

IN THE SUPREME COURT OF OHIO

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

BRIEF OF APPELLEE, AUDREY CLENDENIN

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INTRODUCTION

The legislature amended the definition of injury in the Workers' Compensation Statutes effective October 11, 2006 in amended Senate Bill 7; adding to the definition of injury found in R.C. 4123.01 (C), that a pre-existing condition to be found compensable must be a substantial aggravation, demonstrated by objective diagnostic findings, objective clinical findings, or subjective test. R.C. 4123.01 (C) (4).

The Workers' Compensation system recognizes the definition of injury has been expanded both by case law as well as statutory amendment; at one time the revised code used a broad definition encompassing "any injury" as long it was caused by external accidental means or was accidental in character. However, strict adherence to time specific harm or trauma has been replaced with the focus of the relationship between medical harm, diagnosis, and legal causation. For example; a gradually worsening condition, which develops over time, is a compensable injury, *SEE, Village v. General Motors*, (1984) 15 Ohio St.3d 129, 472 N.E.2d 1079; as was aggravation of a pre-existing condition, *SEE, Schell v. Globe Trucking*, (1990) 48 Ohio St.3d 1, 548 N.E.2d 920.

In addition, the Workers' Compensation system recognizes flow through conditions, i.e., conditions that develop because of other conditions previously allowed in the claim, commonly characterized as a developmental condition; for instance, where a claim allowed for a herniated disc is later amended to include degenerative disc disease at the corresponding level. However, pursuant to Senate Bill 7, the definition of

injury found in R.C. 4123.01 was amended adding paragraph (C) (4) which states as follows:

A condition that pre-existed an injury, unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

In conjunction, the legislature amended 4123.54, which is captioned Compensation in The Case of Injury or Death-Agreement of Work Performed in Another State, adding paragraph (G) which reads as follows:

If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, **no compensation or benefits are payable because of the pre-existing condition, once that condition has returned to a level that would have existed without the injury.** (emphasis added)

Coincidentally, the legislature did not include such amendment in the provision authorizing continuing jurisdiction, (R.C. 4123.512) which likewise was addressed in Senate Bill 7.

The issue before the Court is to determine whether the language of R.C. 4123.54 (G) operates to suspend benefits or finalizes a claimant's right to participate for such additional condition.

As framed by Appellant, this case presents to the Court the opportunity to advise the path to judicial review of an Industrial Commission Order finding abatement of a pre-existing condition, either as "right to participate" or as "extent of disability". Simply

stated, Appellant asserts such an order suspends benefit payments because the pre-existing injury has returned to a level that would have existed without the injury; whereas, Appellee, Clendenin, asserts the clear language of the statute finalizes her right to further participate in Workers' Compensation fund for such condition and thus finalizes her right to participate for such condition.

The legislature could not have been more clear that the return of the condition to a level that existed without the injury precludes the future payment of compensation or benefits thereafter. The statute says nothing about temporary suspension of benefits; if such were the case the methodology to raise such issue would require, once again, a motion to participate for such additional condition and if denied administratively would such be appealable pursuant to R.C. 4123.512.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the recitation of the underlying facts as set forth by Appellant. Appellee supplements the Statement of the Case as set forth hereinafter.

Clendenin filed an appeal pursuant to R.C. 4123.512 of the IC finding of abatement to the Hamilton County Court of Common Pleas. (Complaint, C.P., R. @3) The Administrator, Bureau of Workers' Compensation filed a Motion to Dismiss (7/30/2014) (C.P., R. @ 16) pursuant to Civil R. 12 (B) (1), for lack of subject matter jurisdiction, asserting Clendenin had an ongoing viable claim for multiple other conditions and abatement applied singularly to the condition of substantial aggravation of pre-existing dermatomyositis and thus the court lacked subject matter jurisdiction,

asserting the Industrial Commission's finding was as to "extent of disability", rather than a finding of a "right to participate".

The trial court granted the Motion to Dismiss (10/23/14) (C.P., R. @ 20) which was timely appealed to the First District Court of Appeals (C.P., R. @ 21). The First District Court of Appeals found abatement of a condition allowed as a substantial aggravation of pre-existing condition finalized participation in the Workers' Compensation Fund for such condition pursuant to R.C. 4123.54 (G) and as such was appealable pursuant to R.C. 4123.512 as an issue of the "right to participate". (C.A., R. @ 12,13)

ARGUMENT

Appellant's Proposition of Law:

A decision that a claimant's substantially aggravated pre-existing 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.

Appellee's Counter Proposition of Law:

A decision that a claimant's substantially aggravated pre-existing condition has returned to a level that would have existed absent a workplace injury, involves the right to participate and is thus appealable 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.

Courts of Common Pleas do not have inherent jurisdiction in workers' compensation cases but only that which is conferred by the Workers' Compensation Act.

SEE, Jenkins v. Keller, (1966) 6 Ohio St.2d 1221, 216 N.E.2d 379. R.C. 4123.512

authorizes appeal from decision of the Industrial Commission of Ohio of a claimant's "right to participate". *SEE, Benton v. Hamilton County Educational Serv. Ctr.*, 123 Ohio St.3d 347, 2000-Ohio-4969, 916 N.E.2d 778.

"The only decisions reviewable pursuant to R.C. 4123.512 are those decisions involving a claimant's right to participate or to continue to participate in the Workers' Compensation Fund." *Afrates v. City of Loraine*, (1992) 63 Ohio St.3d 22, 584 N.E.2d 1175.

The longstanding confusion of "extent of disability" versus "right to participate" was thought to have been resolved in *Felty v. AT&T Technologies, Inc.*, (1992) 65 Ohio St.3d 234, 602 N.E.2d 1141, wherein this Court noted a "claim" refers to the "basic or underlying request by an employee to participate in the compensation system because of a specific work-related injury or disease".

This Court in *Starkey v. Builders First Source*, (2011) 130 Ohio St.3d 114, 2011-Ohio-3278, 956 N.E.2d 267 observed the Worker's Compensation statutes do not define the term "condition" but noted the word "injury" is defined in R.C. 4123.01 (C) as "... any injury, whether caused by external means or external in character and result, received in the course of and arising out of, the injured employee's employment....".

In *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, this Court defined a workers' compensation claim as follows:

A workers' compensation claim is simply the recognition of the employee's right to participate in the fund for a specific injury or medical condition, which is defined narrowly, and it is only for that condition, as set forth in the claim, that compensation and benefits provided under the act may be payable. Nor is the right to participate an all-encompassing one-time final determination.

The grant or denial of the right to participate for one injury or condition does not preclude a subsequent claim for participation in the fund based on another injury or condition arising out of the same industrial accident. *Ward v. Kroger* ¶10.

This Court went on to note "each injury or condition that is alleged to give the claimant a right to participate in the Workers' Compensation Fund must be considered as a separate claim". *Id.* at ¶11.

B. A R.C. 4123.54 (G) decision can be appealed because it does affect an employee's right to participate (or continue to participate) in the workers' compensation system.

The 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*, (1989) 45 Ohio St.3d 200, 202. Despite this Court's efforts to resolve such dilemma, the legislature's action has again caused confusion to arise. *SEE, Felty v. AT&T Technologies, Inc.*, (1992) 65 Ohio St.3d 234, 602 N.E.2d 1141; *Afrates*, 63 Ohio St.3d 22 at Syl. ¶ 1; *State, ex rel. Liposchak v. Indus. Comm.* (2000) 90 Ohio St.3d 276, 279. With the enactment of R.C. 4123.54 (G) the legislature has once again breathed new life into the confusion between the "right to participate" and "extent of disability".

The question in this case, asks whether a R.C. 4123.54 (G) determination temporarily suspends or finalizes the right to compensation and benefits for the substantially aggravated pre-existing condition.

1. A determination that a pre-existing condition has returned to a pre-injury level permanently bars the payment of benefits for that condition.

Employees who are injured in workplace accidents may receive workers' compensation benefits for their 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 pre-existing condition. R.C. 4123.01 (C) (4). If and when the pre-existing 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).

Appellant acknowledges the statute (R.C. 4123.54 (G)) is silent about whether compensation or benefits may again be paid should the pre-existing condition again become substantially aggravated, but asserts principles of administrative deference, indicate they may be resumed.

Contrary to Appellant's assertion regarding the effect of continuing jurisdiction, once the Industrial Commission has made a decision a substantial aggravation of a pre-existing condition has abated, returning to pre-injury status, the statute specifically dictates no further compensation or benefits are payable thereafter. Continuing jurisdiction arises only in limited circumstances as they have been defined by this Court.

The Commission's continuing jurisdiction is limited to correcting mistakes in specific circumstances. The Commission has the power to modify final orders based upon mistake of fact, mistake of law, or contain a clerical error. *State, ex rel. B & C Machine Co. v. Indus. Comm.*, (1992) 65 Ohio St.3d 538, 1992-Ohio-75. The prerequisites for invoking continuing jurisdiction are (1) new and changed

circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *SEE, State, ex rel. Nichols v. Ind. Comm.*, (1998) 81 Ohio St.3d 454, 459, 1998-Ohio-616.

Appellant asserts a finding pursuant to R.C. 4123.54 (G) merely temporarily suspends, rather than permanently terminates the right to benefits and compensation, but noticeably absent from the statute is any such suggestion such a finding is a mere suspension of benefits and subject to the ongoing jurisdiction of the Industrial Commission. Appellant's suggestion this issue is analogous to that in *Ramirez*, is misplaced. *State, ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630, Syllabus (1982). The issue in *Ramirez* involved payment of temporary total disability and upon a finding of maximum medical improvement, temporary total disability terminates. However, a finding of MMI does not affect the ongoing payment of medical benefits and continuing jurisdiction applies when there is a showing of new and changed circumstances, i.e., subsequent surgery or the allowance of an additional condition, such new and changed circumstance may then allow for the resumption of such benefits. A finding of MMI/maximum medical improvement is directed solely to the continued payment of temporary total disability; whereas, abatement pursuant to R.C. 4123.54 (G) forecloses both future compensation and medical benefits.

Throughout such process, the payment for ongoing medical treatment continues; whereas, in Clendenin's case, not only was there a finding of MMI (Maximum Medical Improvement) future medical benefits were precluded as well. Appellant further suggests if the statutory scheme is in fact ambiguous, the Bureau's suggested

interpretation is the better one, as it is at least based upon a “permissible construction of the statute”, based upon Bureau policy.

However, Clendenin’s appeal asserting the “right to participate” was filed in the trial court August 29, 2013; the Motion to Dismiss was granted October 23, 2014, and while pending appeal, the Bureau enacted policy; Aggravation and Substantial Aggravation of Pre-Existing Condition, Policy No. CP-01-09 (April 23, 2015) available at <https://perma.cc/HX7X-7QBJ>-further asserting that although finalized in 2015 the policy was not new, asserting it had long interpreted R.C. 4123.54 (G) as permitting the claimant to request that it reopen a substantial aggravation claim. Interestingly, such was not argued before the trial court nor before the Court of Appeals below, having been asserted for the first time before this Court in the Memorandum in Support of Jurisdiction and its’ Brief herein. Such is contrary to the Bureau’s assertion it has consistently maintained throughout these proceedings R.C. 4123.54 (G) does not permanently bar an injured worker from receiving benefits. In fact, the Bureau’s initial position had been Clendenin had the right to continue to participate for other conditions in her claim and the finding of abatement only affected a single condition and had no effect upon other allowed conditions. Appellant’s argument is facetious and ignores the fact each condition is independent of the others and is ruled upon separately. A party cannot change its’ theory of the case and present new arguments for the first time on appeal. *State, ex rel. Guitierrez v. Trumbull Cty. Bd. Of Elections*, (1992) 65 Ohio St.3d 175,177, 602 N.E.2d 622. The denial of a right to participate and/or to continue to participate for a specific condition gives rise to appeal pursuant to R.C. 4123.512, as

there has been a determination that finalizes the right to participate for a specific medical condition.

In *State, ex rel. Evans v. Industrial Commission*, (1992) 64 Ohio St.3d 236, 594 N.E.2d 609, in ¶1 of the Syllabus this Court noted:

An Industrial Commission decision does not determine an employee's right to participate in the State Insurance Fund unless the decision finalizes the allowance or disallowance of the employee's claim.

It is important to note the facts in *Evans*; the employee had suffered a work related back injury; the injury was subsequently aggravated in a non-work related incident when *Evans* slipped and fell on ice. The Industrial Commission had granted temporary total for the period prior to the second incident but denied payment for medical bills following the second incident. This Court noted:

In this case the Commission did more than simply refuse to grant additional benefits for a specified time period. The Hearing Officer denied both temporary total disability benefits after 12/30/86 and medical bills incurred after 01/08/87. We understand this order to permanently foreclose *Evans* from receiving any further benefits under the claim he filed for the ongoing accident that occurred at work.... This flat prohibition of any future benefits determines the claimant's right to participate in the State Insurance Fund and is subject to appeal pursuant to R.C. 4123.519 (now R.C. 4123.512). *Id* @ 240-241 594 N.E.2d @ 612-613.

The Court concluded the intervening incident foreclosed the right to continue to participate and such finding was appealable pursuant to R.C. 4123.512.

The appellant has further asserted that after the Motion to Dismiss was filed *Clendenin* filed an action in *Mandamus* which was subsequently voluntarily dismissed. However, such is not included in the record herein, was not before the Court of Appeals nor before the trial court. It must be noted that this matter arose upon a Motion to

Dismiss for Lack of Subject Matter Jurisdiction and the determination before the court was limited to whether a finding of abatement of an allowance for substantial aggravation of a pre-existing condition finalizes the right to participate for such condition.

2. Because it does permanently finalize the right to benefits, a party may appeal an R.C. 4123.54 (G) determination.

Contrary to Appellant's assertions, there is nothing in R.C. 4123.54 (G) that suggests a suspension of benefits. The clear language of the statute states otherwise and in resolving any ambiguity must look to the plain language of the statute. There is nothing in the plain wording of the statute R.C. 4123.54 (G) which suggests the Industrial Commission has continuing jurisdiction to revisit its' prior decision should new and changed circumstances arise. Multiple collateral issues are effected by such interpretation, including principles of collateral estoppel and res judicata.

Appellant asserts the First District was misguided in its conclusion the proper avenue for review was appeal, asserting the First District misinterpreted R.C. 4123.54 (G). Appellants interpretation creates the scenario where should a motion be filed asserting new and changed circumstances and such is denied, raises the issue that once denied administratively, does such result in an appeal pursuant to R.C. 4123.512 or do we have a never ending administrative process where there is never a finalization of the "right to participate" for such condition.

It is interesting the Appellant has asserted for the first time before this Court its interpretation that R.C. 4123.54 (G) merely suspends compensation and benefits, when such was not raised neither before the trial court nor the Court of Appeals.

The Administrator in its Motion to Dismiss asserted that an abatement of a condition allowed as a substantial aggravation did not finalize the claim, asserting there remained other conditions for which Clendenin was still entitled to participate. The Administrator reiterated such argument before the Court of Appeals. Such argument clearly fails, because such argument exists in any claim that has an underlying allowed condition for which the claimant seeks to then additionally participate for an additional condition and if such additional condition is denied, they are allowed to participate for the underlying claim.

CONCLUSION

It is respectfully submitted this Court affirm the decision of the First District Court of Appeals and answer the proposition of law as set forth by the Appellant before this Court in the negative, finding a determination pursuant to R.C. 4123.54 (G) finalizes the right to participate or to continue to participate in a claim, and is thus appealable under R.C. 4123.512.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee, Audrey Clendenin, was sent by regular U.S. Mail to Eric E. Murphy, State Solicitor, at 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 this 14th day of June, 2016.

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