

In the
Supreme Court of Ohio

AUDREY CLENDENIN,	:	Case No. _____
Plaintiff-Appellee,	:	
v.	:	On Appeal from the
GIRL SCOUTS OF WESTERN OHIO,	:	Hamilton County
Defendant,	:	Court of Appeals,
and	:	First Appellate District
STEPHEN BUEHRER, ADMINISTRATOR,	:	Court of Appeals
BUREAU OF WORKERS'	:	Case No. C-140658
COMPENSATION,	:	
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT STEPHEN BUEHRER, ADMINISTRATOR,
BUREAU OF WORKERS' COMPENSATION**

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INTRODUCTION

In this workers' compensation case, the First District Court of Appeals framed its decision below as a procedural one, deciding whether mandamus or a right-to-participate appeal provided the proper vehicle for a particular type of claimant suit—one challenging the Industrial Commission's decision to stop payment of workers' compensation benefits because a pre-existing medical condition, which had been substantially aggravated by a work injury, had since returned to its pre-injury level. See *Clendenin v. Girl Scouts of Western Ohio*, 2015-Ohio-4506 ¶ 8 (1st Dist.). Because this procedural question implicates the courts' subject-matter jurisdiction, it is important that the Court provide clear guidance so that litigants know where to file—guidance that has been particularly elusive for the statute at issue in this case. See *State ex rel. Liposchak v. Ind. Comm'n*, 90 Ohio St. 3d 276, 279 (2000) (“These principles seem simple enough, but distinguishing between appealable right-to-participate orders and nonappealable extent-of-disability orders, as we must do in this case, has never been easy.”). Indeed, the lack of guidance on this jurisdictional question can result in litigants losing out on their day in court. See, e.g., *State ex rel. Bond v. Velotta Co.*, 91 Ohio St. 3d 418, 418-19 (2001). Drawing that jurisdictional line in sharper relief is a question of public and great general interest.

But there is more to this case than this jurisdictional question. The First District's characterization of the legal question presented here camouflages a significant substantive dispute that is also important. This case asks whether R.C. 4123.54(G)—the statute governing payments for preexisting conditions—*forever* bars injured workers from receiving benefits once the Industrial Commission concludes that a preexisting condition has returned to its pre-injury level or whether that finding merely puts on hold those benefits, which may be resumed should the preexisting condition again worsen as a result of the previous workplace injury. Because the

answer to that question has repercussions for injured workers throughout the State, it is a question of public and great general interest.

The First District’s jurisdictional analysis built in this substantive question. Only after determining as a threshold matter that workers can never again receive benefits once payment of benefits ceases under R.C. 4123.54(G) did the First District conclude that the appropriate avenue for review is an administrative appeal to common pleas court rather than a mandamus action. Yet the Bureau of Workers’ Compensation interprets the statute much differently. The Bureau believes that R.C. 4123.54(G) places the payment of benefits only on hold; it leaves open the possibility that payment could resume if a claimant presents adequate evidence that the condition was again substantially aggravated because of the workplace injury.

This case therefore provides the Court with an ideal opportunity to address not only the jurisdictional question about the proper forum for a claimant to challenge a determination that a preexisting condition has returned to a pre-injury level, but also whether R.C. 4123.54(G) permanently bars benefits on the basis of that preexisting condition.

STATEMENT OF THE CASE AND FACTS

A. Ohio’s workers’ compensation system permits employees to receive benefits for workplace injuries that substantially aggravate preexisting conditions, and divides judicial review of Industrial Commission orders between appeals and mandamus.

This case involves two aspects of Ohio’s workers’ compensation system—one substantive, the other procedural. Substantively, the workers’ compensation system permits employees to receive payment for injuries “received in the course of, and arising out of, [the] injured employee’s employment.” R.C. 4123.01(C). For purposes of compensation, the definition of “injury” includes an employee’s preexisting condition that is “substantially aggravated” by an accident that occurs at the employee’s workplace. R.C. 4123.01(C)(4); *see* R.C. 4123.54(A). The workers’ compensation statute, however, limits an employee’s ability to

indefinitely receive payments for a pre-existing condition that is substantially aggravated: “[N]o compensation or benefits are payable . . . once that condition has returned to a level that would have existed without the injury” in the workplace. R.C. 4123.54(G).

Procedurally, the workers’ compensation system sets two paths for employees or employers to obtain judicial review of an Industrial Commission order—one via an appeal to a court of common pleas, the other via mandamus. An employee or employer “may *appeal* an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability” to a court of common pleas. R.C. 4123.512(A) (emphasis added). Given this statute’s express exclusion of orders as to the “extent of disability,” the Court has long read its jurisdictional grant narrowly to permit judicial review (and a potential jury trial) for only “those decisions involving a claimant’s right to participate or to continue to participate in the” workers’ compensation system. *Afrates v. City of Lorain*, 63 Ohio St. 3d 22, syl. ¶ 1 (1992); *Thomas v. Conrad*, 81 Ohio St. 3d 475, 477 (1998). An employee or employer may nevertheless challenge the Industrial Commission’s extent-of-disability orders in *mandamus* if the employee or employer can satisfy its well-established elements. *See Afrates*, 63 Ohio St. 3d 22 at syl. ¶ 3.

B. The Industrial Commission awarded Audrey Clendenin benefits for workplace injuries, but later stopped benefits for one preexisting condition after that condition returned to the level that existed prior to her workplace accident.

Audrey Clendenin was employed by the Girl Scouts of Western Ohio in 2008 when she was injured in a work-related accident. *Clendenin v. Girl Scouts of Western Ohio*, 2015-Ohio-4506 ¶ 3 (1st Dist.) (“App. Op.”). Clendenin sought, and received, workers’ compensation benefits for her injuries in the accident. *Id.* The Industrial Commission awarded her benefits for a number of conditions, including: (1) torn right shoulder rotator cuff, (2) torn

right bicep tendon, (3) substantially aggravated preexisting right shoulder tendonitis, (4) substantially aggravated preexisting arthritis; (5) substantially aggravated right shoulder preexisting labral tear, and (6) as relevant here, substantially aggravated preexisting autoimmune disorder (dermatomyositis). *Id.*

Five years after the Industrial Commission awarded Clendenin these benefits, the Administrator of the Bureau of Workers' Compensation sought a determination under R.C. 4123.54(G) that Clendenin could no longer receive the benefits that had been awarded for substantial aggravation of her preexisting autoimmune disorder. App. Op. ¶ 4. The Administrator argued that Clendenin's autoimmune disorder had returned to a level that would have existed even without her workplace injury and that R.C. 4123.54(G) thus barred the payment of further benefits. *Id.* Agreeing, a district hearing officer found that Clendenin could no longer receive benefits for her preexisting autoimmune disorder. *Id.* Clendenin filed an administrative appeal of that order and the decision was affirmed on appeal. App. Op. ¶ 5.

C. Clendenin challenged the decision to cease paying benefits for her preexisting condition in an appeal filed in the Hamilton County Court of Common Pleas and in a mandamus action filed in the Tenth District Court of Appeals.

Following her unsuccessful administrative appeal, Clendenin filed an appeal and complaint in the Hamilton County Court of Common Pleas. *Id.* In that appeal Clendenin again challenged the decision to cease payment of benefits for her preexisting autoimmune disorder. The Bureau moved to dismiss on the ground that the common pleas court lacked jurisdiction over Clendenin's appeal, arguing that she sought to challenge the extent of her disability, not her right to participate in the workers' compensation system. App. Op. ¶ 6. The Bureau contended that mandamus, rather than an appeal, was the appropriate path to challenge the decision to cease

payment of her benefits. *Id.* The common pleas court granted the Bureau's motion to dismiss and Clendenin appealed to the First District Court of Appeals. *Id.*

After the court of common pleas granted the Bureau's motion to dismiss and Clendenin had appealed to the First District, she alternatively filed a complaint in mandamus in the Tenth District Court of Appeals. Clendenin's mandamus complaint challenged the Industrial Commission's decision to cease the payment of benefits for her preexisting condition as an abuse of discretion and unsupported by the evidence. Complaint in Mandamus at 3-4, *State ex rel. Clendenin v. Indus. Comm'n of Ohio, et al.*, 10th Dist. No. 14AP-1034.

In its answer to Clendenin's mandamus action, the Industrial Commission denied that its order "preclude[d] the possibility of future compensation and benefits for the condition" should the condition again worsen. Answer, *State ex rel. Clendenin v. Indus. Comm'n*, 10th District No. 14AP-1034. The Commission defended the merits of the determination that Clendenin's preexisting condition had returned to its prior level. *Indus. Comm'n Br.* at 7-8, *State ex rel. Clendenin v. Indus. Comm'n*, 10th District No. 14AP-1034. Emphasizing the danger of conflicting judgments, the Commission also argued that mandamus was not proper at that time because, in her appeal pending before the First District Court of Appeals, Clendenin was litigating the jurisdictional question about how to challenge the benefits determination. *Indus. Comm'n Br.* at 9-11, *State ex rel. Clendenin v. Indus. Comm'n*, 10th District No. 14AP-1034.

The Tenth District never addressed any of the parties' arguments. Clendenin dismissed her mandamus action without prejudice shortly after the Commission filed its brief on the merits in that proceeding. *See Order*, Apr. 13, 2015, *Clendenin*, 10th District No. 14AP-1034.

D. The First District Court of Appeals held that the decision to cease benefits barred Clendenin from ever receiving benefits for the substantial aggravation of her preexisting condition and that appeal, not mandamus, was the proper method to challenge the decision.

The First District issued its opinion after Clendenin dismissed her mandamus action. It reversed the common pleas court's decision and held that a right-to-participate appeal—not a mandamus action—was the proper method to challenge the determination that her condition had returned to its pre-injury level. App. Op. ¶ 2. The court of appeals rejected the common pleas court's determination that Clendenin's claim involved the extent of her disability and concluded instead that her challenge was best characterized as a challenge to her right to participate in the workers' compensation fund. App. Op. ¶¶ 13, 18. Significantly, the appellate court reached that conclusion because it believed that the "Bureau has never disputed that the abatement order forecloses any future benefits or compensation for the substantial aggravation of" Clendenin's preexisting autoimmune disorder. App. Op. ¶ 13.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of public and great general interest for several reasons. *First*, as the Court has said time and again, courts should strive to set clear jurisdictional rules (particularly in the workers' compensation context), and this case presents an opportunity for the Court to provide needed guidance to employers, employees, and the Bureau on the jurisdictional divide between appeal and mandamus. *Second*, the First District's interpretation that R.C. 4123.54(G) forever bars further payment for a substantially aggravated preexisting condition once the Industrial Commission determines that the condition has returned to the pre-injury level (even if the injury could again worsen) conflicts with the Bureau's traditional view and substantially affects employers and employees alike.

A. Review is proper because litigants, including the Bureau, need clear jurisdictional rules governing judicial review of workers' compensation orders.

The Court should grant review initially because this case involves the jurisdictional divide between mandamus and appeal, and so it raises special needs for clarity and guidance.

Jurisdictional Rules Generally. Generally speaking, conflicts over subject-matter jurisdiction always raise special concerns. Subject-matter jurisdiction is different from other procedural or substantive issues, because it involves the courts' fundamental power to hear a case. Accordingly, "[t]he issue of subject matter jurisdiction cannot be waived and therefore can be raised at any time during the proceedings" by the parties. *In re Byard*, 74 Ohio St. 3d 294, 296 (1996). Indeed, questions of subject-matter jurisdiction can also be "properly raised by this court sua sponte." *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764 ¶ 10.

These strict rules for subject-matter jurisdiction heighten the need for clarity because any continued uncertainty carries high costs for both the courts and the parties. As the U.S. Supreme Court has noted, significant "[j]udicial resources . . . are at stake" when interpreting jurisdictional prerequisites. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2009). If such a jurisdictional prerequisite remains unclear, the lower courts could guess wrong on whether they have jurisdiction and thereby risk the entire litigation that follows this mistaken jurisdictional ruling. *See Patton v. Diemer*, 35 Ohio St. 3d 68, syl. ¶ 3 (1988) ("A judgment rendered by a court lacking subject matter jurisdiction is *void ab initio*"); *Jenkins v. Keller*, 6 Ohio St. 2d 122, 126 (1966) ("[I]t is well settled that, where a court has no jurisdiction over the subject matter of an action, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court."); *cf. Hampton v. R.J Corman R.R. Switching Co.*, 683 F.3d 708, 714 (6th Cir. 2012) (dismissing for lack of subject-matter jurisdiction "despite the time, effort, and money that

unfortunately have been wasted on litigating this matter”); *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 693 (7th Cir. 2003) (same).

Unclear jurisdictional rules also could require parties to file “protective” suits or appeals in two different courts when it is unclear which of the courts has jurisdiction. As the federal courts have suggested, when “doubt as to the proper forum exists, careful counsel should file suit in both” of the courts that might have jurisdiction. *Inv. Co. Inst. v. Bd. of Governors of Fed. Res.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977); *Eagle-Picher Ind. v. EPA*, 759 F.2d 905, 913 (D.C. Cir. 1985) (“[W]e have previously admonished petitioners of the wisdom of filing protective petitions for review. . . .”). It is not a good thing that unclear rules force careful counsel to expend resources filing appeals or cases in different courts while the jurisdictional issues get sorted out. In short, both the courts and the parties “benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.” *Hertz*, 559 U.S. at 94.

The Specific Jurisdictional Rule Here. The specific jurisdictional divide at issue in this case only enhances the need for the Court’s guidance because it raises all of these concerns. As the Court has said, each of the “avenues for review” of workers’ compensation orders “is strictly limited; if the litigant seeking judicial review does not make the proper choice, the reviewing court will not have subject matter jurisdiction and the case must be dismissed.” *Felty v. AT&T Technologies, Inc.*, 65 Ohio St. 3d 234, 237 (1992). Yet R.C. 4123.512(A)’s divide between right-to-participate issues and extent-of-disability issues “has been the source of considerable discussion by this court as well as by trial and appellate courts” because of the sometimes unclear borders between those issues. *Cook v. Mayfield*, 45 Ohio St. 3d 200, 202 (1989). Despite this Court’s best efforts to establish clear rules, questions still arise. *See Afrates*, 63 Ohio St. 3d 22 at syl. ¶ 1; *see also Liposchak*, 90 Ohio St. 3d at 279 (“These principles seem

simple enough, but distinguishing between appealable right-to-participate orders and nonappealable extent-of-disability orders, as we must do in this case, has never been easy.”).

The lack of clarity has led parties to file both appeals in the courts of common pleas and protective mandamus actions in the Tenth District Court of Appeals to ensure judicial review. *See, e.g., State ex rel. Alhamarshah v. Indus. Comm’n*, 142 Ohio St. 3d 524, 2015-Ohio-1357 ¶ 2. The procedural history of the proceedings here show why. Because of a lack of clarity on what court had jurisdiction to hear her challenge, Clendenin filed both an appeal in the Hamilton County Court of Common Pleas and a mandamus action in the Tenth District Court of Appeals. And just as Clendenin faced a difficult decision about where to file, the Bureau and the Industrial Commission both faced a difficult decision about how to respond. For example, even though mandamus provided the appropriate remedy, because of need to avoid conflicting judgments the Commission was nevertheless compelled to at least temporarily oppose the propriety of the mandamus action while Clendenin’s appeal remained pending in the First District.

This is not an isolated problem. Without a clear rule governing how to challenge workers’ compensation orders, employees and employers can find themselves left to guess as to which path for review is the correct one. If they choose wrong, they could end up with no remedy at all. This Court’s decision in *State ex rel. Bond v. Velotta Co.*, 91 Ohio St. 3d 418 (2001), illustrates. There, after William Bond was awarded benefits for one workplace injury, he sought benefits for a second injury stemming from the same accident. *Id.* at 418. With his additional claim denied, Bond appealed to the Hamilton County Court of Common Pleas. *Id.* at 419. The common pleas court and the court of appeals determined that Bond’s proper remedy was mandamus, not appeal, and this Court declined discretionary review. *Id.* Bond therefore next filed a mandamus action challenging the same decision to deny him benefits. *Id.* This time,

however, the Tenth District Court of Appeals determined that it too lacked jurisdiction contrary to what the First District had said. *Id.* According to the Tenth, Bond was right the first time—he should have filed an appeal in common pleas court. *Id.* This Court affirmed that jurisdictional determination when Bond appealed the mandamus denial as a matter of right. *Id.* Thus having tried both appeal *and* mandamus, the claimant in *Bond* was in the end left without any remedy at all. If the Court does not accept review in this case, it makes it more likely that future claimants will find themselves in the same position Bond did. And the lack of a clear rule will force parties to file wasteful and duplicative appeals and mandamus actions.

B. Review is proper because the First District’s decision conflicts with the Bureau’s longstanding interpretation of R.C. 4123.54(G).

Although the question about jurisdiction is important, this case is about more than jurisdiction. That is because the First District’s jurisdictional determination partially hinged on its reading of R.C. 4123.54(G), which indicates that “no compensation or benefits are payable because of [a] pre-existing condition once that condition has returned to a level that would have existed without the injury.” *Id.* The First District indicated that this provision *forever* bars further compensation for a preexisting condition once the Industrial Commission determines that the preexisting condition has returned to pre-injury levels. App. Op. ¶ 13.

The Bureau, however, has never read R.C. 4123.54(G) in this manner. Instead, the Bureau has long interpreted R.C. 4123.54(G) as only a *pause* in benefit payments, not as a final *termination* of those payments. That is, the Bureau has interpreted the section to allow a claimant to again receive benefits if the claimant can show that the preexisting condition has again *worsened* beyond its pre-injury level and that this new aggravation resulted from the prior workplace injury (rather than a new injury). The Bureau has relied on that interpretation in all of the proceedings related to Clendenin’s claim. And in Clendenin’s separate mandamus action the

Industrial Commission’s answer stated that the decision to cease paying benefits to Clendenin for her preexisting condition did not “preclude the possibility of future compensation and benefits for the condition” should the condition again worsen as a result of the prior injury. Answer, *State ex rel. Clendenin v. Indus. Comm’n*, Tenth District No. 14AP-1034.

In this respect, the First District incorrectly attributed its interpretation to the Bureau. The appellate court suggested that “[t]he Bureau has never disputed that the abatement order forecloses any future compensation for the substantial aggravation of” Clendenin’s preexisting condition. App. Op. ¶ 8. But that determination was wrong as both a factual matter (the Bureau has disputed and did dispute that interpretation of the statute) and as a legal one (R.C. 4123.54(G) does not permanently foreclose any future compensation).

This substantive issue about the meaning of R.C. 4123.54(G) also justifies this Court’s review. It has left the Bureau in a bind. On the one hand, if the Bureau now changes its position to follow the First District’s position, the Bureau must prohibit claimants whose preexisting conditions have re-aggravated from seeking additional payments as a result. On the other hand, if the Bureau retains its position for the remainder of the State, then employees will be unfairly treated differently depending where in the State their suit arises. The Bureau’s quandary raises an issue of public interest. The First District’s interpretation will bar employees there from seeking later compensation, but employees in other districts not bound by the First District’s interpretation may continue to do so. In short, because this issue affects benefits, it is of great general interest to the employees and employers of this State.

ARGUMENT

Appellant’s Proposition of Law:

A decision that a claimant’s substantially aggravated preexisting condition has returned to a level that would have existed absent a workplace injury involves the extent of the claimant’s disability and therefore cannot be appealed pursuant to R.C. 4123.512.

A. A determination that a preexisting condition has returned to a pre-injury level does not permanently bar the payment of benefits on the basis of that condition.

Employees who are injured in workplace accidents may receive workers' compensation benefits for injuries that are directly caused by the accident. *See* R.C. 4123.54(A). They may also receive benefits if the accident "substantially aggravates" a preexisting condition. R.C. 4123.01(C)(4). If and when the preexisting condition returns to a level that would have existed without the workplace injury "no compensation or benefits are payable" because of that condition. R.C. 4123.54(G).

Benefits awarded on the basis of a substantial aggravation of a preexisting condition are in that respect similar to other types of benefits that also abate once they reach a specific medical threshold. An employee may receive benefits for a temporary total disability, which is defined as "a disability which prevents a worker from returning to his former position of employment." *State ex rel. Ramirez v. Indus. Comm'n*, 69 Ohio St. 2d 630, syl. (1982). But such payments cease once the employee has reached a "treatment plateau . . . at which no functional or physiological change can be expected" (known as "maximum medical improvement"). *See* R.C. 4123.54(A) and Ohio Adm. Code § 4121-3-32.

It is well-settled that cessation of benefits on the basis of maximum medical improvement is temporary, not permanent. Once the Industrial Commission has awarded benefits, it retains continuing jurisdiction over that decision and "may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." R.C. 4123.52(A). The Court has held that the Commission's continuing jurisdiction permits it to restart temporary total disability benefits that it had previously terminated. *State ex rel. Bing, v. Indus. Comm'n*, 61 Ohio St. 3d 424, syl. ¶ (1991) ("[E]ven where temporary total disability compensation payments have been previously terminated, R.C. 4123.52 grants the Industrial

Commission continuing jurisdiction to award temporary total disability compensation where the claimant has again become temporarily totally disabled.”); *see also State ex rel. Josephson v. Indus. Comm’n*, 101 Ohio St. 3d 195, 2004-Ohio-737 ¶ 16. (Although R.C. 4123.56(A) now states that “[t]he termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled,” that language merely “made explicit what was already implicit in R.C. 4123.52”. *Bing*, 61 Ohio St. 3d at 426 n.1.)

The same continuing jurisdiction that gives the Industrial Commission power to restart temporary total disability benefits gives it the power to restart payment of benefits for a substantially aggravated preexisting condition should the circumstances warrant. There is no reason that the rule that “a temporary worsening, or flare-up, of a claimant’s condition can warrant renewed . . . compensation as the claimant struggles to return to the former baseline,” *see State ex rel. Barnes v. Indus. Comm.*, 114 Ohio St. 3d 444, 2007-Ohio-4557 ¶ 15, would not apply equally to a preexisting condition that again became substantially aggravated by a workplace injury. To be sure, not every claimant will be able to provide the evidence necessary to show that the workplace injury aggravated the preexisting condition. But what is important is that R.C. 4123.54(G) does not deny them the opportunity to try.

The Bureau interprets the Industrial Commission’s continuing jurisdiction to empower the Commission to resume payment of benefits for a substantially aggravated preexisting condition should the circumstances warrant. It has interpreted the General Assembly’s statement that “no compensation or benefits are payable” as a temporary, not permanent, bar to the payment of benefits. And it has relied on that interpretation in this case and in others. Significantly, the Industrial Commission stated in its answer to Clendenin’s mandamus

complaint that its decision did not “preclude the possibility of future compensation and benefits for the condition” should the condition again worsen. Answer, *State ex rel. Clendenin v. Indus. Comm’n*, Tenth District No. 14AP-1034. The Bureau’s policies regarding substantial aggravation similarly state that, when a condition has returned to a pre-injury level, the Bureau “will maintain the condition in an allowed but not payable status” and that if supported by the appropriate evidence, “[a] motion may be filed to reopen a period of substantial aggravation of a pre-existing condition.” See Aggravation and Substantial Aggravation of a Pre-Existing Condition, Policy # CP-01-09 (April 23, 2015) available at <https://perma.cc/HX7X-7QBJ>.

B. R.C. 4123.54(G) determination is not an appealable decision because it does not permanently terminate benefits but only temporarily suspends them.

The procedural mechanism that a claimant may use to challenge an Industrial Commission decision depends on the nature of the Commission decision. *Thomas v. Conrad*, 81 Ohio St. 3d 475, 478 (1998). Because “[t]he courts simply cannot review all the decisions of the commission if the commission is to be an effective and independent agency,” the most limited mechanism is review by direct appeal. *Felty*, 65 Ohio St. 3d at 238. “Only decisions reaching an employee’s right to participate in the workers’ compensation system because of a specific injury or occupational disease are appealable.” *Id.* at 237 and syl. ¶ 1. Pursuant to *Felty*, claimants may appeal only decisions that grant, deny, or terminate initial or continued participation in the workers’ compensation system. *Id.* at 239 and syl. ¶ 2. Other decisions may only be challenged in mandamus. *Id.* at 239-40.

A decision to temporarily suspend payment of benefits for an allowed claim involves the extent of a disability, not a right to participate. *Id.* This Court has held that “a decision which merely extends the period of time for which a claimant will receive benefits concerns the extent of disability and is not appealable.” *State ex rel. Roope v. Indus. Comm’n*, 2 Ohio St. 3d 97, 99

(1982); *but see State ex rel. Evans v. Indus. Comm'n*, 64 Ohio St. 3d 236, 240-41 (1992) (finding appeal was appropriate because of order-specific language that permanently foreclosed future benefits). And it regularly reviews mandamus actions challenging the Industrial Commission's decision to terminate payment of temporary total disability payments without questioning whether mandamus is appropriate. *See State ex rel. Sherry v. Indus. Comm'n*, 108 Ohio St. 3d 122, 2006-Ohio-249, ¶ 8; *State ex rel. Hampe v. MTD Products*, 84 Ohio St. 3d 422, 423 (1999); *State ex rel. Jones v. Indus. Comm'n*, 76 Ohio St. 3d 503 (1996).

Lower courts have done the same. They often consider a mandamus claim challenging termination of temporary disability benefits without questioning their jurisdiction. *See State ex rel. Lawson v. Indus. Comm'n*, 2014-Ohio-4490 (10th Dist.). And they regularly dismiss appeals when a challenge should instead have been brought in mandamus. *See Cervone v. Dayton Techs.*, No. 16794, 1998 WL 226376 (2d Dist. May 8, 1998) (noting that this Court had not “disapprove[d] of the use of mandamus petitions for challenging commission rulings on the termination of [temporary total disability] benefits”); *see also Martin v. Louisiana-Pacific Corp*, 113 Ohio App. 3d 332, 335-36 (1996); *Kuhn v. Schmidt Bros.*, 2008-Ohio-1567 ¶ 7 (6th Dist.); *Gilbrath v. Autozone*, 2014-Ohio-2347 ¶¶ 20-37 (4th Dist.).

There is no reason that a R.C. 4123.54(G) decision should be treated differently than a decision to cease payment of temporary total disability benefits. Both decisions are temporary rather than permanent and both cannot be challenged in a R.C. 4123.512 appeal.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction and reverse the decision below.

Respectfully submitted,

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Bureau of Workers' Compensation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant Stephen Buehrer, Administrator, Bureau of Workers' Compensation was served by regular U.S. mail and e-mail this 14th day of December, 2015, upon the following:

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