

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2015-1975**

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**SHANNON FERGUSON  
Plaintiff-Appellee,**

**-vs-**

**STATE OF OHIO, ET. AL.  
Defendants-Appellants, et. al.**

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**ON APPEAL FROM CUYAHOGA COUNTY  
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT**

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**BRIEF OF *AMICI CURIAE*,  
OHIO ASSOCIATION FOR JUSTICE AND  
OHIO ASSOCIATION OF CLAIMANTS' COUNSEL  
URGING AFFIRMANCE ON BEHALF OF PLAINTIFF-APPELLEE**

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### INTERESTS OF *AMICI CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization with over 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was created to advance the founding ideals of the NACCA and to educate the public and legal community on workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ are filing this brief on behalf of Plaintiff-Appellee Shannon Ferguson. The OACC and OAJ adopt the statement of facts and case set forth in Plaintiff-Appellant's merit brief.

## INTRODUCTION

The General Assembly has the power to establish the Ohio's workers compensation system pursuant to Article II, Section 35 of the Ohio Constitution. Philip J. Fulton, *Ohio Workers' Compensation Law*, Section 2.11 (3d.Ed. 2008). However, it is the exclusive power of the Ohio Supreme Court to prescribe civil rules governing practice and procedure in Ohio courts. Ohio Constitution, Article IV, Section 5(B). In 2006, this Court invited the legislature to fix a "confusing system" governing employee dismissals of employer appeals in workers' compensation proceedings by offering a solution within the General Assembly's constitutional authority:

Though the situation is confusing, and perhaps frustrating for employers, the General Assembly could correct it if it chose to do so. It could simply direct the employer in an employer appeal to file the complaint in common pleas court and still keep the burden of proof and the burden of going forward with evidence on the claimant.

*Fowee v. Wesley Hall*, 108 Ohio St.3d 533, 2006-Ohio-1712, ¶ 29 (O'Donnell, J., concurring in judgment). Rather than accept this invitation, however, the legislature attempted to fix the problem its own way: by going beyond its constitutional authority to modify Ohio Civ.R. 41(A)(1)(a)<sup>1</sup> even though this Court specifically found that it applies to workers' compensation proceedings.

Article II, Section 35 does not give the legislature the authority to veto a civil rule after the Ohio Supreme Court has found that it is applicable to a R.C. 4123.512 appeal. If the General Assembly wants to properly fix the "problem" of employee dismissals in employer-initiated appeals, it needs to accept this Court's real invitation and change R.C. 4123.512 in a constitutional way: by making employers the plaintiffs in their own appeals. But attempting to intrude upon this Court's rulemaking power to change the procedure of R.C. 4123.512 appeals is simply

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<sup>1</sup> The relevant language of Civ. R. 41(A)(1)(a) reads: "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by . . . filing a notice of dismissal at any time before the commencement of trial."

unconstitutional. Accordingly, this Court should strike the S.B. 7 amendment to R.C. 4123.512 because it invades separation of powers protections.

**A. The S.B. 7 Amendment to R.C. 4123.512(D) is Unconstitutional Because It Violates the Doctrine of Separation of Powers.**

Article IV, Section 5(B) of the Ohio Constitution provides that “[t]he supreme court shall prescribe [civil] rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.” Ohio Civ. R. 1 clarifies the scope of the Civil Rules. This Court has elucidated that it is a rule of inclusion rather than exclusion: “To the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are clearly inapplicable . . .” *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 370, 691 N.E.2d 667 (1998). Accordingly, many of the Civil Rules apply to workers’ compensation appeals unless they “are clearly inapplicable.” *Price v. Westinghouse Electric Corp.*, 70 Ohio St.2d 131, 133, 435 N.E.2d 1114 (1982). Following this reasoning, this Court has held that Ohio Civ. R. 41(A)(1)(a) applies to workers’ compensation appeals under R.C. 4123.512, and that a claimant, as plaintiff, can voluntarily dismiss their complaint without prejudice, regardless of who brings the appeal. *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 704 N.E.2d 1212 (1998).

However, in 2006, the 126<sup>th</sup> General Assembly circumvented the Court’s exclusive authority to prescribe rules governing procedure in Ohio courts, and passed legislation to modify the effect of Ohio Civ.R. 41(A)(1)(a) on workers’ compensation proceedings by amending R.C. 4123.512(D), limiting a claimant-plaintiff’s rights in employer-initiated appeals. The relevant text of R.C. 4123.512(D) now reads: “the claimant may not dismiss the complaint without the employer’s consent if the employer is the party that filed the notice of appeal.”

It is obvious that amended R.C. 4123.512(D) and Civ.R. 41(A)(1)(a) conflict: the rule allows plaintiffs to voluntarily dismiss their complaint indiscriminately while the statute restricts

plaintiffs from doing the same in employer-initiated appeals absent an employer's consent. It is also evident that the amendment to R.C. 4123.512(D) is procedural; the General Assembly simply modified the statute to limit and circumvent the effect of Civ. R. 41(A)(1)(a) in workers' compensation appeals.

Because this Court has already established that Ohio Civ. R. 41(A)(1)(a) applies to workers' compensation appeals, the Ohio General Assembly cannot enact an inconsistent procedural statute to modify the rule. *See Rockey v. Lumber Co.*, 66 Ohio St.3d 221, 224-25, 611 N.E.2d 789 (1993) ("The Ohio Rules of Civil Procedure . . . must control over subsequently enacted inconsistent statutes purporting to govern procedural matters.") and J. Patrick Browne, *Civil Rule 1 and the Principle of Primacy—a Guide to the Resolution of Conflicts between Statutes and the Civil Rules*, 5 Ohio N.U. L. Rev. 363, 407 (1978) ("[Article IV, Section 5(B)] the Ohio Constitution does not mention subsequently enacted procedural statutes because the Constitution ' . . . simply does not envisage the General Assembly acting in the area of practice and procedure after the primary power to do so was passed to the supreme court.'" ).

The 2006 legislation was a clear invasion of the rulemaking powers of the Ohio Supreme Court. As long as Civ.R. 41 (A)(1)(a) is applicable to workers' compensation proceedings, the General Assembly does not have the authority to veto or modify it through an inconsistent statute. Accordingly, this Court should affirm the decision of the Court of Appeals and strike down amended R.C. 4123.512(D) because it directly conflicts with Ohio Civil Rule 41(A)(1)(a).

**1. Modifying the Application of Civ. R. 41(A)(1)(a) to Workers' Compensation Proceedings is Unconstitutional and Does Not Effect Just Results.**

This Court has historically recognized that claimants in R.C. 4123.512 appeals must shoulder both the burdens and benefits of a plaintiff's status under the Civil Rules regardless of which party appeals. *See* Ohio Civ. R. 1(B)("These [civil] rules shall be construed and applied to



effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.”). It is a claimant-plaintiff’s burdensome procedural position that explains why the Ohio Supreme Court empowered them to indiscriminately utilize Civ. R. 41(A)(1)(a) even in employer-initiated appeals. *See Fowee v. Wesley Hall*, 108 Ohio St.3d 533, 2006-Ohio-1712, ¶ 22 (“Our opinions have consistently held that the employee-claimant, despite having proven her claim before the Industrial Commission, continues to carry the burden of initially filing the petition and proving her cause of action in what is essentially a trial *de novo*.”) (internal citation omitted).

In fact, “[r]egardless of who files the notice of appeal, the action belongs to the claimant.” *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 691 N.E.2d 667 (1998).

The claimant files a complaint, pleads all jurisdictional facts, presents a claim for relief, appears in the caption of the complaint as plaintiff, opens and closes the case, has the burden of production and persuasion, and has the duty to prosecute the action.

*Id.* “Thus, where an employer appeals an unfavorable administrative decision to the court the claimant must, in effect, re-establish his workers’ compensation claim to the satisfaction of the common pleas court [or jury] even though the claimant has previously satisfied a similar burden at the administrative level.” *Id.* at 369.

Following this reasoning, this Court held that claimants can voluntarily dismiss their complaints in employer-initiated appeals pursuant to Ohio Civ.R. 41(A)(1)(a) in *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 704 N.E.2d 1212 (1998). The *Kaiser* Appellee, like the State in the instant case, argued that such a holding “unfairly burdens an employer, as a claimant can dismiss his or her claim while continuing to receive benefits until the claimant refiles another petition.” *Kaiser*, 84 Ohio St.3d at 415. But this Court was not persuaded, finding that a prevailing employer ultimately suffered no prejudice:

[A]ppellee overlooks R.C. 4123.512(H), which guarantees that if, in a final judicial action, it is determined that the payments of compensation or benefits or both paid to a claimant should not have been made, then the amounts paid are to be charged to the state's Surplus fund. Likewise, if the employer is a state risk, the amounts will not be charged to the employer's experience, or in the event of a self-insured employer, the self-insured employer may deduct the amounts of compensation paid on its statutory reporting forms. Thus, the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the refiling of a voluntarily dismissed action are repaid if the employee's claim does not prevail.

*Id.*

This Court has repeatedly found that “as plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure.” *Id.* This logic only makes sense as the Court has applied the Civil Rules to R.C. 4123.512 proceedings unless they are clearly inapplicable. *Price v. Westinghouse Electric Corp.*, 70 Ohio St.2d 131, 133, 435 N.E.2d 1114 (1982) (holding that the Rules of Civil Procedure apply to R.C. 4123.512 appeals unless they are clearly inapplicable because finding otherwise would “leave the Courts of Common Pleas in a procedural vacuum”).

Unfortunately, the S.B. 7 amendment to R.C. 4123.512(D) deprives claimants of the protections provided by the civil rules by forcing claimants who have prevailed administratively, many of whom cannot afford to go to trial, to shoulder the legal expenses as well as the burden of proof to reprove their right to participate in the fund. If successful at a common pleas court, claimants are eligible for reimbursement of their expenses, and their attorneys are eligible for attorney fees up to forty-two hundred dollars. *See* R.C. 4123.512(F).<sup>2</sup> Claimants do not necessarily

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<sup>2</sup> “The cost of any legal proceedings authorized by this section, including an attorney’s fee to the claimant’s attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant’s right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission or the administrator rather than the employer contested the right to participate in the fund. The attorney’s fee shall not exceed forty-two hundred dollars.”

receive any benefits and they do not “collect on an administrative award” if they prevail at trial. *Compare* State’s brief at 18 (“And it is especially unfair for a litigant who delays the opponent’s appeal on an administrative award that is the very subject of the appeal.”). Rather, claimants, if successful, only obtain the right to participate in the workers compensation fund for the condition(s) at issue. They must thereafter prove their entitlement to compensation and benefits in subsequent administrative hearings.

Moreover, unlike employers who can pass on the defense of a R.C. 4123.512 appeal to the Ohio Attorney General, claimants do not have this option. They must either pay to reprove their right to participate in the fund, or they risk losing any benefits they may currently receive if they do not prosecute their case. In fact, if an employer has appealed an allowed claim into court, a claimant is prevented from filing for permanent partial disability benefits or a scheduled loss award. *Indus. Comm. Hearing Officer Manual Memo I5 and E7 (App-1-4)*. This means that a claimant could severely injure their arm at work, ultimately suffer an amputation, but be prevented from obtaining compensation for the amputation if the employer appeals the allowance into court. A claimant would not be able to file for a loss of use award until they are successful in a court of common pleas action or have voluntarily dismissed the action *with the employer’s consent*.

There is already little incentive for claimants to file R.C. 4123.512 appeals due to the cost of an appeal, the absence of a financial reward, or the financial impact that a R.C. 4123.512 appeal has on their underlying claim. Preventing claimants from being able to indiscriminately utilize a voluntary dismissal when they have already proven their right to participate further erodes their access to the civil justice system. Rather than penalizing employers, the S.B. 7 amendment to R.C. 4123.512(D) penalizes claimants by forcing them to be plaintiffs in every court appeal without the benefit of all the Civil Rules.

**2. The S.B. 7 Amendment to R.C. 4123.512(D) Conflicts with Civ. R. 41(A)(1)(a) in Contravention of The Modern Courts Amendment.**

The S.B. 7 amendment both conflicts with Civ. R. 41(A)(1)(a) and is procedural: this Court has already held the latter by applying Civ.R. 41(A)(1)(a) and (2) to R.C. 4123.512 in the first place. *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 370, 691 N.E.2d 667 (1998) and *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 704 N.E.2d 1212 (1998). The S.B. 7 amendment to R.C. 4123.512(D) is not substantive because its effect is procedural and does not create a right; in fact, it takes away a right: it prevents a plaintiff from filing a motion to dismiss without prejudice, absent an employer's consent, in an employer-initiated appeal. The amendment does not establish subject matter jurisdiction or even touch upon jurisdiction (dismissing a complaint does not divest a court of jurisdiction as it is the notice of appeal that confers jurisdiction on a court), does not define when a claim must be brought, and has nothing to do with payment or compensation as a claimant does not necessarily receive compensation or benefits during the pendency of a R.C. 4123.512 action.

It is also evident that amended R.C. 4123.512(D) and Civ.R. 41(A)(1)(a) conflict; to argue otherwise ignores the reality of workers' compensation appeals and the purpose behind the S.B. 7 amendment. The unjust environment that has resulted evidences why the General Assembly should not attempt to abrogate any civil rule: for this Court has consistently applied the civil rules to workers' compensation proceedings not only to provide procedural structure, but to provide equal access to the civil justice system.

**CONCLUSION**

If the legislature does not want Civ.R. 41 to apply to workers' compensation proceedings, it has the right to create a wholly different procedural mechanism distinct from the Ohio Civil Rules pursuant to Article II, Section 35 of the Ohio Constitution. However, it does not have the

power to modify a Civil Rule after the Ohio Supreme Court has found that it applies to workers' compensation proceedings. This power lies exclusively with the Ohio Supreme Court.

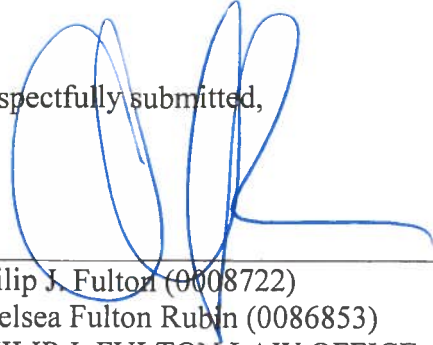
Moreover, if the General Assembly wants to properly fix the "problem" of employee dismissals in employer-initiated appeals, it needs to amend R.C. 4123.512 so claimants are not always the plaintiffs who must carry the burden of proof in workers' compensation proceedings, even when it is not their appeal. *See Fowee v. Wesley Hall*, 108 Ohio St.3d 533, 2006-Ohio-1712,

¶ 29 (O'Donnell, J., concurring in judgment):

Though the situation is confusing, and perhaps frustrating for employers, the General Assembly could correct it if it chose to do so. It could simply direct the employer in an employer appeal to file the complaint in common pleas court and still keep the burden of proof and the burden of going forward with evidence on the claimant.

But attempting to amend Civ. R. 41 through a subsequent inconsistent statute is not the answer; the General Assembly simply does not have the power to veto, or modify, a civil rule. Accordingly, this Court should affirm the decision of the Eighth District Court of Appeals and find amended R.C. 4123.512(D) unconstitutional.

Respectfully submitted,



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# APPENDIX

August 2, 2010

Memo E7

**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**Processing Applications for Compensation Pursuant to O.R.C.  
4123.57(A) when Allowance Question is in Court**

The Industrial Commission shall not process a C-92 Application during the pendency of the employer's appeal of the original allowance in Court under O.R.C. 4123.512. However, should the injured worker dismiss the complaint with the consent of the employer pursuant to Civil Rule 41(A), the C-92 Application shall be processed during the pendency of the employer's appeal filed under O.R.C. 4123.512. If a question of an additional allowance is in Court, there is jurisdiction to process a C-92 Application as it relates to the original conditions allowed in the claim that are not being contested in Court.

Please see Hearing Officer Manual policy I5 regarding the processing of other compensation and medical benefit issues during the pendency of the original allowance or additional allowance in court.

**NOTE:** 1962 O.A.G. No. 2794 and O.R.C. 4123.512(H)

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Ind. Comm'n Hearing  
Officer Manual



June 18, 2014

Memo 15

**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**Processing Compensation and Medical Benefits Issues in  
Claims When an Original Allowance or Additional Allowance  
Issue is in Court**

The chart below and on the next page delineates how compensation and medical benefits issues should be handled and processed when an appeal is pending in court. Column one identifies the compensation or medical benefit issue. Column two indicates whether or not the compensation or medical benefit issue can be considered for adjudication when the original allowance issue is on appeal to court pursuant to O.R.C. 4123.512. Column three indicates whether or not the compensation or medical benefit issue can be considered for adjudication when an additional allowance issue is on appeal to court pursuant to O.R.C. 4123.512.

**Note:** Hearing Officer Manual policy E7 also addresses related issues.

Yes indicates – Process or adjudicate the request for compensation or benefits

No indicates – Do not process or adjudicate the request for compensation or benefits

Ind. Comm'n Hearing  
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<u>Issue in Question</u>	<u>Original Allowance and R.C. 4123.512 Appeals to Court</u>	<u>Additional Allowance and R.C. 4123.512 Appeals to Court</u>
Temporary Total Disability	Yes	Yes
Permanent Total Disability	Yes	Yes
Medical Expenses	Yes	Yes
Permanent Partial Disability	No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.	No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.
Scheduled Loss	No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.	No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.
Impairment of Earning Capacity	No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.	No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.
Wage Loss Compensation	Yes	Yes

<b>Motion for additional Condition</b>	<b>Yes</b>	<b>Yes</b>
<b>Living Maintenance</b>	<b>Yes</b>	<b>Yes</b>
<b>Living Maintenance Wage Loss</b>	<b>Yes</b>	<b>Yes</b>
<b>Handicap Reimbursement (CHP-4)</b>	<b>Yes</b>	<b>Yes</b>
<b>Violation of a Specific Safety Requirement</b>	<b>Yes</b>	<b>Yes</b>

Ind. Comm'n Hearing  
Officer Manual