bringing the workers' compensation action but rather for falsifying his claim in the first place. Under the evidence presented by the employer the claim was at first suspicious in that it happened with no witnesses around. Upon investigation the conclusion was reasonable that the nature of the injury was not consistent with the work that was being per-

formed. Then Jarrell's statement left management no alternative."

Thus, even though appellant argues that the trial court did not require Anchor Hocking to establish by clear and convincing evidence that appellant filed a false workers' compensation claim, we find that the trial court did hold Anchor Hocking to this higher burden. However, even under this higher burden, the trial court still found that Anchor Hocking did not terminate appellant because he filed a workers' compensation claim.

Appellant's second assignment of error is overruled.

III

[10] In his sixth assignment of error appellant contends that the trial court's verdict is against the manifest weight of the evidence. Appellant essentially argues that the trial court's findings on employer's reasons for terminating his employment were against the manifest weight of the evidence.

[11, 12] In reviewing a weight-of-evidence claim, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. We defer to the findings of the trial court since it is in the best position to observe the witnesses and weigh their credibility. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d, 77, 80, 10 OBR 408, 410-411, 461 N.E.2d 1273, 1276.

Appellant refers to the testimony of Karen Feisel and the three reasons set forth by Feisel for appellant's termination. Feisel testified that Vern Montgomery believed that the injury could not have occurred in the manner appellant stated it did. Second, in deciding what action to take against appellant, Anchor Hocking considered the jury verdict in the workers' compensation case. Third, Anchor Hocking considered the testimony of Vicky Jarrell. Appellant attempts to discredit these reasons by referring to other evidence presented at trial.

In doing so, appellant attacks the validity of Anchor Hocking's reasons for his discharge, which is required under his burden of proof. However, appellant fails to cite evidence in the record, nor can we find any, which would establish that the reasons articulated by the employer were pretextual and that the real reason for the employee's discharge was the filing of a workers' compensation claim.

If appellant sought merely to attack Anchor Hocking's reasons for discharge, he should have pursued his claim for wrongful termination instead of dismissing it prior to trial. A situation similar to the case *sub judice* was addressed in *Hartwig v. Zeller Corp.* (Nov. 2, 1990), Defiance App. No. 4-89-12, unreported, 1990 WL 178954, wherein the court stated:

"We find nothing in the statute [R.C. 4123.90] that suspends the rights of the employer to discharge for a cause that is just other than the condition that the employee files a claim or participates in workers' compensation proceedings. Causes for discharge, other than that described in the statute, are not governed by this legislation. Further, there is no reference in this section of the statute to [§] an otherwise just and legitimate termination of employment at any time." *Id.* at 5.

Thus, the proper inquiry under a retaliatory discharge claim is whether a filing of a workers' compensation claim was the reason for his termination, not whether appellant's treatment under Anchor Hocking's work rules was fair.

We find, based upon the record in this matter, that the trial court's verdict was not against the manifest weight of the evidence.

Appellant's sixth assignment of error is overruled.

IV

[13] In his third assignment of error appellant contends that it was error for the trial court to allow Anchor Hocking to admit information of other workers' compensation decisions and employee terminations as evidence that it did not discharge appellant in violation of R.C. 4123.90. Under this assign-

ment of error, appellant refers to the testimony of Karen Feisel. Feisel testified that one other employee had been discharged for falsification of records. Feisel also testified that fifteen employees whose workers' compensation claims had been denied were not terminated.

Appellant contends that this testimony was not admissible pursuant to Evid.R. 406, which provides as follows:

"Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

Appellant argues that the testimony presented by Feisel was insufficient to establish habit or routine. We disagree. This court, in *Gardner v. Kelsey Hayes Co.* (Aug. 10, 1995), Knox App. No. 94CA000015, unreported, 1995 WL 557004, stated that in considering a claim for handicap discrimination, it was proper to consider the fact that other nonhandicapped employees were retained or not disciplined for conduct similar to that which resulted in the plaintiff's discharge. *Id.* at 8-9.

Therefore, Anchor Hocking's evidence concerning consistent enforcement of the work rule regarding falsification of records and the fact that no other employees had been discharged for filing a workers' compensation claim is admissible under Evid.R. 406.

Appellant's third assignment of error is overruled.

1842 V

[14] Appellant contends in his fourth assignment of error that the trial court committed error by refusing to allow appellant to inspect the writing used by Karen Feisel to refresh her memory. Feisel testified that she used notes to refresh her memory prior to testifying.

Evid.R. 612 addresses this issue and provides:

"[I]f a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

Appellant maintains that he was entitled to review the notes used by Feisel because a discrepancy existed concerning the date when Feisel first spoke to Vicky Jarrell concerning what appellant told her he intended to do. We disagree. Under Evid.R. 612, it was within the trial court's discretion whether to require Feisel to produce the documents, reviewed by her, prior to testifying. Therefore, in order to prevail under this assignment of error, appellant must establish that the trial court abused its discretion in not requiring Feisel to produce these documents.

[15] An abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142. We do not find that the trial court abused its discretion when it denied appellant's request under Evid.R. 612, especially since appellant failed to conduct proper discovery prior to trial, when he could have clarified the dates in question.

Appellant's fourth assignment of error is overruled.

VI

[16] Appellant contends in his fifth assignment of error that the trial court erred when it permitted other witnesses to testify concerning the credibility of Vicky Jarrell. Appellant argues that this testimony was not admissible under Evid.R. 608, because Vicky Jarrell did not testify in the case *sub judice* and her character for truthfulness was not attacked at the workers' compensation trial.

Evid.R. 608(A) addresses opinion and reputation evidence and provides:

"The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence ¹³⁴³may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

We find that the trial court properly permitted the testimony of Karen Feisel concerning her opinion of Vicky Jarrell's reputation for truthfulness. The record indicates that appellant's trial counsel opened the door by questioning Feisel about her opinion of Vicky Jarrell's credibility. After appellant's trial counsel asked those questions, the trial court permitted, on redirect examination, Feisel's opinion as to Vicky Jarrell's credibility. We will not address this assignment of error as it relates to Karen Moyer because it does not relate to an objection concerning Vicky Jarrell's credibility.

Appellant's fifth assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

Judgment affirmed.

GWIN, P.J., and WILLIAM B. HOFFMAN, J., concur separately.

GWIN, Presiding Judge, concurring:

I concur in the judgment, but write separately to clarify certain issues.

In the first appeal on this case, I authored the opinion, which reversed the granting of a summary judgment in favor of appellee employer. In that opinion, we correctly held that the fact that appellant was unsuccessful in his workers' compensation claim was not dispositive of the issue whether appellant had filed the claim fraudulently. However, we also held that appellee had the burden of proving fraud by clear and convincing evidence. I now believe that this was an error. I do not think that the appellee had a burden of proving anything.

In this case, the other judges discuss the burden of proof and the burden of production. Both cite *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6, 479 N.E.2d 275. *Wilson* dealt with a motion to dismiss pursuant to Civ. R. 12(B)(6). The *Wilson* court outlines what a plaintiff must do to survive a Civ. R. 12(B)(6) motion. Here we are far beyond that stage. The parties here have tried this case.

I believe that the appellant had the burden of proving all the elements of his case, and here, he failed to prove that he was injured on the job.

¹³⁴⁴WILLIAM B. HOFFMAN, Judge, concurring:

I fully concur in the majority's analysis and disposition of appellant's second, third, fourth, fifth, and sixth assignments of error. I write separately to clarify what I believe to be the appropriate burden of proof to be applied to retaliatory discharge cases under R.C. 4123.90. In addition, I wish to separately express my position with respect to appellant's first assignment of error.

BURDEN OF PROOF

I essentially concur with the majority's statement as to the burden of proof. I recognize that my disagreement may well be more a matter of semantics than substance.

Once an employee establishes a prima facie case for retaliatory discharge, the burden of going forward with the evidence shifts to the employer to set forth a legitimate, nonretaliatory reason for the discharge. The burden of going forward with the evidence is different from the burden of proof. The burden of proof never shifts.

If the employer meets its burden of going forward, the employee must prove that the nonretaliatory reason for discharge proffered by the employer is pretextual in nature and that the real reason for discharge was retaliation for the employee's pursuit of his workers' compensation claim. The burden of proof does not shift back to the employee. The burden of proof remains on the employee at all times. What changes is that the employee now must prove that the nonretali-

atory reason for discharge proffered by the employer is pretextual and that the real reason for his discharge was retaliation for pursuing his workers' compensation claim.

I

At issue herein is whether the trial court erred in requiring the appellant/employee to prove that he was injured on the job. The majority affirms this assignment of error pursuant to *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6, 479 N.E.2d 275. By so doing, I presume, the majority concludes that an employee is not required to prove that he was injured on the job in order to establish a claim for retaliatory discharge under R.C. 4123.90. With that conclusion, I readily agree.

The majority bases its decision on *Wilson*. I find that reliance misplaced. The majority states in its discussion of burden of proof that one of the elements a plaintiff is required to allege pursuant to *Wilson* is that the employee was injured on the job. It is axiomatic that a plaintiff is required to prove at trial any element that he is required to allege in his complaint. Despite the majority's ¹³⁴⁵ conclusion that the appellant was required to allege that he was injured on the job, it concludes that the trial court erred in requiring him to prove it at trial. I find that reasoning logically inconsistent.

I believe that the majority misinterprets *Wilson*. The syllabus in *Wilson* reads:

"A complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90."

There is a difference between what the Ohio Supreme Court found sufficient to state a claim under the facts in *Wilson* and what is required to state a claim for retaliatory discharge under R.C. 4123.90. The procedural posture of the *Wilson* case is significant. *Wilson* came to the Ohio Supreme Court as a result of the dismissal of the employee's complaint under Civ.R. 12(B)(6) for failure to state a cause of action. To the extent that

the majority reads *Wilson* to require an injury on the job to be alleged (and, I contend, therefore necessarily proved at trial) as an element in a retaliatory discharge claim, *Wilson* is inapposite to the majority's conclusion.

Unlike the majority, I do not find that *Wilson* requires an allegation or proof of an injury on the job before a claim based upon R.C. 4123.90 can be maintained. *Wilson* held that the employee's complaint stated a claim. To find that the employee stated a claim is different from establishing what an employee is required to allege before he can state a claim for relief under R.C. 4123.90.

The issue becomes whether an employee can assert a successful claim for retaliatory discharge under R.C. 4123.90 even though the employee cannot prove that he sustained an injury on the job. I submit that a close reading of the statute reveals that the employee can maintain such a claim. R.C. 4123.90 states:

"No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." (Emphasis added).

Nothing in the statute requires the employer to have sustained an injury on the job, be it compensable or not. All the statute requires is that the employee has filed a claim or instituted, pursued, or testified in any proceeding under the Workers' Compensation Act for an injury or occupational disease that occurred in the course of and arising out of his employment with that employer. I find no language in the statute to support the trial court's apparent requirement that the employee prove that an injury occurred at work.

¹³⁴⁶ Accordingly, I would sustain this assignment of error, not pursuant to *Wilson*, but rather based on the plain language of the statute.

