[Cite as *Largent v. Sticker Corp.*, 2011-Ohio-6094.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BRIAN P. LARGENT, ADMINISTRATOR OF THE ESTATE OF ALVIN LARGENT, DECEASED,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2010-L-061**
- vs -	:	
STICKER CORP., et al.,	:	
Appellees.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 09 CV 002901.

Judgment: Affirmed.

Paul W. Flowers, Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, OH 44113-2216 and *Frank Gallucci, III*, 55 Public Square, Suite 2222, Cleveland, OH 44113 (For Appellant).

Michael J. Reidy, Ross, Brittain & Schonberg Co., L.P.A., 6480 Rockside Woods Boulevard, S., Suite 350, Cleveland, OH 44131 (For Appellee Sticker Corp.).

Mike DeWine, Attorney General, and *Virginia Egan Fisher*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Appellee Marsha P. Ryan).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Brian P. Largent, administrator of the estate of Alvin Largent, deceased, appeals the judgment of the Lake County Court of Common Pleas granting

appellees' joint motion for summary judgment. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The instant appeal stems from a fatal injury sustained by Alvin Largent on March 14, 2008, in the course and scope of his employment at Sticker Corporation. Mr. Largent was crushed by a piece of steel weighing approximately 1,800 pounds.

{¶3} Shortly after Mr. Largent's death, a workers' compensation claim was allowed for "instantaneous death." Appellant filed his first C-86 motion on December 5, 2008, whereby he sought to delete the word "instantaneous." Appellant maintained that, according to medical evidence, Mr. Largent's death was delayed, not instantaneous. A district hearing officer determined that no compensation had accrued in the claim. This ruling was overruled by a staff hearing officer, who concluded that the term "instantaneous" should not have been included in the claim description, and the issue of the duration of time between Mr. Largent's work injury and his death should be referred to the Bureau of Workers' Compensation for further proceedings.

{¶4} An application for payment of benefits accrued at time of death was submitted by appellant. Appellant requested payment of those benefits which would have been due to Mr. Largent immediately prior to his death for the loss of use of his upper and lower extremities, pursuant to R.C. 4123.60.

{¶5} On April 24, 2009, appellant filed a second C-86 motion seeking an amendment of the claim to allow quadriplegia and a scheduled "loss of use" award for upper and lower extremities. Appellant attached a medical report from Dr. John Tafuri stating "that as a direct and proximate result of the work-related accident of March 14, 2008[,] Alvin Largent did sustain a functional loss of use of all four extremities and had

conscious pain and suffering for the time period that he was alive following the accident." Dr. Tafuri opined that the conscious pain and suffering and functional loss of use of all four extremities lasted for a period of "up to a minute" prior to Mr. Largent's death.

{¶6} The district hearing officer refused the request for the additional allowance and for the loss of use award, finding that Mr. Largent's estate failed to prove that he developed quadriplegia as a result of the accident. Further, Mr. Largent's estate failed to prove the existence of any outstanding, unpaid compensation, pursuant to R.C. 4123.60. This decision was affirmed on appeal by a staff hearing officer. Appellant then filed an appeal to the Industrial Commission of Ohio, which was denied.

{¶7} Appellant filed an appeal in the Lake County Court of Common Pleas, pursuant to R.C. 4123.512. Appellee, Sticker Corporation, filed a motion to dismiss pursuant to Civ.R. 12(B)(1) and (B)(6). Sticker Corporation argued: (1) the trial court does not have jurisdiction of the appeal as it concerns an "extent of injury" determination, and (2) the claim for quadriplegia abated upon decedent's death, thereby precluding the estate from appealing the denial of the alleged condition.

{¶8} The trial court found that Sticker Corporation's motion to dismiss appellant's "quadriplegia claim pursuant to Civ.R. 12(B)(6) not well-taken, as the Decedent's Estate is not precluded from appealing the denial of the claim." With respect to appellant's R.C. 4123.57 scheduled loss claim, the trial court found Sticker Corporation's motion to dismiss pursuant to Civ.R. 12(B)(1) well-taken. The trial court stated appellant "has requested an award for Decedent's 'loss of use of upper and lower extremities,' which would have arisen from the underlying claim for quadriplegia.

Accordingly, the only issue that is appealable to this Court is whether or not Decedent sustained injuries causing quadriplegia prior to his death."

{¶9} Thereafter, appellees (Sticker Corporation and Marsha P. Ryan, Administrator of the Bureau of Workers' Compensation) filed a joint motion for summary judgment. In said motion, appellees claim that in his responses to interrogatories, appellant stated there were no dependents for workers' compensation purposes. Consequently, a claim could not be pursued, as only dependents can pursue a claim for accrued benefits.

{¶10} In a response, appellant maintains that no claim for dependents can be made because it is beyond the trial court's jurisdiction and identifiable beneficiaries are not a prerequisite for recovery.

{¶11} In a judgment entry dated May 27, 2010, the trial court granted appellees' motion for summary judgment stating, "as this claim had been filed solely by the Estate and not by any dependents, [appellant's] claim abated upon the death of the Decedent."

{¶12} Appellant filed a timely notice of appeal asserting the following assigned error:

{¶13} "The trial court erred, as a matter of law, in granting summary judgment upon plaintiff-appellant's administrative appeal for workers' compensation benefits."

{¶14} Under this assigned error, appellant presents the following questions:

{¶15} "[1.] Does a request for an additional allowance for quadriplegia abate upon the death of the injured worker, or can the benefits which would have been available be recovered pursuant to R.C. 4123.60?

{¶16} "[2.] Can an Estate pursue the claim for benefits which are available under R.C. 4123.60 when the injured worker passes away before the claim can be filed?

{¶17} "[3.] Did the trial judge err, as a matter of law, by granting summary judgment on May 27, 2010?"

{¶18} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶19} "*** (1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶20} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶21} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶22} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials

of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶23} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 119-120.

{¶24} Article II, Section 35 of the Ohio Constitution provides for payment of compensation to only two classes of persons—injured workers and their dependents. It provides that laws may be passed, "for the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment."

{¶25} Two types of compensation are available to dependents of deceased workers: the compensation the worker was entitled to receive prior to death under R.C. 4123.60, and death benefits under R.C. 4123.59. *State ex rel. Nyitray v. Indus. Comm. of Ohio* (1983), 2 Ohio St.3d 173, 174. "The award is not personal to the worker because R.C. 4123.60 specifically provides that dependents may recover the compensation the deceased worker was entitled to receive." Id. at fn. 5. "[A]n R.C. 4123.60 award is similar to a death benefit award under R.C. 4123.59 – both exist

separate and apart from the rights of the injured worker." *State ex rel. Nicholson v. Copperweld Steel Co.* (1996), 77 Ohio St.3d 193, 196-197. (Citations omitted.)

{¶26} Appellant applied for compensation pursuant to R.C. 4123.60, which provides, in part:

{¶27} "In all cases where an award had been made on account of temporary, or permanent partial, or total disability, in which there remains an unpaid balance, representing payments accrued and due to the decedent at the time of his death, the administrator may, after satisfactory proof has been made warranting such action, award or pay any unpaid balance of such award to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case. *If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependents of the decedent*, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person." (Emphasis added.)

{¶28} A claimant's death not only abates his workers' compensation claim but may also create an interest in his dependent(s). This can occur under the preceding paragraph in two different ways. In the first scenario, a dependent may recover where the claimant had made a claim for benefits, obtained an award, and actually accrued benefits. In the second scenario, R.C. 4123.60 allows a dependent of the decedent to timely apply for compensation, if the decedent would have been lawfully entitled to have applied for an award at the time of his death. Under this portion, a dependent is therefore entitled to file an independent claim for compensation that the deceased employee could have pursued but for his death. In the instant appeal, the decedent's estate, not a dependent of the decedent, has filed a claim for compensation.

{¶29} Appellant relies, in part, on the Supreme Court of Ohio's decisions of *State ex rel. Nossal v. Terex Div. of I.B.H.* (1999), 86 Ohio St.3d 175 and *State ex rel. Liposchak v. Indus. Comm.* (2000), 90 Ohio St.3d 276 to conclude that an estate is entitled to recover pursuant to R.C. 4123.60. *Nossal* and *Liposchak*, however, are readily distinguishable from the facts of the instant case.

{¶30} In *Nossal*, the spouse of an employee was awarded death benefits. *Nossal*, supra, at 176. The employer appealed and, while the appeal was pending, the spouse died. Id. The employer successfully dismissed the claim due to the spouse's death. Id. David Nossal, administrator of the spouse's estate, instituted a new cause of action moving the commission to order payment of the accumulated death benefits from the date of the claimant's death to the date of the spouse's death. Id. The Industrial Commission denied the administrator's request. Id. Consequently, the administrator filed a writ of mandamus. Id. The *Nossal* Court held that "where the commission

awards death benefits to the surviving spouse of a deceased employee, but the spouse dies before the funds are disbursed, accrued benefits for the period between the deceased employee's death and the spouse's death shall be paid to the spouse's estate." Id. at 177.

{¶31} In *Liposchak*, the court determined that the estate of a deceased worker can collect the permanent partial and permanent total disability compensation that had accrued but had not been paid to him before his death. *Liposchak*, supra, at 276. The employee qualified for permanent total disability. Id. The employee, however, died before payment. His mother and brother filed a claim under R.C. 4123.60, which was denied. Id. The trial court stated, "[w]e follow *Nossal*, and hold that [the employee's] estate is entitled under R.C. 4123.60 to compensation that accrued to Robert, but had not been paid to him at the time of his death." Id. at 282.

{¶32} It is clear both *Nossal* and *Liposchak* were claims allowed under the first scenario set forth in the statute, where an award had been made prior to the intervening death, and the death occurred prior to payment. In *Nossal*, a claim for death benefits was made and allowed by an employee's dependent spouse, who then died. *Nossal* permitted the estate of the widow to receive benefits that had been awarded but not yet disbursed at the time of her death. *Liposchak*, although involving a claim for living benefits, allowed the employee's estate to recover disability compensation that was already awarded and accrued but had not been paid to the employee prior to his death.

{¶33} Here, a claim had not been filed by Mr. Largent at the time of his death. Therefore, the second scenario in R.C. 4123.60 is applicable. Upon Mr. Largent's death, only his dependents were eligible to apply to receive an award that he may have

received had he made the application for an award during his lifetime. As admitted by appellant's response to discovery, however, Mr. Largent did not have any dependents for workers' compensation purposes. His estate, not his dependent(s), sought compensation under R.C. 4123.60. No statute entitles appellant to the benefits he is seeking. Neither *Nossal* nor *Liposchak* extends benefits to the deceased employee's estate when a claim for compensation had not been filed as of the date of the employee's death.

{¶34} Appellant also cites to the Supreme Court of Ohio's decision in *State ex rel. Johnston v. Ohio Bur. of Workers' Comp*. (2001), 92 Ohio St.3d 463 for the proposition that an employee's estate, not just his dependents, are entitled to recover the loss of use benefits he would have received if he had filed a claim. *Johnston* was released shortly after the decision in *Liposchak* and tracks the jurisprudence in this area of law. *Johnston* is distinguishable, as that case involved both an application for an award that was made prior to death and an eight-month administrative delay, neither of which occurred in the instant case.

{¶35} Contrary to appellant's assertion, our decision in *Battin v. Trumbull Cty*. (Apr. 27, 2001), 11th Dist. No. 2000-T-0091, 2001 Ohio App. LEXIS 1934 does not support his argument that an estate is permitted to recover under R.C. 4123.60 when an employee had not filed a claim prior to his death. Thomas Battin sustained serious injuries while in the course and scope of his employment, which resulted in an award of workers' compensation benefits for multiple conditions. Id. at *2. After Mr. Battin's death, his wife learned that he suffered from blindness in one eye; however, he did not receive a workers' compensation benefit for blindness. Id. Therefore, his wife

submitted a new claim on behalf of herself, her son, and Mr. Battin. Id. The claims were denied and his wife appealed to the trial court. Id. The trial court held that the claim of Mr. Battin had abated upon his death; however, the death of Mr. Battin had no effect upon the claims of his wife and son. Id. at *6. This court upheld the decision of the trial court, stating:

{¶36} "Our review of the relevant case law indicates that the trial court's holding on this particular issue was correct. In *State ex rel. Nicholson v. Copperweld Steel Co*. (1996), 77 Ohio St.3d 193, the Supreme Court of Ohio stated that the surviving spouse of a deceased claimant cannot 'step into the shoes' of the claimant for the purpose of pursuing his specific claim after his death. However, the court further stated that, *under R.C. 4123.60, the dependents of the claimant still have a right to pursue their own individual claims predicated upon the injury to the claimant*." (Emphasis added.) Id. at *7.

{¶37} Our decision in *Battin* is consistent with our reasoning in the instant case. That is, when an employee dies, the dependents may still pursue their individual claims. If a claim is not filed prior to an employee's death, only the *dependents* have a right to pursue those benefits permitted by statute.

{¶38} Appellant further alleges that res judicata and collateral estoppel bar appellees from challenging his status, as they never appealed the Industrial Commission's order of April 30, 2009. "'The doctrines of *res judicata* and collateral estoppel are applicable to quasi-judicial decisions of administrative agencies.'" *Lasko v. General Motors Corp.*, 11th Dist. No. 2002-T-0143, 2003-Ohio-4103, at ¶15. (Citations omitted.)

{¶39} The order of April 30, 2009, deleted the word "instantaneous" from the Bureau of Workers' Compensation order of March 19, 2008. The order permitted appellant's motion to clarify the deceased's claim from "Instantaneous death" to "death." The April 30, 2009 order stated:

{¶40} "The Staff Hearing Officer grants the C-86 application filed on behalf of the estate of decedent Alvin Largent *** to the following extent. The Staff Hearing Officer finds that the estate of Alvin Largent had 'standing' to file the C-86 references above[,] as a timely application for payment of accrued compensation [C-6], on behalf of decedent's estate, is pending. As such, the estate of Alvin Largent has at least a contingent interest in the claim and would be required and permitted, in order to successfully litigate the C-6 application, to put on its proofs and legal argument."

{¶41} This order did not address the estate's request for an additional allowance of quadriplegia. As noted by appellant in his complaint, he filed a C-6 application on March 13, 2009, for payment of compensation accrued at the time of Mr. Largent's death and a C-86 motion requesting the additional allowance of quadriplegia and a scheduled loss of use award for all four limbs on April 24, 2009. A hearing on said motions was not held until May 27, 2009. Therefore, the issue of an additional allowance for quadriplegia was not determined as of the April 30, 2009 order. Neither collateral estoppel nor res judicata bars appellees from challenging appellant's authority to pursue this claim as the administrator of Mr. Largent's estate, as he is not a dependent.

{¶42} Appellant's sole assignment of error is without merit. Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

THOMAS R. WRIGHT, J., concurs,

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., dissents with Dissenting Opinion.

{¶43} I respectfully dissent, because my reading of the record in this case indicates res judicata bars the employer from raising the issue of the administrator's standing to apply for benefits pursuant to R.C. 4123.60, at this stage of the proceedings.

{¶44} The following procedural history can be gleaned from the record:

{¶45} Shortly after the accident, a workers' compensation claim was allowed for "instantaneous death" in this matter. On December 5, 2008, the administrator of Mr. Largent's estate filed a C-86 motion seeking to delete the word "instantaneous" from the allowance. On March 3, 2009, a district hearing officer issued an order finding no compensation had accrued in this claim, and thus ruling the estate had no standing to file the C-86 motion. On March 13, 2009, the estate filed a C-6 application for payment of compensation accrued at the time of death.

{¶46} On April 7, 2009, the March 3, 2009 decision by the district hearing officer was reversed by a staff hearing officer, who granted the C-86 motion filed by the estate on behalf of the administrator. The officer found the estate *had* standing to file the C-86

motion, "as a timely application for payment of accrued compensation (C-6), on behalf of decedent's estate, is pending. As such, the estate of Alvin Largent has at least a contingent interest in the claim and would be required and permitted, in order to successfully litigate the C-6 application, to put on its proofs and legal arguments."

{¶47} The staff hearing officer cited R.C. 4123.60 as permitting a C-6 application to be filed for "compensation which the decedent might have received but for his death." The officer also concluded whether the death was "instantaneous" was a medical issue yet to be determined. The hearing officer ordered the C-6 application be referred to the BWC for further processing. On April 24, 2009, plaintiff filed a second C-86 motion seeking an amendment of the claim to allow quadriplegia and a scheduled "loss of use" award for upper and lower extremities.

{¶48} The employer appealed the April 7, 2009 decision to the Industrial Commission, and the Commission refused the appeal on April 30, 2009. *No appeal was taken by the employer from this decision*, although a judicial review of the order is permitted under R.C. 4123.512.

{¶49} After a hearing on May 27, 2009, on June 12, 2009, a district hearing officer denied the C-6 application for payment of compensation accrued at the time of death and also denied the C-86 motion requesting additional allowance and the loss of use award. The hearing officer relied on the medical report of an expert retained by the employer, and concluded that Mr. Largent's death was instantaneous. The estate sought review by a staff hearing officer, who affirmed the district hearing officer's determination.

{¶50} The estate appealed that decision and a staff hearing officer affirmed it, finding Mr. Largent's death to be "instantaneous." On August 21, 2009, the Industrial Commission refused to hear the appeal and the estate appealed to the Court of Common Pleas.

{¶51} In the employer's motion for summary judgment, it claimed Mr. Largent had no "dependents" and therefore cannot pursue any claims under R.C. 4123.60. I believe this issue had been waived by the employer at this stage in the proceedings, because in the April 7, 2009 decision, the staff hearing officer determined the estate had the standing to pursue claims under R.C. 4123.60, and the Industrial Commission affirmed that determination on April 30, 2009. The employer never appealed from the Industrial Commission's decision on this issue.

{¶52} The doctrine of res judicata is applicable to quasi-judicial decisions of administrative agencies. *Lasko v. GMC*, 11th Dist. No. 2002-T-0143, 2003-Ohio-4103, ¶5, citing *Gilbert v. Trumbull County Bd. of Edn.* (Sept. 30, 1993), 11th Dist. No. 92-T-4761, 1993 Ohio App. LEXIS 4813, *4, citing *Scott v. East Cleveland* (1984), 16 Ohio App.3d 429, 432. In *Lasko,* the employer did not appeal from the Industrial Commission's order which determined the employee suffered from the condition of dementia, and granted him total disability. This court held that the employer's failure to seek review of that determination precluded the employer from subsequently relitigating this issue under the doctrine of res judicata when the employee's widow sought death benefits based on his death from dementia.

{¶53} In Mr. Largent's case the employer never appealed the Industrial Commission's order of April 30, 2009, where the Commission left intact the ruling by a

staff hearing officer that the estate had standing to seek benefits under R.C. 4123.60. Therefore, I believe res judicata bars the employer from belatedly challenging the estate's standing to seek relief under the statute. For this reason, I respectfully dissent.