

In the  
**Supreme Court of Ohio**

AUDREY CLENDENIN,	:	Case No. 2015-1993
Plaintiff-Appellee,	:	
v.	:	On Appeal from the
GIRL SCOUTS OF WESTERN OHIO,	:	Hamilton County
Defendant,	:	Court of Appeals,
and	:	First Appellate District
SARAH MORRISON, ACTING	:	
ADMINISTRATOR, BUREAU OF	:	Court of Appeals
WORKERS' COMPENSATION,	:	Case No. C-140658
Defendant-Appellant.	:	

---

**BRIEF OF APPELLANT SARAH MORRISON, ACTING ADMINISTRATOR,  
BUREAU OF WORKERS' COMPENSATION**

---

DENNIS A. BECKER (0005511)  
Becker & Cade  
526 A Wards Corner Road  
Loveland, Ohio 45140  
513-683-2252  
513-683-2257 fax  
dabecker@fuse.net

Counsel for Appellee  
Audrey Clendenin

Girl Scouts of Western Ohio  
4930 Cornell Road  
Cincinnati, Ohio 45242-1804

Appellee

MICHAEL DEWINE (0009181)  
Attorney General of Ohio

ERIC E. MURPHY\* (0083284)  
State Solicitor

*\*Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)  
Chief Deputy Solicitor

SAMUEL C. PETERSON (0081432)  
Deputy Solicitor

CHERYL J. NESTER (0013264)

Principal Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980

614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

Counsel for Appellant

Sarah Morrison, Acting Administrator,  
Bureau of Workers' Compensation

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
STATEMENT OF THE CASE AND FACTS.....	2
A.    The Industrial Commission awarded Audrey Clendenin benefits for workplace injuries, but later suspended benefits for one preexisting condition after that condition returned to the level that existed prior to her workplace accident. ....	2
B.    Clendenin challenged the decision to suspend payment of 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. ....	3
C.    The First District Court of Appeals held that the decision to suspend benefits barred Clendenin from ever again receiving benefits for her preexisting condition, and thus that appeal was the proper method to challenge the decision. ....	5
ARGUMENT .....	5
<b>Appellant’s Proposition of Law:</b>	
<i>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 under R.C. 4123.512.....</i>	
A.    A party may appeal only those Industrial Commission decisions that affect an employee’s right to participate in the workers’ compensation system. ....	5
B.    A R.C. 4123.54(G) decision cannot be appealed because it does not affect an employee’s right to participate (or continue participating) in the workers’ compensation system. ....	7
1.    A determination that a preexisting condition has returned to a pre-injury level does not permanently bar the payment of benefits for that condition.....	7
2.    Because it does not permanently terminate benefits, a party may not appeal a R.C. 4123.54(G) determination. ....	12
CONCLUSION.....	14
CERTIFICATE OF SERVICE	

APPENDIX:

Notice of Appeal, Dec. 14, 2015.....	App. 1
Judgment Entry, First Appellate District, Oct. 30, 2015 .....	App. 4
Opinion, First Appellate District, Oct. 30, 2015.....	App. 5

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Afrates v. City of Lorain</i> , 63 Ohio St. 3d 22 (1992) .....	6, 7
<i>Bernard v. Unemployment Comp. Review Comm’n</i> , 136 Ohio St. 3d 264, 2013-Ohio-3121.....	10
<i>Clendenin v. Girl Scouts of W. Ohio</i> , 145 Ohio St. 3d 1421, 2016-Ohio-1173.....	5
<i>Clendenin v. Girl Scouts of W. Ohio</i> , 2015-Ohio-4506 (1st Dist.).....	2, 3
<i>Cook v. Mayfield</i> , 45 Ohio St. 3d 200 (1989) .....	7
<i>Felty v. AT&amp;T Tech., Inc.</i> , 65 Ohio St. 3d 234 (1992) .....	1, 6, 7, 12
<i>Lang v. Dir., Ohio Dept. of Job &amp; Family Servs.</i> , 134 Ohio St. 3d 296, 2012-Ohio-5366.....	10, 12
<i>State ex rel. Barnes v. Indus. Comm.</i> , 114 Ohio St. 3d 444, 2007-Ohio-4557.....	9
<i>State ex rel. Bing v. Indus. Comm’n</i> , 61 Ohio St. 3d 424 (1991) .....	9, 12
<i>State ex rel. Evans v. Indus. Comm.</i> , 64 Ohio St.3d 236 (1992) .....	2, 12
<i>State ex rel. Hampe v. MTD Products</i> , 84 Ohio St. 3d 422 (1999) .....	13
<i>State ex rel. Jones v. Indus. Comm’n</i> , 76 Ohio St. 3d 503 (1996) .....	13
<i>State ex rel. Josephson v. Indus. Comm’n</i> , 101 Ohio St. 3d 195, 2004-Ohio-737.....	9
<i>State ex rel. Liposchak v. Indus. Comm’n</i> , 90 Ohio St. 3d 276 (2000) .....	7
<i>State ex rel. Ramirez v. Indus. Comm’n</i> , 69 Ohio St. 2d 630 (1982) .....	9

<i>State ex rel. Sherry v. Indus. Comm’n</i> , 108 Ohio St. 3d 122, 2006-Ohio-249.....	13
<i>State v. Everette</i> , 129 Ohio St. 3d 317, 2011-Ohio-2856.....	8
<i>Swallow v. Indus. Comm’n</i> , 36 Ohio St. 3d 55 (1988) .....	10
<i>Thomas v. Conrad</i> , 81 Ohio St. 3d 475 (1998) .....	1, 5, 6
<i>Whitman v. American Trucking Ass’n</i> , 531 U.S. 457 (2001).....	8

**Statutes, Rules, and Constitutional Provisions**

Ohio Adm.Code 4121-3-32 .....	9
R.C. 4123.01(C).....	7
R.C. 4123.01(C)(4).....	7
R.C. 4123.52 .....	9, 12
R.C. 4123.52(A).....	8
R.C. 4123.54(A).....	7
R.C. 4123.54(G).....	<i>passim</i>
R.C. 4123.56(A).....	9, 11, 12
R.C. 4123.511(E) .....	6
R.C. 4123.512 .....	2, 5
R.C. 4123.512(A).....	6, 7

**Other Authorities**

Aggravation and Substantial Aggravation of a Pre-Existing Condition, Policy # CP-01-09 (April 23, 2015) <i>available at</i> <a href="https://perma.cc/HX7X-7QBJ">https://perma.cc/HX7X-7QBJ</a> .....	10
--	----

## INTRODUCTION

The workers' compensation statute—R.C. 4123.54(G)—permits an injured worker to receive benefits when a workplace accident has substantially aggravated the worker's *preexisting* injury, but suspends those benefit payments once the injury returns to its preexisting level. This case asks how an employee (or employer) should obtain judicial review of an Industrial Commission order suspending (or refusing to suspend) benefit payments because a preexisting injury has (or has not) returned to the level it would have been without the injury. Audrey Clendenin was injured while employed by the Girl Scouts of Western Ohio and received workers' compensation benefits for her injuries. Among other benefits, the Industrial Commission awarded Clendenin compensation because her workplace accident had substantially aggravated a preexisting autoimmune disorder (dermatomyositis) that often results in a distinctive skin rash, muscle weakness, and inflamed muscles, among other symptoms. Five years later, at the request of the Administrator of the Bureau of Workers' Compensation, the Industrial Commission found that Clendenin's preexisting dermatomyositis had returned to its pre-injury level and granted the Bureau's motion requesting abatement of her dermatomyositis benefits under R.C. 4123.54(G). Clendenin seeks to challenge that decision in the courts. This case asks how she should do so. Because the Industrial Commission's order *suspended* rather than *terminated* her benefits, the Court's precedent makes clear that her path to judicial review lies through mandamus not appeal.

The Court's decisions have repeatedly distinguished between Industrial Commission decisions that grant, deny, or terminate an employee's initial or continued participation in the workers' compensation program on the one hand, and its decisions that involve only additional activity in a case, or temporary suspension of benefits, on the other. *See Thomas v. Conrad*, 81 Ohio St. 3d 475, 477-78 (1998); *Felty v. AT&T Tech., Inc.*, 65 Ohio St. 3d 234, 236-37 (1992).

The first group of decisions—called right-to-participate decisions—may be appealed to a common pleas court, while the second—called extent-of-disability decisions—must be challenged through alternative means, most frequently by way of mandamus. The key feature that distinguishes right-to-participate decisions from extent-of-disability decisions is the permanence of the relevant decision. *See State ex rel. Evans v. Indus. Comm.*, 64 Ohio St.3d 236, 240 (1992). If a decision *permanently* forecloses an employee’s ability to participate (or continue participating) in the workers’ compensation system, it is an *appealable* right-to-participate decision. *Id.* at syl. ¶ 1. If, by contrast, a decision *temporarily* suspends benefits awarded in connection with an allowed claim, it is a *non-appealable* extent-of-disability decision. *Id.* at syl. ¶ 2.

Because a decision to cease the payment of benefits under R.C. 4123.54(G) may be reconsidered should an injured worker’s medical circumstances change, it is a temporary decision. The Court’s precedent therefore indicates that the decision is an extent-of-disability decision that may not be appealed under R.C. 4123.512. The Court should reverse the First District’s decision to the contrary. The appellate court not only interpreted R.C. 4123.54(G) mistakenly as imposing a permanent bar to benefits, but also incorrectly attributed that interpretation to the Bureau. If the Court affirms, it will make it difficult for injured employees to again receive benefits on the basis of a preexisting condition that gets substantially re-aggravated by the workplace injury.

#### **STATEMENT OF THE CASE AND FACTS**

- A. The Industrial Commission awarded Audrey Clendenin benefits for workplace injuries, but later suspended 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 W. 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 some that the accident had directly caused (e.g., a torn right shoulder rotator cuff and a torn right bicep tendon) and some that were preexisting but that had been substantially aggravated by the injury (e.g., her right shoulder tendonitis, arthritis, and right shoulder labral tear). *Id.* As relevant here, she received benefits because the injury had substantially aggravated her preexisting autoimmune disorder known as dermatomyositis. *Id.*

Five years after the Industrial Commission allowed Clendenin’s claim, the Administrator of the Bureau of Workers’ Compensation sought a determination under R.C. 4123.54(G) that Clendenin could not continue to receive medical benefits and compensation for her dermatomyositis. App. Op. ¶ 4. A hearing officer concluded that Clendenin’s preexisting autoimmune disorder had returned to a level that would have existed even without her workplace injury, and thus that R.C. 4123.54(G) barred the payment of further benefits. *Id.* The officer determined 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.

**B. Clendenin challenged the decision to suspend payment of 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. Complaint, Com. Pl. R. 3. In that appeal, Clendenin again challenged the Commission’s decision to suspend 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. Mtn. to Dismiss, Com. Pl. R. 16. The Bureau contended that mandamus, rather than an appeal, was the appropriate path to challenge the decision to suspend the payment of her benefits. *Id.* at 4-5. The common pleas court granted the Bureau's motion to dismiss, Entry, Com. Pl. R. 20, and Clendenin appealed to the First District Court of Appeals, Notice of Appeal, App. R. 1.

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 *also* 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. Franklin 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 Dist. Franklin 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 Dist. Franklin No. 14AP-1034. Emphasizing the danger of conflicting judgments, the Commission argued that mandamus was not proper 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 Dist. Franklin No. 14AP-1034.

The Tenth District never addressed any of the parties' arguments because Clendenin dismissed her mandamus action without prejudice shortly after the Commission filed its brief in

that proceeding. See Order, Apr. 13, 2015, *State ex rel. Clendenin v. Indus. Comm'n*, 10th District No. 14AP-1034.

**C. The First District Court of Appeals held that the decision to suspend benefits barred Clendenin from ever again receiving benefits for her preexisting condition, and thus that appeal 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 State Insurance Fund. App. Op. ¶¶ 13, 18. Significantly, the appellate court reached that conclusion because it mistakenly 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.

The Bureau appealed, and the Court accepted review. *Clendenin v. Girl Scouts of W. Ohio*, 145 Ohio St. 3d 1421, 2016-Ohio-1173.

## 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 under R.C. 4123.512.*

**A. A party may appeal only those Industrial Commission decisions that affect an employee's right to participate in the workers' compensation system.**

The procedural mechanism that a claimant may use to challenge an Industrial Commission decision depends on the nature of that decision. *Thomas v. Conrad*, 81 Ohio St. 3d

475, 478 (1998). The Court has emphasized that 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 Tech., Inc.*, 65 Ohio St. 3d 234, 237 (1992).

The Industrial Commission may hear administrative appeals of initial decisions to grant or deny an employee’s claim for benefits. R.C. 4123.511(E). An employee or employer in turn “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). This Court has long read the statutory text authorizing appeals in R.C. 4123.512(A) quite narrowly. *Felty*, 65 Ohio St. 3d at 238. It has held that parties may appeal (and potentially receive a jury trial for) only those “decisions reaching an employee’s right to participate in the workers’ compensation system.” *Id.* at syl. ¶ 1; *see also Thomas v. Conrad*, 81 Ohio St. 3d 475, 477 (1998); *Afrates v. City of Lorain*, 63 Ohio St. 3d 22, syl. ¶ 1 (1992). It has defined right-to-participate decisions as only those that grant, deny, or terminate initial or continued participation in the workers’ compensation system with respect to each specific medical condition for which the employee has sought, or the Industrial Commission has granted, workers’ compensation benefits. *Felty*, 65 Ohio St. 3d at 239-40 and syl. ¶¶ 1-2.

If an Industrial Commission order does not affect an employee’s right to participate in the workers’ compensation system, the employee (or an employer) may challenge that decision in *mandamus*, but only if the employee or employer can satisfy its well-established elements. *See Afrates*, 63 Ohio St. 3d 22 at syl. ¶¶ 1-3. Among the Commission decisions that may be challenged in *mandamus* are extent-of-disability orders. Extent-of-disability orders include

requests for additional activity in a case, or for temporary suspension of a claim. *Felty*, 65 Ohio St. 3d at 239-40.

**B. A R.C. 4123.54(G) decision cannot be appealed because it does not affect an employee’s right to participate (or continue participating) in the workers’ compensation system.**

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 the two types of issues. *Cook v. Mayfield*, 45 Ohio St. 3d 200, 202 (1989). Despite the Court’s best efforts to establish clear rules, questions about how to categorize specific decisions still arise. *See Afrates*, 63 Ohio St. 3d 22 at syl. ¶ 1; *see also State ex rel. Liposchak v. Indus. 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.”). One such question has arisen again here.

The question at issue in this case, while technically about the avenue for review of the Industrial Commission’s decision, really asks whether a R.C. 4123.54(G) determination temporarily suspends or permanently terminates benefits. The Court’s answer to that question will dictate its answer to whether review must be had by way of appeal or mandamus.

**1. A determination that a preexisting condition has returned to a pre-injury level does not permanently bar the payment of benefits for 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). Compensable injuries include any injury “received in the course of, and arising out of, [the] injured employee’s employment,” R.C. 4123.01(C), as well as any injury that “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, however, “no compensation or benefits are payable” because of that condition. R.C. 4123.54(G).

The statute itself is silent about whether the compensation or benefits may be paid should the preexisting condition again become substantially aggravated as a result of the prior workplace injury. But the statutory text and context, as well as principles of administrative deference, indicate that they may be resumed.

a. *Statutory Scheme.* A “statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments.” *State v. Everett*, 129 Ohio St. 3d 317, 2011-Ohio-2856 ¶ 25 (citations omitted). In this case, R.C. 4123.54(G) addresses only when the payment of benefits must end. A separate statute, R.C. 4123.52(A), affects whether they may begin again. That statute gives the Commission continuing jurisdiction over each workers’ compensation case. R.C. 4123.52(A). It states that once the Industrial Commission has awarded benefits, it “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 bifurcated statutory structure demonstrates that R.C. 4123.54(G) temporarily suspends, rather than permanently terminates, benefits. R.C. 4123.54(G) only restricts the ongoing payment of benefits for a pre-existing injury, it does not limit the Commission’s continuing jurisdiction under R.C. 4123.52(A). Had the General Assembly wished to restrict or modify that jurisdiction it would have done so directly. It would not have made such a significant change by implication. *Cf. Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001) (Congress does not “hide elephants in mouseholes”). That the legislature left R.C.

4123.52(A)'s continuing jurisdiction undisturbed confirms that a decision to suspend benefits under R.C. 4123.54(G) may be revisited should circumstances change.

The Court's precedent supports this reading. Indeed, it has affirmed the Commission's power to order the Bureau to *resume* paying benefits in similar situations. For example, 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). Such payments cease, however, 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. 4123.56(A) and Ohio Adm.Code 4121-3-32. 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. The same should be true here; 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, should apply equally to a preexisting condition that again becomes substantially aggravated by a workplace injury.

b. *Bureau's Interpretation*. Even if the statutory scheme were ambiguous, the Bureau's reading is the better one and is at least "based on a permissible construction of the statute." *Lang*

*v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St. 3d 296, 2012-Ohio-5366 ¶ 12. Courts must “give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command.” *Bernard v. Unemployment Comp. Review Comm’n*, 136 Ohio St. 3d 264, 2013-Ohio-3121 ¶12 quoting *Swallow v. Indus. Comm’n*, 36 Ohio St. 3d 55, 57 (1988). The Bureau and the Commission have both concluded that R.C. 4123.54(G) should be read to impose a temporary, not permanent, bar to the payment of benefits.

The Bureau’s policies regarding substantial aggravation 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>. Although that policy was finalized in 2015, the Bureau’s interpretation is not new. The Bureau’s policies have long interpreted R.C. 4123.54(G) as permitting claimants to request that it reopen a substantial aggravation claim; the current policy is merely the most recent iteration of that interpretation. Significantly, the Bureau has consistently maintained throughout these proceedings that R.C. 4123.54(G) does not permanently bar an injured worker from receiving benefits. For example, it argued in the court of appeals that the Commission’s decision at issue “did not extinguish [Clendenin’s] right to participate” in the workers’ compensation fund. Bureau Br., App. R. 16 at 6.

The Industrial Commission has interpreted R.C. 4123.54(G) the same way. And it *also* has relied on that interpretation with respect to Clendenin’s claim itself. 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 ¶ 2, *State ex rel. Clendenin v. Indus. Comm’n*, 10th Dist. Franklin No. 14AP-1034. It agreed with Clendenin’s allegation that the Industrial Commission’s decision involved “an issue of extent of disability.” *See id* at ¶ 1 (admitting the allegations contained in paragraph 12 of Clendenin’s mandamus complaint). Although the Commission opposed Clendenin’s mandamus request, it did so because Clendenin’s appeal of the same issue remained pending in the First District and because her claims failed on the merits. The Commission *did not* take the position that mandamus was inappropriate generally.

Finally, the Bureau’s reading, not Clendenin’s, favors employees over the range of cases, including her own. By interpreting R.C. 4123.54(G) as imposing a permanent bar to benefits, Clendenin would hamper the ability of injured workers to again receive benefits if their workplace injuries substantially re-aggravate a preexisting condition. The Bureau, by comparison, would provide an easier path to resuming benefits. Although, not every claimant will be able to provide the evidence necessary to support the resumption of benefits, the Bureau’s interpretation of R.C. 4123.54(G) would not deny them the opportunity to try to do so.

c. *Clendenin’s Contrary Claims.* Clendenin may argue that the decision to suspend benefits in this case should be treated differently than a temporary-disability decision because R.C. 4123.56(A) now specifically states that “[t]he termination of temporary total disability . . . does not preclude the commencement of temporary total disability at another point in time.” Yet that specific statutory grant of authority was not the basis for the Court’s conclusion that the Commission had jurisdiction to revisit a decision terminating such benefits should the circumstances warrant. *Bing*, 61 Ohio St. 3d at 426 n.1 (concluding that R.C. 4123.56(A) was

inapplicable). Instead, the Court held that R.C. 4123.52 by itself vested the Commission with “continuing jurisdiction to revisit a case and make later awards of temporary total disability compensation where circumstances warrant.” *Id.* at 426. It held that the language of R.C. 4123.56(A) merely “made explicit what was already implicit in R.C. 4123.52.” *Id.* at 426 n.1. In light of the broad language of R.C. 4123.52 and the Court’s decision in *Bing*, it is at least *permissible* for the Bureau and the Commission to interpret the statute as granting the Commission continuing jurisdiction to revisit an order suspending benefits pursuant to R.C. 4123.54(G). *See Lang*, 134 Ohio St. 3d 296 at ¶ 12 (if the meaning of a statute is unclear, courts must look to whether an agency’s interpretation is “based on a permissible construction of the statute).

Clendenin may also argue that a decision to suspend benefits under R.C. 4123.54(G) should be treated differently because it suspends payment of compensation and medical benefits while a treatment plateau decision suspends only compensation. That distinction also does not matter. What matters is that in both cases, the suspension is not permanent and can be reconsidered should circumstances change.

**2. Because it does not permanently terminate benefits, a party may not appeal a R.C. 4123.54(G) determination.**

If the Court agrees that a R.C. 4123.54(G) decision is subject to revision, the Court necessarily must conclude that such a decision may not be appealed. That conclusion is compelled by its decisions in *Felty* and *Evans*, among others. *See Evans*, 64 Ohio St. 3d 236 at syl. ¶ 2 (“[t]he Industrial Commission’s decision to deny or grant additional benefits under a previous claim does not determine the worker’s right to participate in the State Insurance Fund, and is not subject to appeal.”). It is also consistent with its established practice. As discussed above, R.C. 4123.54(G) decisions are similar to decisions finding that a claimant has reached

maximum medical improvement. In those cases the Court 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, 504-05 (1996). There is no reason to treat R.C. 4123.54(G) decisions any differently.

The First District concluded that appeal, not mandamus, was the proper avenue for review *only* because it misinterpreted R.C. 4123.54(G). Its determination that Clendenin could appeal the Commission's decision hinged on its interpretation of R.C. 4123.54(G)'s statement 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." *See App. Op. ¶ 10 quoting R.C. 4123.54(G)*. It believed that the statute *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*. As discussed above, however, the First District incorrectly interpreted the statute. Not only that, it incorrectly attributed its interpretation to the Bureau. The appellate court stated that "[t]he Bureau has never disputed that the abatement order forecloses any future compensation for the substantial aggravation of" Clendenin's preexisting condition. *Id.* But, as the Bureau's argument here has shown, that statement 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).

**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General

*/s Eric E. Murphy*

---

ERIC E. MURPHY\* (0083284)  
State Solicitor

*\*Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

SAMUEL C. PETERSON (0081432)

Deputy Solicitor

CHERYL J. NESTER (0013264)

Principal Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[eric.murphy@ohioattorneygeneral.gov](mailto:eric.murphy@ohioattorneygeneral.gov)

Counsel for Appellant

Sarah Morrison, Acting Administrator,

Bureau of Workers' Compensation

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Brief of Appellant Sarah Morrison, Acting Administrator, Bureau of Workers' Compensation was served by regular U.S. mail this 16th day of May, 2016, upon the following:

Dennis A. Becker  
Becker & Cade  
526 A Wards Corner Road  
Loveland, Ohio 45140

Girl Scouts of Western Ohio  
4930 Cornell Road  
Cincinnati, Ohio 45242-1804

Appellee

Counsel for Appellee  
Audrey Clendenin

*/s Eric E. Murphy*

---

Eric E. Murphy  
State Solicitor

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,	:	
BUREAU OF WORKERS'	:	Court of Appeals
COMPENSATION,	:	Case No. C-140658
Defendant-Appellant.	:	

---

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT  
STEPHEN BUEHRER, ADMINISTRATOR,  
BUREAU OF WORKERS' COMPENSATION**

---

DENNIS A. BECKER (0005511)  
Becker & Cade  
526A Wards Corner Road  
Loveland, Ohio 45140  
513-683-2252  
513-683-2257 fax  
dabecker@fuse.net

Counsel for Plaintiff-Appellee  
Audrey Clendenin

Girl Scouts of Western Ohio  
4930 Cornell Rd.  
Cincinnati, Ohio 45242-1804

Defendant-Appellee

MICHAEL DEWINE (0009181)  
Attorney General of Ohio

ERIC E. MURPHY\* (0083284)  
State Solicitor

*\*Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)  
Chief Deputy Solicitor

SAMUEL C. PETERSON (0081432)  
Deputy Solicitor

CHERYL J. NESTER (0013264)

Principal Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

Counsel for Defendant-Appellant

Stephen Buehrer, Administrator,  
Bureau of Workers' Compensation

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT  
STEPHEN BUEHRER, ADMINISTRATOR,  
BUREAU OF WORKERS' COMPENSATION**

Defendant-Appellant Stephen Buehrer, Administrator, Bureau of Workers' Compensation, gives notice of this discretionary appeal to this Court, pursuant to Ohio Supreme Court Rules 5.02 and 7.01, from a decision of the First District Court of Appeals captioned *Audrey Clendenin v. Girl Scouts of Western Ohio*, No. C-140658 issued and journalized on October 30, 2015.

Date-stamped copies of the First District's Judgment Entry and Opinion are attached as Appendix 1 and 2, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Attorney General of Ohio

/s Eric E. Murphy

ERIC E. MURPHY\* (0083284)  
State Solicitor

*\*Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

SAMUEL C. PETERSON (0081432)

Deputy Solicitor

CHERYL J. NESTER (0013264)

Principal Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980; 614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

Counsel for Defendant-Appellant  
Stephen Buehrer, Administrator,  
Bureau of Workers' Compensation

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant Stephen Buehrer, Administrator, Bureau of Workers' Compensation was served by U.S. mail this 14th day of December, 2015, upon the following:

Dennis A. Becker  
Becker & Cade  
526A Wards Corner Road  
Loveland, Ohio 45140

Counsel for Plaintiff-Appellee  
Audrey Clendenin

Girl Scouts of Western Ohio  
4930 Cornell Rd.  
Cincinnati, Ohio 45242-1804

Defendant-Appellee

/s Eric E. Murphy  
Eric E. Murphy  
State Solicitor

ENTERED  
OCT 30 2015

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

AUDREY CLENDENIN,  
Plaintiff-Appellant,  
  
vs.  
  
GIRL SCOUTS OF WESTERN OHIO,  
Defendant,  
  
and  
  
ADMINISTRATOR, BUREAU OF OF  
WORKERS' COMPENSATION,  
Defendant-Appellee.

APPEAL NO. C-140658  
TRIAL NO. A-1305928

JUDGMENT ENTRY.



This cause was heard upon the appeal, the record, the briefs, and arguments.  
The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.  
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.  
The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on October 30, 2015 per Order of the Court.

By: Pat DeWitt  
Presiding Judge

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

**FILED**  
COURT OF APPEALS

OCT 30 2015

AUDREY CLENDENIN,  
Plaintiff-Appellant,

vs.

GIRL SCOUTS OF WESTERN OHIO,  
Defendant,

and

ADMINISTRATOR, BUREAU OF  
WORKERS' COMPENSATION,  
Defendant-Appellee.

C140658  
APPEAL NO. C-1406  
TRIAL NO. A-1305928  
TRACY WINKLER  
CLERK OF COURTS  
HAMILTON COUNTY, OH

OPINION.



D112451227

PRESENTED TO THE CLERK  
OF COURTS FOR FILING

OCT 30 2015

COURT OF APPEALS

TRACY WINKLER  
CLERK OF COURTS  
HAMILTON COUNTY, OH

2015 OCT 30 A 8:25

FILED

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed from is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: October 30, 2015

*Becker & Cade and Dennis A. Becker*, for Plaintiff-Appellant,

*Michael DeWine*, Ohio Attorney General, and *Thomas J. Straus*, Assistant Attorney General, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

**CUNNINGHAM, Judge.**

{¶1} Appellant Audrey Clendenin appeals from the judgment of the Hamilton County Court of Common Pleas dismissing for lack of subject-matter jurisdiction her appeal of an order issued by the Industrial Commission of Ohio (“commission”). The order terminated compensation and benefits for the previously-allowed condition of substantial aggravation of preexisting dermatomyositis upon a finding that it had abated, as contemplated by R.C. 4123.54(G).

{¶2} In a case involving an issue of first impression, we hold that because the commission’s order terminated Clendenin’s right to participate in the workers’ compensation fund for the previously-allowed condition, R.C. 4123.512(A) vested the court of common pleas with subject-matter jurisdiction to hear her appeal, even though Clendenin continued to participate in the fund for other allowed conditions arising out of the same accident. Therefore, we reverse the trial court’s judgment, and remand the cause so that Clendenin may proceed with her appeal of the commission’s decision.

### **I. Background Facts**

{¶3} Clendenin was involved in a work-related accident in October 2008 while employed by the Girl Scouts of Western Ohio. She sought to participate in the workers’ compensation fund for her injuries. Her case, assigned number 08-379860, was allowed for multiple conditions, including right-shoulder-rotator-cuff tear, right-bicep-tendon tear, substantial aggravation of preexisting right-shoulder tendonitis, substantial aggravation of preexisting acromioclavicular-joint arthritis, substantial

aggravation of preexisting right-shoulder-labral tear, and substantial aggravation of preexisting dermatomyositis, an autoimmune disorder.

{¶4} In March 2013, appellee Administrator, Bureau of Workers' Compensation ("Bureau") filed a C-86 motion requesting the abatement of Clendenin's condition of substantial aggravation of preexisting dermatomyositis. The matter was referred to a district hearing officer ("DHO"), who found, based on a physician's report, that the condition had returned to a level that would have existed without the injury. The DHO ordered that "compensation and medical benefits [were] no longer to be paid" for the allowed condition. The order did not affect the other allowed conditions in the case numbered 08-379860.

{¶5} Clendenin unsuccessfully appealed the order administratively. Clendenin then filed an appeal and complaint in the Hamilton County Court of Common Pleas related to the abatement order. She pled that the condition identified as substantial aggravation of preexisting dermatomyositis had not returned to preinjury status and that compensation and benefits should continue to be paid for the condition.

{¶6} The Bureau moved to dismiss the cause for lack of subject-matter jurisdiction. The court granted the motion and dismissed the appeal. Clendenin now appeals from that judgment. In her sole assignment of error, Clendenin argues that the trial court erred by granting the Bureau's motion to dismiss.

{¶7} We apply a de novo standard of review to the trial court's granting of a motion to dismiss under Civ.R. 12(B)(1) for lack of subject-matter jurisdiction. *W. & S. Life Ins. Co. v. Owens*, 1st Dist. Hamilton No. C-140255, 2015-Ohio-1188, ¶ 8; *Peppers v. Meyer Builders-Douglas Homes, Ltd.*, 1st Dist. Hamilton No. C-030894, 2004-Ohio-5057, ¶ 15.

## II. Analysis

{¶8} The issue in this case is whether Clendenin can appeal to the court of common pleas the commission's order determining that her preexisting condition of dermatomyositis had returned to its preinjury status and that she may not receive any compensation or benefits for that preexisting condition.

{¶9} It is not disputed that Clendenin had initially established her right to participate for the preexisting condition as required under the statute. To participate in Ohio's workers' compensation fund, a claimant must establish an "injury" as defined by R.C. 4123.01(C). This statute specifies that an injury includes "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." The subdivisions of R.C. 4123.01(C) qualify the definition of a compensable injury. R.C. 4123.01(C)(4) provides that an injury does not include a condition that preexisted an injury unless that preexisting condition is "substantially aggravated" by the injury, as documented by certain objective evidence. *Pflanz v. Lof*, 1st Dist. Hamilton No. C-100574, 2011-Ohio-2670, ¶ 11-12.

{¶10} But the Bureau contended that Clendenin's condition had reverted to a level that would have existed without the injury, and requested and received from the commission an abatement order terminating compensation and benefits in accordance with R.C. 4123.54(G). This statute provides that once the substantially-aggravated preexisting condition "has returned to a level that would have existed without the injury," then "no compensation or benefits are payable" to the claimant. The legislature added R.C. 4123.01(C)(4) and 4123.54(G) as part of Am.Sub.S.B. No. 7 in 2006.

{¶11} Clendenin sought to appeal the commission's abatement order under the authority provided in R.C. 4123.512(A). That statute provides limited jurisdiction to the court of common pleas to review final decisions of the commission that involve a claimant's right to participate or to continue to participate in the fund. *Thomas v. Conrad*, 81 Ohio St.3d 475, 477, 692 N.E.2d 205 (1998). Conversely, determinations involving the extent of a claimant's disability must be challenged in mandamus. *Felty v. A.T. & T. Technologies, Inc.*, 65 Ohio St.3d 234, 240, 602 N.E.2d 1141 (1992).

{¶12} The *Thomas* court explained this limit on the appellate jurisdiction of the court of common pleas as follows:

"The only action by the commission that is appealable \*  
\* \* is this essential decision to grant, to deny, or to  
terminate the employee's participation or continued  
participation in the system." *Felty* at 239, 602 N.E.2d at  
1145. Such appeals are limited to "whether an employee  
is or is not entitled to be compensated for a particular  
claim." *Id.* "Only those decisions that finalize the  
allowance or disallowance of a claim \* \* \* are  
appealable." *Id.* at 240, 602 N.E.2d 1146.

*Thomas* at 478.

{¶13} The Bureau has never disputed that the abatement order forecloses any future benefits or compensation for the substantial aggravation of preexisting dermatomyositis. But the Bureau maintains that the abatement order did not terminate Clendenin's participation in the workers' compensation fund, as she continues to participate for the other approved conditions under the same case

number. As such, it contends, the order involved only the extent of her disability and, therefore, the court of common pleas lacked jurisdiction to proceed with the appeal. We cannot agree.

{¶14} *The order terminates the right to participate for a “claim”—a specific injury or medical condition.* The Bureau’s argument fails because the *Thomas* and *Felty* courts used the word “claim” when explaining what type of decision by the commission is appealable—“those decisions that finalize the allowance or disallowance of a claim.” Generally, in workers’ compensation parlance, a “claim” is “ ‘simply the recognition of the employee’s right to participate in the fund for a specific injury or medical condition.’ ” *Starkey v. Builders Firstsource Ohio Valley, L.L.C.*, 130 Ohio St.3d 114, 2011-Ohio-3278, 956 N.E.2d 267, ¶ 14, quoting *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155, ¶ 10.

{¶15} Further, the Supreme Court has rejected an argument similar to the one advanced now by the Bureau. *See Zavatsky v. Stringer*, 56 Ohio St.2d 386, 384 N.E.2d 693 (1978), paragraph three of the syllabus. *Zavatsky* involved in part the issue of the claimant *Zavatsky*’s right to participate in the workers’ compensation fund in the first instance. *Id.* at 387. The court determined that *Zavatsky* could appeal from an order that allowed a claim for injury to the left elbow, but denied a claim as to the low back and left leg arising from the same work place accident. *Id.* at 387 and 404. The Supreme Court later reiterated this rule in *Felty*, where it stated that “an order allowing a claim for one injury but denying a claim for two other injuries arising out of the same accident is appealable.” *Felty*, 65 Ohio St.3d at 239, 602 N.E.2d 1141. The Bureau has not explained why this rule should not apply when determining the appealability of an order terminating the right to participate, instead of denying the right to participate in the first instance.

{¶16} To be appealable, an order terminating participation may involve more than causation. The Bureau also maintains that the trial court lacks jurisdiction because the abatement order does not involve the issue of whether the injury, disease, or death resulted from employment, citing *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 280, 737 N.E.2d 519 (2000). In *Liposchak*, the Supreme Court explained that the denial or grant of death benefits was not appealable under R.C. 4123.512 unless the decision concerned the causal relationship between injury, disease, or death and employment. *Id.* at 281. After *Liposchak*, courts have held that an order involving the right to participate is not appealable under R.C. 4123.512 unless the order involves the issue of causation related to the employment. *See, e.g., Benton v. Hamilton Cty. Edn. Serv. Ctr.*, 123 Ohio St.3d 347, 2009-Ohio-4969, 916 N.E.2d 778; *Coder v. Ohio Bank*, 145 Ohio App.3d 739, 764 N.E.2d 477 (3d Dist.2001).

{¶17} But the Supreme Court has clarified that *Liposchak* defines the issue that may be appealed in a “right-to-participate case,” and not in a “right-to-continue-participation case” such as this one. (Emphasis sic.) *White v. Conrad*, 102 Ohio St.3d 125, 2004-Ohio-2148, 807 N.E.2d 327, ¶ 10. Moreover, the commission’s abatement order can arguably be characterized as a decision involving the “in the course of and arising out of her employment” inquiry. In essence, the commission found that Clendenin’s condition, as it existed at the time of the Bureau’s R.C. 4123.54(G)-based motion, was not causally related to her 2008 work-related accident. Therefore, the commission cut off future benefits and compensation for the condition of substantial aggravation of the preexisting dermatomyositis.

{¶18} Ultimately, Clendenin’s right to participate in the fund for her claim based on the condition of substantial aggravation of preexisting dermatomyositis had

already been established. Her right to appeal was thereafter limited to subsequent rulings that affected her right to continue to participate for that claim. We conclude that the abatement order did not involve the extent of her disability but, instead, involved her right to continue to participate in the workers' compensation fund for the claim and was appealable, notwithstanding the fact that Clendenin is participating for other conditions under the same case number.

### III. Conclusion

{¶19} We sustain the assignment of error, because the trial court erred by granting the Bureau's motion to dismiss for lack of subject-matter jurisdiction. Accordingly, we reverse the trial court's judgment and remand the cause for proceedings consistent with the law and this decision.

Judgment reversed and cause remanded.

HENDON, P.J., and MOCK, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.