

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John W. Saxton,	:	
	:	
Plaintiff-Appellant,	:	No. 11AP-923
	:	(C.P.C. No. 10CVD-10-14521)
v.	:	
	:	(REGULAR CALENDAR)
Navistar, Inc. et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 5, 2013

Philip J. Fulton Law Office, and Chelsea J. Fulton, for appellant.

Vorys, Sater, Seymour and Pease LLP, Theodore P. Mattis, and Bethany R. Spain, for appellee Navistar, Inc.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for appellee Administrator, Ohio Bureau of Workers' Compensation.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} John W. Saxton, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Navistar, Inc., defendant-appellee.

{¶ 2} On June 18, 1998, appellant was injured at an event being held in New Jersey by his employer, Navistar, a self-insured employer under Ohio's workers' compensation system. At the time of his injury, appellant was living in Hilliard, Ohio. Navistar filed a workers' compensation claim in New Jersey on appellant's behalf, and appellant received compensation and benefits under the New Jersey claim. On March 25,

2003, the workers' compensation system in New Jersey entered an order for a permanent partial disability award of \$151,134, although appellant retained the right to seek modification of the award within two years if his condition worsened. Via some agreement between Navistar and appellant, Navistar continued to pay appellant's medical expenses after the 2003 award. Appellant left his employment with Navistar in 2008.

{¶ 3} As of 1998, R.C. 4123.54 permitted injured workers to file a workers' compensation claim in multiple states. However, effective September 11, 2008, R.C. 4123.54 and 4123.542 were amended to preclude a claimant who received a decision on the merits for compensation under the workers' compensation laws of another state from filing a claim for compensation in Ohio for the same injury.

{¶ 4} On March 11, 2009, appellant filed a workers' compensation claim in Ohio based upon the same injuries involved in the New Jersey claim. In an order mailed March 5, 2010, a staff hearing officer found that, although appellant's claim was not barred by the statute of limitations in R.C. 4123.84, appellant's claim must be denied because he had already filed a claim in New Jersey and had entered into a full and final settlement with Navistar in that claim. The commission refused appellant's appeal in an order mailed March 27, 2010.

{¶ 5} Appellant filed a notice of appeal and complaint in the Franklin County Court of Common Pleas, seeking the right to participate in the Ohio workers' compensation system. On July 8, 2011, Navistar filed a motion for summary judgment, arguing that R.C. 4123.542 prohibited appellant from filing a claim in Ohio because he filed a claim and received benefits in New Jersey for the same injuries; appellant's claim was barred by the two-year statute of limitations set forth in R.C. 4123.84; and appellant could not file a claim in Ohio because he had entered into a full and final settlement in New Jersey based upon the same injuries. Appellant countered that he had not reached a full and final settlement in New Jersey; R.C. 4123.542 cannot be applied retroactively to preclude his current claim because R.C. 4123.54 permitted claims in both states at the time of his injury; and his claim was brought within the two-year statute of limitations in R.C. 4123.84 because Navistar was on notice of the claim through his physician and appellant received benefits from Navistar, both within two years after his injury.

{¶ 6} On September 30, 2011, the trial court granted summary judgment to Navistar. The trial court first found that R.C. 4123.542 barred appellant from filing a claim in Ohio because he had already filed a claim in New Jersey. The court then found there existed genuine issues of material fact with regard to whether appellant received benefits from Navistar within the statute of limitations, but the court declined to address the notice issue with respect to the statute of limitations, given its ruling that R.C. 4123.542 applied. The court did not address the full and final settlement argument raised by Navistar in its motion for summary judgment. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The trial court erred in granting summary judgment by interpreting R.C. 4123.54 and R.C. 4123.542 on the date appellant asked Ohio to accept jurisdiction rather than the date of injury contrary to long-standing Supreme Court precedent.

{¶ 7} Appellant argues in his assignment of error that the trial court erred when it granted summary judgment to Navistar. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of

material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 8} Appellant presents one issue for review in his sole assignment of error. Appellant argues that the trial court erred when it found R.C. 4123.54 and 4123.542 applied to his case based upon the date appellant filed his request with the commission rather than the date of his injury. It is undisputed that the version of R.C. 4123.54 in effect in 1998 permitted a claimant to file a workers' compensation claim in more than one state. See *McBride v. Coble Express, Inc.*, 92 Ohio App.3d 505, 510 (3d Dist.1993) (finding R.C. 4123.54(B) specifically authorizes the commission to hear cases involving injury in this state to a resident of this state who is injured in the course of his employment, regardless of whether he recovers benefits under the law of another state). However, R.C. 4123.542, which became effective September 11, 2008, provides, in pertinent part:

An employee or the employee's dependents who receive a decision on the merits of a claim for compensation or benefits under the workers' compensation laws of another state shall not file a claim for compensation and benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for the same injury, occupational disease, or death.

{¶ 9} Here, appellant contends that the 2008 amendment to R.C. 4123.542 is not applicable to his claim because the statutory right to file an application for modification of an award is a substantive right that accrues at the time of a claimant's injury. Thus, appellant claims the law applicable to his case was the 1998 version of R.C. 4123.54, which permitted claimants to file workers' compensation claims in multiple jurisdictions, and not the 2008 version of R.C. 4123.542, which prohibited claimants from filing workers' compensation claims in multiple jurisdictions. Appellant also contends that to retroactively apply R.C. 4123.542 to his claim would be contrary to the Ohio Constitution, Article 2, Section 28, which prohibits the violation of substantive rights or the imposition of new duties and obligations arising from past conduct. Appellant again asserts the statutory right to file an application for modification of an award is a substantive right that accrues at the time of a claimant's injury.

{¶ 10} Navistar first counters that R.C. 4123.542 is a remedial statute that governs where a workers' compensation claim can be filed and, therefore, it can be applied retroactively. Navistar contends that R.C. 4123.542 changed only the procedure for determining the forum in which workers' compensation claims could be filed and not the total substantive benefits one could receive, because former R.C. 4123.54 contained a credit for benefits paid in another state for the same injury. Notwithstanding, Navistar also counters that there has been no retroactive application of R.C. 4123.542 here because appellant did not file his claim until 2009, after R.C. 4123.542 was already in effect. Navistar asserts, and the trial court held, that appellant had the opportunity to file his claim before R.C. 4123.542 was enacted in 2008, but he chose not to do so.

{¶ 11} There is no Ohio case law interpreting R.C. 4123.542 on this point. However, appellant asserts that the trial court's holding that R.C. 4123.542 precluded his filing in Ohio is directly contrary to precedent from the Supreme Court of Ohio and this appellate district that a claimant's entitlement to workers' compensation payments is measured by the statutes in force at the time of injury rather than by subsequently enacted statutes, as found in *Republic-Franklin Ins. Co. v. Amherst*, 50 Ohio St.3d 212, 214 (1990), *State ex rel. Kirk v. Owens-Illinois, Inc.*, 25 Ohio St.3d 360 (1986), and *State ex rel. Borden, Inc. v. Martin*, 10th Dist. No. 03AP-257, 2004-Ohio-4647. Navistar dismisses the controlling value of these three cases on the basis that they are factually distinguishable from the present case. Navistar points out that, in the three cases cited by appellant, the commission was found to have improperly applied a new statutory provision that was enacted after the industrial claim was already filed and pending.

{¶ 12} While we agree with Navistar that *Republic-Franklin*, *Kirk*, and *Borden* involve the attempted application of a statutory provision that was enacted after the industrial claim was already filed, whereas the present case involves the attempted application of a statutory provision that was enacted prior to a claim ever being filed in Ohio, we fail to see how this factual difference makes the law articulated in the three cases inapplicable here. None of the three cited cases indicate that the filing status of the injured's claim has any bearing on the broad tenet that an industrial injury claim is measured by the statutes in force at the time of injury. To adopt Navistar's reasoning would be to shift the relevant date for determining what law applies to an industrial claim

from the date of the injury to the date the claim was filed in cases in which a new law is enacted between the date of injury and the date of filing. As *Republic-Franklin*, *Kirk*, and *Borden* plainly indicate, it is the date of the injury that provides the relevant date for determining what law applies to an industrial claim, and the cases make no mention of the exception to this rule that Navistar urges us to adopt.

{¶ 13} The correctness of our reading of *Republic-Franklin*, *Kirk*, and *Borden* is made apparent by the holding in *State ex rel. Jeffrey v. Indus. Comm.*, 164 Ohio St. 366 (1955), which the court relied upon in *Republic-Franklin*. In *Jeffrey*, the court held that:

The right of an injured employee to compensation and medical benefits under the Workmen's Compensation Act is governed strictly by the provisions of that act and may not be changed by the Industrial Commission or even by the General Assembly subsequent to the accrual of the right. The right to payment for medical and hospital expenses is a substantive right, measured by the provisions of the act in force at the time the cause of action accrues, which is the time the injury is received. *Industrial Commission of Ohio v. Kamrath*, 118 Ohio St. 1, 160 N.E. 470; *State ex rel. Schmersal v. Industrial Commission*, 142 Ohio St. 477, 52 N.E.2d 863. The cause of action is the right to participate in the State Insurance Fund, or the right to receive benefits payable by a self-insuring employer.

Id. at 367-68. Thus, the court in *Jeffrey* made clear that the right to participate in the Ohio workers' compensation system is a substantive right that may not be changed subsequent to the date the right accrues, which is the date of injury.

{¶ 14} Applying *Jeffrey* to the present case, appellant's right to participate in the Ohio workers' compensation system accrued on the date of his injury, June 18, 1998. As of that date, R.C. 4123.54 was in force and permitted appellant to participate in the Ohio workers' compensation system even though he had already filed a workers' compensation claim in New Jersey. Thus, appellant's right to participate in the Ohio system could not be altered by the later enactment of R.C. 4123.542 after his right had already accrued. Therefore, the trial court erred when it found that R.C. 4123.542 barred appellant from filing a claim in Ohio because he had already filed a claim in New Jersey.

{¶ 15} Navistar contends that, even if this court concludes that R.C. 4123.542 does not bar appellant's Ohio workers' compensation claim, Navistar is still entitled to

summary judgment because (1) appellant's claim is barred because he entered into a full and final settlement of his New Jersey workers' compensation claim, and (2) appellant's claim is barred by the two-year statute of limitations set forth in R.C. 4123.84. As indicated previously, the trial court found in its decision that there existed a genuine issue of material fact with regard to the statute of limitations under R.C. 4123.84 but did not determine the full and final settlement issue.

{¶ 16} With regard to the full and final settlement issue, which the trial court did not address, Ohio appellate courts often refuse to consider on appeal grounds raised in the trial court but not decided below. Consistent with this principle, in *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89 (1992), the Supreme Court of Ohio noted that where the trial court declined to consider one of the arguments raised in a motion for summary judgment but granted the motion for summary judgment solely on the basis of a second argument, the first argument was not properly before the court of appeals. Because the trial court here decided not to address the full and final settlement issue, we decline to address this issue in the first instance. Furthermore, what Navistar seeks to do here is defend the trial court's judgment on grounds other than those specified in the trial court's judgment entry, i.e., that it was entitled to summary judgment for the additional reason that appellant entered into a full and final settlement in New Jersey. However, because Navistar failed to set forth a cross-assignment of error, pursuant to App.R. 3(C)(2) for our consideration, the issue is not properly before this court. *See Good v. Krohn*, 151 Ohio App.3d 832, 2002-Ohio-4001, ¶ 15 (3d Dist.), citing R.C. 2505.22; App.R. 3(C)(2); 16(A) and (B); *Zotter v. United Serv. Auto. Assn.*, 11th Dist. No. 94-P-0001 (Nov. 10, 1994). Therefore, we remand the matter for the trial court to initially consider and decide the full and final settlement issue.

{¶ 17} With respect to the statute of limitations, the trial court found there existed genuine issues of material fact as to whether appellant received benefits from Navistar within the two-year statute of limitations, but the court declined to address whether Navistar was put on notice within the two-year statute of limitations given its ruling that R.C. 4123.542 applied. Like the full and final settlement issue discussed above, because the trial court did not address the notice issue, we remand that issue to the trial court for a determination in the first instance.

{¶ 18} As for the trial court's determination that there exist genuine issues of material fact as to whether appellant received benefits from Navistar within the two-year statute of limitations, Navistar argues in its brief that the trial court erred when it did not grant his motion for summary judgment on this ground. Navistar contends this court must address the trial court's ruling de novo in this appeal. However, App.R. 3(C)(1) provides, in pertinent part: "A person who intends to defend a judgment * * * against an appeal taken by an appellant and who also seeks to change the judgment * * * shall file a notice of cross appeal." Here, Navistar's argument is actually in the nature of an assignment of error in cross appeal because it essentially asserts an error at trial. Contrary to Navistar's assertion, a finding that the trial court erred in denying its motion for summary judgment on the reception of benefits issue would substantially change the judgment of the trial court. Because no separate notice of appeal was filed with respect to such argument pursuant to App.R. 3(C)(1), we find it is not properly before us. *See, e.g., Ware v. King*, 187 Ohio App.3d 291, 2010-Ohio-1637, ¶ 19 (3d Dist.) (concluding that summary judgment was inappropriate on one of plaintiff's claims and citing App.R. 3(C)(1) when declining to address a statute of limitations argument offered as an alternative in support of the judgment). Therefore, this portion of the trial court's judgment finding a genuine issue of material fact on the reception of benefits issue must be affirmed. For all of the foregoing reasons, appellant's assignment of error is sustained.

{¶ 19} Accordingly, appellant's sole assignment of error is sustained, 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 for proceedings in accordance with law and consistent with this decision.

*Judgment affirmed in part and reversed in part;
cause remanded.*

CONNOR and DORRIAN, JJ., concur.
