

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| MICHAEL P. ONDERKO, | : | CASE NO. 2014-1881 |
| | : | & 2014-1962 |
| Plaintiff-Appellee, | : | |
| | : | |
| vs. | : | On Appeal from the Erie |
| | : | County Court of Appeals, |
| SIERRA LOBO, INC. | : | Sixth Appellate District |
| | : | Case No. E-14-009 |
| Defendant-Appellant. | : | |

**BRIEF OF AMICUS CURIAE
FRATERNAL ORDER OF POLICE CAPITAL CITY LODGE NO. 9
IN SUPPORT OF APPELLEE MICHAEL P. ONDERKO**

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I. STATEMENT OF THE CASE AND THE FACTS

The parties have fully stated the case and facts of this appeal. There is no need for repetition and Amicus FOP adopts the parties' statements as if fully rewritten herein.

II. INTRODUCTION

Amicus Curiae Fraternal Order of Police Capital City Lodge No. 9 (FOP) respectfully submits that this honorable court sustain the decision of the Sixth District Court of Appeals in the case of Onderko v. Sierra Lobo, Inc. (6th Dist. Ct. App. E-14-009).

III. ARGUMENT

PROPOSITION OF LAW NO. 1

Revised Code Section 4123.90 does not require that a claimant prevail in a workers' compensation claim as a pre-condition to seeking relief thereunder.

The Sixth District Court of Appeals sustained the Appellee's First Assignment of Error thereby reversing the trial court's decision granting summary judgment for Appellant. The FOP urges this Court to affirm that decision.

The gist of the trial court's decision was that a workers' compensation claim must be allowed as a prerequisite to an action under R.C. 4123.90.

R.C. 4123.90 states in pertinent 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."

It does not state that the claim and/or any matter under a claim must be allowed, granted, or approved. The Appellate Court's statutory construction of R.C. 4123.90 supports that conclusion.

The success or failure of a workers' compensation claim, with the exception of fraud, should have no impact on the viability of an action under R.C. 4123.90. Further, the denial of a claim should not give license to an Employer to discharge an employee because efforts to win a claim failed. The FOP asserts that to permit an Employer license to discharge an employee in retaliation for unsuccessfully pursuing workers' compensation benefits would deter injured workers from filing legitimate claims and/or non-fraudulent claims.

Examples abound where claims are legitimate and non-fraudulent that may be denied based on the law or facts.

For example, a worker has a job that requires keyboarding 8 hours per day. He or she begins to have pain in both wrists and hands. Upon visiting the doctor and undergoing EMG testing a diagnosis of carpal tunnel syndrome is rendered. The workers' doctor blames keyboarding. A workers' compensation claim is filed. The Employer disputes the claim and has the claimant examined by a doctor of its choosing. That doctor says yes to carpal tunnel syndrome but opines it was not caused by keyboarding. The Employer's doctor says it was caused by the claimant's diabetes. Ultimately, the claim is heard and denied by Industrial Commission hearing officer. The claim was neither illegitimate nor fraudulent. The hearing officers chose to rely on the Employer's medical evidence. The claimant should not be discharged because he/she was unsuccessful in convincing hearing officer to rely on his/her doctor.

Another example: A police officer trying to apprehend a suspect falls and claims he hurt his right shoulder. He sees an orthopedic surgeon who suspects the officer has a right rotator cuff tear. The officer undergoes MRI testing which confirms the doctor's diagnosis. The officer files a claim. The Employer disputes the claim because a year prior the officer had right shoulder pain due to weight lifting; saw a physician; and underwent physical therapy. The right shoulder pain resolved. The Employer disputes the claim by arguing that the officer had a rotator cuff tear a year prior and that his recent fall in apprehension of a suspect did not cause his shoulder problem. The claim is ultimately disallowed by the Industrial Commission. The officer decides not to appeal the decision in Court pursuant to R.C. 4123.512. Thus the claim is ended. The officer then relies on his health insurer to pay his doctor bills and ultimate surgery. That the Industrial Commission chose to believe the Employer's doctor rather than the officer's physician should not give the Employer license to discharge the officer for filing and pursuing an unsuccessful workers' compensation claim. The officer filed a legitimate application and should not face job loss because he pursued a claim.

Further, suppose an injured worker has a claim allowed for a lumbar strain. An MRI shows the worker also has a herniated disc at L4-5 of the lumbar spine. His/her doctor believes the accident that caused the strain also caused the herniation. The employer's doctor disagrees and says the herniation is due to the "natural aging process" not the mechanism of the accident. Ultimately, the Industrial Commission agrees and denies the worker's motion to have the herniation added to the claim. The injured worker decides not to appeal into Court under R.C. 4123.512. Should legitimate disagreement among doctors that is resolved in the Employer's favor allow the

Employer to discharge the employee for pursuing an unsuccessful motion? In all of the foregoing examples if the Employer did discharge the Employee for unsuccessfully pursuing a claim; or there is evidence that, if believed, would prove such a case, R.C. 4123.90 is designed to protect workers who are lawfully entitled to seek workers' compensation benefits.

Finally, there have been cases where a claimant has met success at the administrative level only to ultimately lose in the Court of Appeals and/or the Ohio Supreme Court. The FOP hopes that this Court would agree with the lower court that a loss does not forfeit the protection R.C. 4123.90 affords.

The Court of Appeals decision sets forth all of the authorities and rationale that support its decision and thus the FOP adopts those authorities as if fully rewritten herein.

The purpose of this brief is to urge this Court to affirm the appeal court's decision and to provide examples that a lost claim is not necessarily illegitimate.

The FOP fears that if the appeals court's decision is overturned injured workers will be deterred from filing legitimate workers' compensation claims.

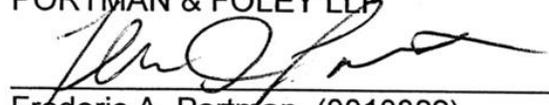
Injured workers should not be deterred from filing legitimate workers' compensation claims for fear that the unsuccessful pursuit thereof could lead to loss of employment. The Ohio Legislature agreed and responded with the passage of R.C. 4123.90.

IV. CONCLUSION

The purpose of the Workers' Compensation Act of Ohio should not be defeated by allowing Employers to discharge employees who do not prevail in a claim.

Discharging an employee for filing and pursuing benefits is a clear violation of R.C. 4123.90. The trial court's grant of summary judgment to the Appellant misconstrued the language of R.C. 4123.90 by adding a provision that does not exist.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief of Amicus Curiae Fraternal Order of Police Capital City Lodge No. 9 In Support of Appellee, Michael P. Onderko, was served via regular U.S. Mail, postage prepaid, this 7 day of May, 2015 upon:

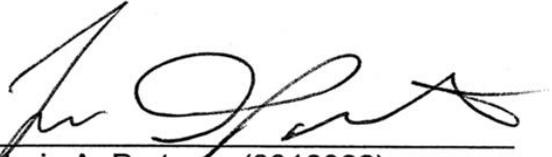
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