[Cite as *Ackely v. Ryan*, 2010-Ohio-477.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JERRY ACKLEY,	:	**MEMORANDUM OPINION**
Appellee,	:	
		CASE NO. 2009-L-143
- vs -	:	
MARSHA P. RYAN, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION,	:	
	:	
Appellee,	:	
DIE CO., INC.,	:	
Appellant.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 08 CV 003807.

Judgment: Appeal dismissed.

Michael J. Feldman, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Appellee, Jerry Ackley).

Richard Cordray, Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215-3428, and *Jeffrey B. Duber*, Assistant Attorney General, State Office Building, 12th Floor, 615 West Superior Avenue, Cleveland, OH 44113 (For Appellee, Marsha P. Ryan, Administrator, Bureau of Workers' Compensation).

Natalie F. Grubb and *John S. Lobur*, Grubb & Associates, L.P.A., 437 West Lafayette Road, Ste. 260-A, Medina, OH 44256 (For Appellant, Die Co., Inc.).

MARY JANE TRAPP, P.J.,

{¶1} This appeal ensued on October 26, 2009, when appellant, Die Co., Inc., filed a notice of appeal from an October 6, 2009 judgment entry of the Lake County

Court of Common Pleas. In that entry, the trial court ordered that the case was dismissed without prejudice.

{¶2} The docket in this matter reveals that on March 7, 2007, the employer/ appellant, Die Co., Inc., filed a notice of appeal with the Lake County Court of Common Pleas pursuant to R.C. 4123.512 from a February 2007 decision of the Industrial Commission of Ohio. That case was assigned case number 07CV000646. On June 8, 2007, employee/appellee, Jerry Ackley, filed a motion for leave of court to file instanter his complaint appealing from the same February 2007 decision of the Industrial Commission. Mr. Ackley filed his complaint on June 22, 2007. Mr. Ackley voluntarily dismissed that action on December 6, 2007.

{¶3} On December 3, 2008, Mr. Ackley refiled the action, in case number 08CV003807. On October 6, 2009, Mr. Ackley filed a "Motion for Court dismissal under [Civ.R.] 41(A)(2)." On that same date, the trial court issued an entry which stated that the case was dismissed "*** as appellant is unavailable for trial, without prejudice, otherwise then on the merits with a right to re-file."

{¶4} In general, a dismissal without prejudice constitutes "an adjudication otherwise than on the merits" with no res judicata bar to refiling the suit. *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 225, fn. 2; see, also, *Beil v. Key Bank*, 11th Dist. No. 2007-L-193, 2007-Ohio-7118, at ¶2. As this court has previously stated, a dismissal without prejudice leaves the parties in the same position they were in prior to the action being filed. Id. citing to *Johnson v. H & M Auto Service et al.*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, 2007 Ohio App. LEXIS 5094, at ¶7. We further note that a

dismissal without prejudice is not a final appealable order because a party may refile or amend a complaint. Id.

{¶5} The Supreme Court of Ohio stated that R.C. 2305.19, the saving statute, "applies to employer-initiated workers' compensation appeals pursuant to R.C. 4123.512(A). In so doing, we stated that '(i)n an employer-initiated workers' compensation appeal ***, after the employee-claimant files the petition as required by R.C. 4123.512 and voluntarily dismisses it as allowed by Civ.R. 41(A), if the employee-claimant fails to refile within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal.' [*Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712] at syllabus." *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 126-127, 2009-Ohio-360.

{¶6} The Supreme Court explained that:

{¶7} "'regardless of who files the notice of appeal, the action belongs to the (employee-claimant)' and that the employee-claimant 'has the burden of going forward with evidence and proof to the satisfaction of the common pleas court, despite having satisfied a similar burden before the Industrial Commission.'

{¶8} "*** '(t)he primary concern in holding that the employee can dismiss the employer's appeal is the employee's ability to interminably prolong the proceedings.' *** But we found, as had most of the courts of appeals that had considered the issue, that this concern was sufficiently addressed by the saving statute, which forces the employee-claimant to refile suit within a year of the dismissal or lose the claim. ***" Id. at 127.

{¶9} Here, the trial court specified that the action was dismissed without prejudice. Since the action could be refiled within one year of the dismissal, the trial court's dismissal without prejudice is not a final appealable order. Hence, this court lacks jurisdiction at this time to consider this appeal.

{¶10} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.