[Cite as *Nixon v. Quality Mold, Inc.*, 2008-Ohio-6618.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ERIC S. NIXON Appellee v. QUALITY MOLD, INC., et al. Appellants	C. A. No. 24314 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 07 02 1633

DECISION AND JOURNAL ENTRY

Dated: December 17, 2008

SLABY, Judge.

{¶1} Defendant/Appellant, Quality Mold, Inc., appeals the judgment of the Summit County Court of Common Pleas denying Quality Mold's motion to deny Workers' Compensation Case No. 06-371758 filed by Plaintiff/Appellee, Eric S. Nixon. We dismiss.

{¶2} On February 28, 2007, Quality Mold filed a notice of appeal with the trial court under R.C. 4123.512 appealing the February 2, 2007 decision of the Industrial Commission of Ohio, which allowed Nixon's claim for Workers' Compensation benefits as sought in claim number 06-371758 (the "Claim"). On April 10, 2007, Nixon filed his complaint as required by R.C. 4123.512(D). Quality Mold answered the complaint. The parties attempted to mediate the dispute but were unsuccessful. On November 28, 2007, Nixon dismissed his complaint without prejudice pursuant to Civ.R. 41(A). On April 29, 2008, Quality Mold filed a motion to deny the Claim because Nixon had failed to obtain Quality Mold's consent prior to dismissing his complaint as required by R.C. 4123.512(D). Nixon responded to Quality Mold's motion and

argued that he was not required to obtain Quality Mold's consent because this requirement was not in effect on the date of his injury. The trial court agreed and on June 13, 2008, the trial court denied Quality Mold's motion finding that Nixon's injury preceded the effective date of R.C. 4123.512(D)'s employer consent requirement. Quality Mold timely appealed and raises one assignment of error.

Assignment of Error

> "The trial court erred in setting the effective date of amendment to ORC 4123.512(D) to commence contrary to Senate Bill 7 which set the effective date as June 30, 2006."

{¶3} In its sole assignment of error, Quality Mold argues that Senate Bill 7 sets the effective date of R.C. 4123.512(D) as June 30, 2006, which date precedes Nixon's injury. Quality Mold maintains that because Nixon failed to obtain its consent prior to dismissing his complaint, the Claim must be denied. In its motion to deny, Quality Mold acknowledges that "[t]he amendment does not state how the employer commences proceedings and a motion under Civil Rule 60(B) might be applicable" but that it chose "to file a motion to deny the claim." The type of motion Quality Mold filed, however, leaves us without jurisdiction to consider this appeal because the trial court's June 13, 2008 order denying Quality Mold's motion to deny the claim is not a final appealable order.

{¶4} It is generally true "'[a] dismissal without prejudice leaves the parties as if no action had been brought at all.'" *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 596, quoting *Deville Photography, Inc. v. Bowers* (1959), 169 Ohio St. 267, 272. An administrative appeal, however, is created by statute and must be considered in context. Here, Quality Mold's choice of motion to attack the trial court's dismissal order leaves us without jurisdiction to consider this appeal. As noted by the Sixth District Court of Appeals in *Keller v. Manville,* 6th

Dist. No. L-08-1315, 2008-Ohio-5803, a trial court's resolution of an employer's motion to strike a Civ.R. 41(A) dismissal or motion to reinstate a case dismissed pursuant to Civ.R. 41(A) would be final and appealable because an appeal pursuant to R.C. 2505.02(B)(2) is a special proceeding and the denial of such motion would affect a substantial right of an employer because being required to wait to appeal from an "order until after the case was refiled and heard" would deny the employer a "meaningful remedy[.]" Id. at ¶14, citing *Anderson v. Sonoco Products Co.* (1996), 112 Ohio App.3d 305.

{¶5} Here, however, Quality Mold did not file a motion to strike or a motion to reinstate the action, the resolution of which would have affected a substantial right to a meaningful remedy as noted in *Keller* and *Anderson,* supra. Instead, Quality Mold moved to deny Nixon's claim, admittedly without legal support for its choice of motion. Inasmuch as other remedies exist as discussed herein, Quality Mold was not denied a substantial right and the trial court's June 13, 2008 order is not a final, appealable order.

{¶6} Quality Mold's assignment of error is not addressed because this Court lacks jurisdiction over the appeal. The appeal, therefore, is dismissed.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNN C. SLABY
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, P. J.
DISSENTS, SAYING:

{¶7} I respectfully dissent, as I would find that this is a final, appealable order.

{¶8} A discussion of the evolution of the law is helpful to a discussion of the issue at hand. Under an earlier version of the law, an employee could control the prosecution of the appeal by dismissing his complaint. See *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, at ¶19, in which the high court recognized an employee's right to unilaterally dismiss a complaint filed in response to an employer's R.C. Chapter 4123 notice of appeal, as well as the applicability of the R.C. 2305.19 saving statute, prior to the June 30, 2006 amendment. Recognizing the inequities that arise in employer-initiated appeals, the *Fowee* majority stated that "[i]t seems reasonably clear that the General Assembly contemplated that the filing of the notice of appeal, not the complaint, commences the action." Id. at ¶10, quoting *Robinson v. B.O.C. Group, Gen. Motors Corp.* (1998), 81 Ohio St.3d 361, 365. Furthermore, the majority recognized that "[r]egardless of who files the notice of appeal, the action belongs to the claimant *** [who] has the burden of going forward with evidence and proof to the satisfaction of the common pleas court, despite already having satisfied a similar burden before the Industrial Commission." *Robinson*, 81 Ohio St.3d at 366. The *Fowee* court held, under the prior version of the law, that an employer is entitled to judgment on its appeal when the employee dismisses his complaint in an employer-initiated appeal and fails to refile the complaint within one year

under the saving statute. Id. at ¶19. Accordingly, even under the prior version of the law, an employer who initiated an action by filing an appeal had recourse to obtain a resolution of its appeal in spite of the claimant's dismissal of the action.

{¶9} Interestingly, in his concurrence in judgment only in *Fowee*, Justice O'Donnell addressed the frustration experienced by employers in the circumstances under the prior version of the law where the employee, as claimant, could delay resolution of the matter by dismissing the complaint. Justice O'Donnell noted that "the General Assembly could correct" the situation and relieve employer frustration by amending the statute to "direct the employer in an employer appeal to file the complaint in common pleas court" while maintaining the burdens of proof and of going forward on the employee-claimant. *Fowee* at ¶29. Just over two months after the *Fowee* decision was released, the legislature addressed such employer frustration in another way by amending R.C. 4123.512(D) to provide that "the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section." The statute was amended to prevent this from happening by adding that an appeal could not be voluntarily dismissed by the employee without the consent of the employer.

{¶10} The majority in the case before this Court denigrates the proscription of the applicable version of the statute. The majority inferably recognizes an employer's ability to challenge a claimant's unilateral dismissal of the employer's appeal for the reason that worker's compensation appeals constitute special proceedings and the employer's substantial rights are implicated. The majority, however, has determined that Quality Mold has not invoked this Court's jurisdiction to consider Nixon's unlawful dismissal only because Quality Mold did not

seek relief below in the limited ways it believes the Second and Sixth District Courts of Appeals recognized.

{¶11} *Keller v. Johns Manville*, 6th Dist. No. L-08-1315, 2008-Ohio-5803, did not limit an employer's pursuit of a remedy before the trial court to a motion to strike the dismissal or a motion to reinstate the action. Rather, it merely held that the appellate court has jurisdiction to consider an employee's appeal from the trial court's granting of the employer's motion to strike the employee's Civ.R. 41(A) dismissal.

{¶12} *Anderson v. Sonoco Prods. Co.* (1996), 112 Ohio App.3d 305, out of the Second District, recognized jurisdiction to consider an employer's appeal of the trial court's denial of *both* a motion to vacate the employee's notice of voluntary dismissal *and* its motion for default judgment. Although the *Anderson* court held that the employer was not entitled to default judgment, it did not hold that it had no jurisdiction to reach that decision.

{¶13} I acknowledge that, ordinarily the denial of a dispositive motion is not a final, appealable order. However, workers' compensation appeals are special proceedings implicating substantial rights. Both *Anderson* and *Keller* recognized workers' compensation appeals as special proceedings. Both courts further stated that substantial rights were implicated where a party must otherwise wait to appeal. Specifically, the *Anderson* court asserted that an employer has a substantial right to mitigate its inability to recoup wrongfully paid benefits.

{¶14} Quality Mold correctly asserts that "[t]he amendment [to R.C. 4123.512] does not state how the employer commences proceedings and a motion under Civil Rule 60(B) might be applicable." Although *Anderson* was decided in 1996, long before the amendment to the statute, the current version is clearly not intended to place greater limitations or burdens on the employer as the majority now attempts to do. Based on the reasoning in *Anderson*, and that court's

recognition of authority to address the employer's motion for default judgment, I believe this Court has jurisdiction to address Quality Mold's motion to deny the claim. Accordingly, I would address the case on the merits and further reverse the judgment of the trial court.

APPEARANCES:

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