

[Cite as *Klamfoth v. Advanced Foundns. Solutions*, 2009-Ohio-4547.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James E. Klamfoth,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 08AP-934
	:	(C.P.C. No. 07CVD04-05596)
	:	
Advanced Foundations Solutions,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant,	:	
	:	
William E. Mabe, Administrator,	:	
Bureau of Workers' Compensation,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 3, 2009

Renny J. Tyson Co., LPA, and Renny J. Tyson, for plaintiff-appellee.

Sara L. Rose, LLC, and Sara L. Rose, for defendant-appellant.

Richard Cordray, Attorney General, Charissa D. Payer, and Sandra E. Pinkerton, for defendant-appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal from a workers' compensation right-to-participate action in the Franklin County Court of Common Pleas.

{¶2} Plaintiff-appellee, James E. Klamfoth, was injured in an automobile accident while driving his personal vehicle after making a sales call on behalf of his employer. He filed a workers' compensation claim, which the Industrial Commission of Ohio allowed. Klamfoth's employer, defendant-appellant, Advanced Foundations Solutions, contested the claim on the ground that Klamfoth, who did normally drive his own car while making sales calls, had shortly before the accident abandoned the course and scope of his employment to run a personal errand. When the commission allowed the claim, Advanced filed an appeal to the Franklin County Court of Common Pleas pursuant to R.C. 4123.512. Pursuant to the peculiar procedures required by that section, Advanced initiated the appeal by filing a notice of appeal with the court, whereupon Klamfoth, postured as a plaintiff, filed the requisite complaint to re-establish his workers' compensation award.

{¶3} Klamfoth then voluntarily dismissed his complaint under Civ.R. 41(A), and refiled it within the one-year requirement of R.C. 2305.19, the savings statute. Klamfoth, however, never successfully served Advanced with a copy of the refiled complaint. Advanced filed its answer, but properly reserved the question of lack of jurisdiction due to insufficiency of service. Advanced followed with a motion to be dismissed as a party based upon the failure of service in the refiled case. Advanced also moved to dismiss the action in its entirety on the ground that, once Advanced was

dismissed as a party, the matter could not go forward because R.C. 4123.512 expressly makes the employer a necessary party to a right-to-participate action.

{¶4} The trial court granted Advanced's motion only in part, dismissing Advanced from the matter, but allowing both the Bureau of Workers' Compensation (defendant-appellee before us) and Klamfoth to proceed with the action. Klamfoth and the bureau then presented the court with an agreed entry confirming the administratively approved award of Klamfoth's claim, and the trial court entered judgment accordingly.

{¶5} Advanced brings the following assignments of error:

ASSIGNMENT OF ERROR NO. 1: The trial court erred when it failed to dismiss Klamfoth's workers' compensation claim in its entirety, rather than just against Advanced.

ASSIGNMENT OF ERROR NO. 2: The trial court erred when it failed to order the BWC to remove all costs associated with Klamfoth's workers' compensation claim from Advanced's workers' compensation risk account.

{¶6} Also pending before this court is Klamfoth's motion to dismiss Advanced's appeal on grounds that Advanced does not have standing to bring an appeal from the trial court's action. We will address this motion first.

{¶7} In order to demonstrate standing on appeal, a party must demonstrate a present interest in the subject matter of the litigation and prejudice from the judgment of the trial court. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 1992-Ohio-111. A future, contingent or speculative interest will not confer standing to appeal. *Ohio Contract Carriers Assn., Inc. v. Pub. Utilities Comm.* (1942), 140 Ohio St. 160, 161; *Midwest Fireworks Mfg. Co., Inc. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 2001-Ohio-24. Otherwise stated, an appeal will lie only on behalf of a party

aggrieved by the final judgment appealed from, *Ohio Contract Carriers*, syllabus, and an "aggrieved party" is defined as one whose interest in the subject matter of the litigation is "immediate and pecuniary, and not a remote consequence of the judgment." *Id.* at 161, quoting 2 American Jurisprudence (1936) 941, Appeal and Error, Section 150.

{¶8} We find that Advanced is an aggrieved party with standing to pursue the present appeal. Advanced was not only a party to the underlying administrative proceedings and the subsequent right-to-participate action before being dismissed, but retains a pecuniary interest because, as a state-fund employer, Advanced's risk rating and resulting premium payments to the fund are affected by the outcome of this claim proceeding. Advanced, moreover, did not merely seek to be dismissed as a party to the right-to-participate action, but sought by the same motion to have the entire proceeding dismissed, which the trial court declined to do.

{¶9} Klamfoth also argues that the appeal should be dismissed because no appeal should lie from a trial court order that essentially granted the relief sought by the appellant. In essence, Klamfoth would have the case present a sharp lesson on the theme that one should be careful what one moves for, because the trial court may grant it. That is not an accurate description of the posture of the appeal, since the trial court denied the essential aspect of Advanced's motion.

{¶10} Advanced remains a party aggrieved by the court's final judgment. The procedural aspect of this case is not that Advanced outmaneuvered itself, but that the trial court has entered a final judgment upholding the claim after denying Advanced's

motion to terminate the action in its favor. Klamfoth's motion to dismiss this appeal is accordingly denied.

{¶11} We turn now to Advanced's first assignment of error, which asserts that the trial court erred by entering judgment for Klamfoth and failing to dismiss the entire right-to-participate action once it had dismissed Advanced as a party. As a preliminary question, we note that neither the bureau nor Klamfoth have cross-appealed from the trial court's dismissal of Advanced as a party. Moreover, our independent review of the record reveals no error in the trial court's determinations that Klamfoth had failed to serve Advanced, that Advanced had preserved the question of lack of jurisdiction while continuing to defend the action, that the time under Civ.R. 4(E) for service has run, and that Advanced must be dismissed based upon this failure of service and resulting lack of personal jurisdiction.

{¶12} Because that aspect of the trial court's decision will remain undisturbed, the threshold issue before us is whether the dismissal of Advanced as a party necessarily entailed dismissal of the right-to-participate action as a whole for failure to join a necessary party or whether some other disposition should ensue. As a corollary, we must then determine what effect such a termination of the action would have upon the underlying claim for benefits allowed in prior administrative proceedings.

{¶13} The right-to-participate action created by R.C. 4123.512 provides both employers and claimants an opportunity to appeal to the court of common pleas an adverse determination by the commission establishing the right to benefits (but not the extent of disability or amount of such benefits). *Ward v. Kroger Co.*, 106 Ohio St.3d 35,

2005-Ohio-3560; R.C. 4123.512(A). The specifically defined right to appeal from such administrative proceedings is entirely a creation of statute and, thus, strictly framed by the express statutory language that creates the appeal and defines the conditions under which it may be taken. *Ward* at ¶11-12; *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257.

{¶14} "The appeal authorized by R.C. 4123.519 [now R.C. 4123.512] is unique in that it is considered a trial *de novo*. The burden of proof, as well as the burden of going forward, remains with the claimant." *Youghioghney & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71 (citations omitted). "[W]here an employer appeals an unfavorable administrative decision to the court the claimant must, in effect, reestablish his workers' compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level." *Id.*, quoting *Zuljevic v. Midland-Ross Corp., Unitcast Div.* (1980), 62 Ohio St.2d 116, 118. "As a result of the adjudication structure in these cases, some of the privileges of plaintiff status are conferred on the employee-claimant. * * * [W]ith those privileges come some of the plaintiff's responsibilities as well." *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, ¶22. Failure to prosecute the right-to-participate action operates as a forfeiture of the claimant's right to participate in the workers' compensation fund and warrants judgment as a matter of law in favor of the employer. *State ex rel. Dillard Dept. Stores, Inc. v. Admr., Ohio Bur. of Workers' Comp.*, 173 Ohio App.3d 339, 2007-Ohio-5556, ¶19.

{¶15} From these authorities, we can clearly conclude that, because the plaintiff in a right-to-participate action bears the burden of prosecuting the action, it follows that the claimant, postured as a plaintiff, must bear the burden of his failure to prosecute—even if the action represents, in essence, an appeal filed by an employer dissatisfied with a determination by the commission that grants a claim. Any other conclusion would allow a claimant to defeat by mere inaction the employer's right under R.C. 4123.512 to contest the claim. On the present facts, this means that we cannot accept that Klamfoth could neutralize Advanced's rights under R.C. 4123.512 to contest the claim by the simple expedient of declining to correctly serve Advanced in the common pleas action.

{¶16} Under this procedural framework, the action should not have continued to its cooperative conclusion once the employer was dismissed as a party. To complicate matters, however, there is some support for the proposition that the action was never properly commenced to begin with, which could be reasonably taken to mean that no jurisdiction attached in the trial court at all: the Supreme Court of Ohio most recently stated that, when initiating an action under the statute, "it is the filing of the petition * * * *with the required notice to the relevant parties, that commences the action.*" *Fowee* at ¶15 (emphasis added). Strictly read, this would mean that, in the present case, the action never commenced since there was a lack of service on the employer, a relevant and necessary party. ("The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party." R.C. 4123.512(B).)

{¶17} Such an outcome would again create an unsustainable result in the context of a right-to-participate action, since, in the absence of jurisdiction, the employer would be unable to effectively pursue an appeal. As a result, despite *Fowee*, this court has adhered to prior precedent establishing that, for purposes of entering judgment in favor of an employer who has filed a notice of appeal under R.C. 4123.512, jurisdiction attaches with that notice of appeal and is not dependent upon further pleading by the claimant:

The filing of a notice of appeal is the only act required to vest jurisdiction in the common pleas court. See *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 505 N.E.2d 975, paragraph one of the syllabus (holding that the jurisdictional requirements of former R.C. 4123.519, now R.C. 4123.512, are satisfied by the timely filing of a notice of appeal); *McKinney v. Ohio Bur. Workers' Comp.*, Franklin App. No. 04AP-1086, 2005-Ohio-2330, at ¶4 (noting that the filing of a notice of appeal is the only act required to perfect an appeal and vest jurisdiction in the court); *Smith v. Continental Airlines, Inc.*, Cuyahoga App. No. 81010, 2002-Ohio-4181, at ¶16 (same).

Gambrel v. C.J. Mahan Constr. Co., 10th Dist. No. 07AP-1023, 2008-Ohio-3288, ¶8.

{¶18} This conclusion is consistent with Supreme Court language in comparable cases that preceded *Fowee*: "The voluntary dismissal of the claimant's complaint does not affect the employer's notice of appeal, which remains pending until the refiling of claimant's complaint." *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411, 415. The Eighth District has applied the same rationale in a similar case and carried it to its logical conclusion: "Upon careful review, we have concluded that [the claimant] Smith's voluntary dismissal did not divest the trial court of jurisdiction over Continental's notice of appeal and that the savings statute now precludes Smith from refiling his complaint;

therefore, the court should have granted judgment for Continental [the employer]. Accordingly, we reverse the judgment of the trial court and enter judgment in favor of Continental Airlines, Inc." *Smith v. Continental Airlines, Inc.*, 8th Dist. No. 81010, 2002-Ohio-4181, ¶3.

{¶19} Because we find that the trial court retains jurisdiction to grant any appropriate relief to the appealing employer, the question becomes what form that relief should take and how the employer should plead for it; specifically, whether the motion to dismiss the action here filed by Advanced and denied by the trial court could resolve the action in Advanced's favor.

{¶20} It seems inherently incongruous to ask the trial court to dismiss the case, i.e., terminate the plaintiff's action without granting relief, and yet to enter a judgment in favor of the employer that would alter the status quo resulting from a prior administrative determination—there is no conventionally postured counterclaim in this action that would support relief for the employer. Moreover, the employer's motion to dismiss might well invite the interpretation that the employer seeks to dismiss its own notice of appeal and forego any further effort to modify the compensation award. As a result, in most comparable cases, the employer, rather than moving for dismissal, has moved for judgment on the pleadings. See, e.g., *Gambrel*, our most recent case in this vein.

{¶21} There is however, some support for dismissal as the appropriate procedural outcome. In *Zuljevic*, the Supreme Court found that the claimant (who had prevailed at the administrative level) could not suffer dismissal of his right-to-participate complaint without notice and an opportunity to be heard regarding the pending

dismissal. In so holding, the Supreme Court defined the possible consequences had the complaint been properly dismissed: "It is an abuse of discretion to dismiss [R.C. 4123.512] proceedings on the basis of a claimant's failure to act where he has not been given notice and an opportunity to show cause why the proceedings should not be dismissed and judgment entered against him." *Id.* at 120 (emphasis added).

{¶22} Despite the fact that this language in *Zuljevic* essentially presents a counterfactual to the holding and, thus, might be considered dicta, it nonetheless reflects the Supreme Court's best indication of a proper procedural solution in cases postured like the one before us: instances in which the employer seeks to modify or reverse a prior administrative order granting a claim. Although we acknowledge that any attempt to reconcile both dismissal and an affirmative judgment invites confusion and endless circular debate, the peculiar posture of R.C. 4123.512 actions makes this conclusion as inescapable as it is counterintuitive.

{¶23} As a result, Advanced's first assignment of error is sustained. On remand, the trial court will dismiss Klamfoth's complaint and enter judgment in favor of Advanced.

{¶24} Advanced's second assignment of error asserts that the trial court erred by failing to order the bureau to adjust Advanced's risk account, i.e., premium account computation, to reflect that no claim was allowed in the present case. Advanced cites *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St.3d 547, 2004-Ohio-6888, for this proposition.

{¶25} This issue is not properly before us as the assignment is prematurely brought; the trial court has not ruled on this question and we decline to do so in the first instance. Advanced's second assignment of error is accordingly overruled as premature.

{¶26} In accordance with the foregoing, Advanced's first assignment of error is sustained, its second assignment of error is overruled, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court with instructions to dismiss Klamfoth's right-to-participate action and enter judgment in favor of Advanced vacating the commission's award of workers' compensation benefits.

*Motion to dismiss denied;
judgment affirmed in part and reversed
in part; cause remanded with instructions.*

BRYANT and SADLER, JJ., concur.
