

THE STATE EX REL. ROSS, APPELLANT AND CROSS-APPELLEE, v. INDUSTRIAL  
COMMISSION OF OHIO, APPELLEE AND CROSS-APPELLANT; M. J. CONSTRUCTION  
COMPANY, APPELLEE.

[Cite as *State ex rel. Ross v. Indus. Comm.* (1999), \_\_\_ Ohio St.3d \_\_\_\_.]

*Workers' compensation — Motion for reconsideration granted and judgment  
reversed, when — Occupational diseases — Right to participate — When  
causation is not at issue, whether corporation is successor to employer that  
caused exposure is appropriately decided in mandamus action.*

(No. 96-2388 — Submitted May 12, 1998 — Resubmitted September 15, 1998 —  
Decided January 20, 1999.)

APPEAL and CROSS-APPEAL from the Court of Appeals for Franklin County, No.  
96APD01-71.

ON MOTION FOR RECONSIDERATION.

This case turns on a misunderstanding. It has a procedural history even more convoluted than most workers' compensation cases. Decedent, Patrick R. Ross, worked for several companies during his lifetime, although the majority of his employment was with Pioneer Contracting Corporation ("Pioneer"), an asphalt contractor. In 1988, he died of leukemia. At the time of his death, he was employed by Inland Refuse Transfer ("Inland"). His widow, Gertrude Ross, appellant herein, filed a death claim with appellee Industrial Commission of Ohio, alleging that decedent's leukemia was caused or accelerated by his employment with Inland.

A commission district hearing officer ("DHO") held a hearing on the claim on March 6, 1990. On March 15, 1990, Inland's counsel, at the DHO's request, sent the DHO a letter containing Pioneer's last known address. Counsel stated that the "last known address for Mr. Ross' prior employer, Pioneer Contracting Company, is c/o MJ Contracting, P.O. Box 775, Chagrin Falls, Ohio 44022."

Ross's counsel also received a copy of the letter. Thus began this case's slide into confusion.

In an order dated August 29, 1990, the DHO denied Ross's claim against Inland:

"Claimant's death by leukemia was not the result nor accelerated by his exposure to asphalt while working for Inland Refuse Transfer. This, based on the medical proof on file and specifically on Dr. Berman's 8-14-90 report.

"Claim is disallowed."

The widow-claimant appealed. At the April 24, 1991 regional board hearing, widow-claimant allegedly made an oral amendment to her death claim, asserting that decedent's death did not arise out of his employment with Inland, but instead arose out of his employment with appellee M.J. Construction Company ("M.J. Construction"). Her amendment was based on the misconception, first enunciated in the March 15, 1990 letter to the DHO, that M.J. Construction was a successor to Pioneer. As a result of the amendment, the board referred the claim to a DHO "for a determination as to the culpability of M.J. Construction."

At the June 11, 1991 hearing on that matter, the confusion created by the March 15, 1990 letter continued. The DHO pointed to the letter as proof that M.J. Construction was Pioneer's successor:

"Further, this District hearing officer finds that Pioneer Contracting Corporation underwent a name change in 1983 to M.J. Construction Company as verified by the employer's letter in file dated 3-15-90 and as testified to at hearing."

Still, the hearing, at its heart, concerned Ross's employment at Pioneer and how that employment caused an occupational disease. The hearing officer held that "[t]he application for death benefits \* \* \*, as to M.J. Construction Company

*fna Pioneer Contracting Corporation* is granted \* \* \*.” (Emphasis added.) The hearing officer’s findings were based upon Ross’s work for Pioneer:

“That the death claim, as to M.J. Construction Company, *fna Pioneer Contracting Corporation*, be allowed based upon the report of Doctor Tirgan.

“That the district hearing officer finds, from the proof on file, that decedent was an employee of *Pioneer Contracting Corporation* from approximately 1963 through October of 1983 in various capacities of the asphalt business \* \* \*. During the course and scope of decedent’s employment with *Pioneer*, he was exposed to the asphalt which is dolzel & petroleum fumes which lead to ‘acute myelogenous leukemia and bone marrow fibrosis’ and ultimately resulted in his death.” (Emphasis added.)

Despite the fact that M.J. Construction was not provided with notice of the hearing and was unrepresented, the DHO allowed the claim against M.J. Construction, based upon its “successor” relationship to Pioneer.

The order was not appealed.

The Bureau of Workers’ Compensation began paying death benefits to claimant and charging them against M.J. Construction’s risk. The latter action was the first knowledge that M.J. Construction had of a death claim being assessed against it. M.J. Construction accordingly petitioned the commission for relief pursuant to R.C. 4123.522, which permits a belated appeal by a party who was entitled to, but did not receive, notice of a hearing. The commission granted M.J. Construction’s motion, thereby permitting it to appeal the June 11, 1991 DHO order.

In the appeal that followed, a brief filed on behalf of M.J. Construction Company and M.J. Contracting Corporation untangled their relationship with Pioneer. While there was common ownership between Pioneer and the M.J. companies, they were involved in different businesses. Pioneer ceased doing

business in 1986. Its tangible personal property was sold at public auction. Inland bought Pioneer's real estate and asphalt plants. Michael R. Vitale ("M") and John M. Bass ("J") had owned Pioneer. They also owned M.J. Contracting Corp., a condominium developer, together. Vitale's daughter and son-in-law own M.J. Construction Co., a home builder. Thus, while Pioneer had some tangential relationship to M.J. Contracting Corp. and M.J. Construction Co., neither of those companies was a direct successor.

As a result, a staff hearing officer found on March 14, 1995:

"The order of the District hearing officer dated 6-11-91 is vacated.

"The Staff Hearing Officer finds that Patrick Ross was never an employee of M.J. Construction Co. The application for death benefits is, therefore, denied as the decedent's death was not the result of an occupational disease contracted in the course and scope of employment with M.J. Construction Co. \* \* \*"

Claimant's appeal to the commission was refused.

Claimant appealed the order to the Cuyahoga County Common Pleas Court pursuant to R.C. 4123.512. Six months later, she commenced an action in mandamus in the Court of Appeals for Franklin County, contesting the same order. Claimant's notice of dismissal without prejudice was filed in common pleas court a short time later. She has apparently refiled her appeal and that matter is pending.

In the instant mandamus action, the commission and M.J. Construction filed motions to dismiss, alleging that the issue before the commission was one of "right to participate," giving claimant an adequate remedy at law via appeal of the common pleas court decision. The court of appeals agreed and dismissed the action. This court, in a July 29, 1998 decision, relied as the appellate court had on the case of *State ex rel. Burnett v. Indus. Comm.* (1983), 6 Ohio St.3d 266, 6 OBR 332, 452 N.E.2d 1341, and affirmed the court of appeals.

This cause is now before this court upon a motion for reconsideration.

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**PFEIFER, J.** For the following reasons, we grant appellant’s motion for reconsideration and reverse the judgment of the court of appeals.

One issue is presented: Does claimant have an adequate remedy at law via an R.C. 4123.512 appeal? We find that she does not, and that mandamus is appropriate.

In *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175, this court set forth the parameters of when an appeal to the common pleas court pursuant to R.C. 4123.512 is appropriate. The court held that only decisions involving a claimant’s right to participate in the fund could be appealed. The question in this case is whether the DHO’s decision was properly one of claimant’s right to participate in the fund. We find that the DHO’s decision should have been limited to the simple question of whether M.J. Construction was a successor to Pioneer.

The question on appeal was never one of whether Ross had suffered an occupational disease from his work at Pioneer. The only issue in the appeal was Pioneer’s present identity. M.J. Construction was only claiming, “We are not Pioneer,” not “Ross was not injured through his work at Pioneer.”

The court of appeals put it well:

“As best we can tell from the record before us, no one contests the fact that Patrick Ross died as a result of myelogenous leukemia caused by his exposure to fumes during years of working with asphalt. The question should not be whether or not his widow will receive death benefits or ‘will participate’ in the state fund. The question should only be whose, if anyone’s, experience rate should be computed with his death benefits taken into consideration. This straightforward question has the answer complicated by the fact that a staff hearing officer at the commission did not stop at providing the relief requested on behalf of the M.J. entities (namely, relieving them from responsibility for the claims) but went on to make an order which relieved the Bureau of Workers’ Compensation (‘BWC’) of all death benefit responsibility. We note that the BWC was on notice of all hearings, never contested Ms. Ross’s entitlement to death benefits and apparently paid such benefits over a period of years.”

The court of appeals saw the question as whether the overreaching of the DHO could be remedied through mandamus, or whether the remedy must be by way of appeal to a common pleas court. Looking to *State ex rel. Burnett v. Indus. Comm.* (1983), 6 Ohio St.3d 266, 6 OBR 332, 452 N.E.2d 1341, for guidance, the court found that an R.C. 4123.512 appeal was appropriate. In our earlier decision in this case, this court agreed. See *State ex rel. Ross v. Indus. Comm.* (1998), 82 Ohio St.3d 411, 696 N.E.2d 585. We now find that our reliance on *Burnett* was misplaced.

In *Burnett*, decedent had worked for over thirty years with numerous employers, most of which had exposed him to asbestos. When decedent died of asbestos-induced cancer, his widow filed a death claim against Peck-Hannaford & Briggs Co., a company for which claimant had worked for only five months.

Both the DHO and regional board allowed the claim. The commission reversed after considering evidence that indicated that decedent had no asbestos

exposure at Peck-Hannaford. The widow appealed to the common pleas court and filed for mandamus with the court of appeals. This court affirmed the court of appeals' denial of the writ after finding that claimant had an adequate remedy at law via an appeal of the common pleas court judgment.

The decision in *Burnett* was indeed about decedent's right to participate. He had not proved causation as to any particular employer, according to the commission. Here, the DHO found that Ross had contracted an occupational disease while working for an employer formerly known as Pioneer. The fact that the employer was no longer known as Pioneer did not change that finding. The fact that Pioneer never evolved into M.J. Construction did not change that. Unlike in *Burnett*, we are not dealing with an employer who was blameless. We are dealing with an employer who ceased to exist.

It is clear throughout the proceedings that it was Pioneer that caused the exposure. The only question properly before the DHO on appeal was whether M.J. Construction was the successor to Pioneer. If indeed M.J. Construction and Pioneer were unrelated, as everyone seems to agree, the earlier effective finding that Pioneer caused Ross's occupational disease should have been untouchable by M.J. Construction and the DHO.

The issue before the DHO was not about Ross's right to participate, but whether M.J. Construction was a successor to Pioneer. Since the right to participate was not properly at issue, mandamus is a proper remedy for the claimant. We reverse the judgment of the court of appeals and order the commission to vacate its order and to reinstate the previous allowance as to the employer formerly known as Pioneer Contracting Corporation.

*Reconsideration granted  
and judgment reversed.*

DOUGLAS, RESNICK and F.E. SWEENEY, JJ., concur.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

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**LUNDBERG STRATTON, J., dissenting.** I dissent for the reasons set forth by the former majority in *State ex rel. Ross v. Indus. Comm.* (1998), 82 Ohio St.3d 411, 696 N.E.2d 585.

MOYER, C.J., and COOK, J., concur in the foregoing dissenting opinion.