

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

HARSCO CORPORATION,	:	
Plaintiff-Appellant,	:	CASE NO. CA2000-12-052
- vs -	:	<u>O P I N I O N</u>
	:	10/1/2001
ROSEMARY BISHOP, et al.,	:	
Defendants-Appellees.	:	

Christopher R. Walsh, 136 West Mound Street, Columbus, Ohio 43215,
for plaintiff-appellant

Arthur C. Graves, 2929 Kenny Road, Suite 295, Columbus, Ohio 43221,
for defendant-appellee

Betty D. Montgomery, Ohio Attorney General, Jeffrey B. Hartranft,
140 E. Town Street, 15th Floor, Columbus, Ohio 43215-6002, for
defendant-appellee, James Conrad, Administrator of Bureau of
Workers' Compensation

WALSH, J. Plaintiff-appellant, Harsco Corporation ("Harsco"),
appeals a decision of the Madison County Court of Common Pleas,
dismissing its declaratory judgment action for lack of subject
matter jurisdiction. We affirm the decision of the trial court.

Defendant-appellee, Rosemary Bishop, was a Harsco employee.
She suffered a workplace injury, and in May 1993, her workers'

compensation claim was allowed by the Ohio Industrial Commission. In February 1999, Bishop filed an additional claim with the Bureau of Workers' Compensation ("BWC"), alleging that she suffered from depression and generalized anxiety disorder arising out of her workplace injury. The claim was allowed, and Harsco appealed this decision to the trial court. Bishop then filed a complaint with the trial court to defend her right to participate in the workers' compensation fund, as required by R.C. 4123.512. Harsco and BWC filed answers to the complaint. However, before proceeding to trial, Bishop voluntarily dismissed her complaint without prejudice pursuant to Civ.R. 41(A).

Harsco subsequently filed a complaint for declaratory judgment. Harsco alleged that Bishop could not establish by a preponderance of the evidence that she had a right to participate in the workers' compensation fund, that Bishop was barred from refiling her action under R.C. 2305.19, and that R.C. 4123.01 et seq. are unconstitutional to the extent that the statutes require employers to pay benefits for conditions which are not work-related. Bishop responded by filing a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction. BWC filed a motion for judgment on the pleadings, alleging that the trial court lacked subject matter jurisdiction to determine Bishop's right to participate in the workers' compensation fund and that the remaining allegations in Harsco's complaint should be dismissed pursuant to Civ.R. 12(B)(6) as there was no real controversy regarding Bishop's ability to refile her complaint or the constitutionality of R.C. 4123.512.

The trial court dismissed Harsco's action, finding that it lacked subject matter jurisdiction to determine Bishop's right to participate in the fund, and that no real controversy existed as to the remaining issues. Harsco appeals, raising a single assignment of error, contending that the trial court erred by dismissing its declaratory judgment action. Harsco raises the following five issues for review:

1. Whether the trial court had subject matter jurisdiction over Appellant's complaint's [sic].
2. Whether the right to participate may only be adjudicated by way of Ohio Revised Code § 4123.512.
3. Whether Ohio Revised Code § 4123.512 is a special statutory proceeding.
4. Whether Ohio Revised Code § 2305.19 applies to the facts of this case.
5. Whether Ohio Revised Code § 4123.512 is constitutional under the facts of this case.

Because it is difficult to consider these issues in isolation, they are addressed together in the following discussion.

R.C. 4123.512 provides a unique process for appealing an administrative decision regarding a claimant's right to participate in the worker's compensation fund. The statute gives both the claimant and the employer the right to appeal a decision of the Industrial Commission to the court of common pleas. R.C. 4123.-512(A). However, regardless of whether the claimant or the employer appeals the decision, it is the claimant's responsibility to file a petition showing a cause of action to participate in the fund, and setting forth the basis for the jurisdiction of the court over the action. R.C. 4123.512(D). Where an employer appeals an unfavorable decision to the common pleas court, "the claimant must,

in effect, re-establish his worker's compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level." Kaiser v. Ameritemps (1999), 84 Ohio St.3d 411, 413, quoting Zuljevic v. Midland-Ross Corp. (1980), 62 Ohio St.2d 116, 118.

The procedural mechanism of R.C. 4123.512 provides the exclusive means for appealing a final decision of the Industrial Commission involving a claimant's right to participate in the workers' compensation fund. Afrates v. City of Lorraine (1992), 63 Ohio St.3d 22, 26. Such decisions, if appealed, must be appealed pursuant to the terms of R.C. 4123.512. Id. Likewise, the only decisions which may be reviewed pursuant to R.C. 4123.512 are those decisions involving a claimant's right to participate in the fund. Id. A final decision of the Industrial commission which does not go to the basis of a claimant's right to participate, "may be challenged by a writ of mandamus, where appropriate, or in an action for declaratory judgment." Id. at 27.

R.C. 4123.512 is considered a special statutory proceeding in that it provides the exclusive means of appealing a decision regarding a claimant's right to participate in the workers' compensation fund. Robinson v. B.O.C. Group, General Motors Corporation (1998), 81 Ohio St.3d 361, 366. Accordingly, Civ.R. 57, which permits declaratory relief where appropriate, even when another adequate remedy exists, does not apply to workers' compensation appeals. State ex rel. Iris Sales Co. v. Voinovich (1975), 43 Ohio App.2d 18, 22. "[D]eclaratory relief should not be granted in those situations where a special statutory proceeding has been pro-

vided for that purpose." Id.

While R.C. 4123.512 is a special statutory proceeding, it does not preclude the application of the Rules of Civil Procedure entirely. Robinson at 370. Civ.R. 1(C) provides, in pertinent part:

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure ***

(7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

This rule is intended to be one of inclusion rather than exclusion. Price v. Westinghouse Elec. Corp. (1982), 70 Ohio St. 2d 131, 132.

"To the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are 'clearly inapplicable.' *** Moreover, it is clear that in certain instances some of the Civil Rules will be applicable while others will be clearly inapplicable." Id., citing Housing Authority v. Jackson (1981), 67 Ohio St.2d 129; see, also, Robinson, 81 Ohio St.2d at 370; Staff Notes (1970) to Civ.R. 1(C). In fact, R.C. 4123.512(D) specifically provides that "[f]urther proceedings shall be had in accordance with the Rules of Civil Procedure[.]"

A worker's compensation claimant is considered the plaintiff regardless of who initiates the appeal. Robinson at 368; Kaiser, 84 Ohio St.3d at 415. As plaintiff, a claimant under R.C. 4123.512 must be afforded all of the rights provided by the Rules of Civil Procedure. Id. at 416. Civ.R. 41(A)(1)(a), which provides that a plaintiff may dismiss an action without order of court "by filing a

notice of dismissal at any time before the commencement of trial, "may be used by a claimant to voluntarily dismiss a complaint filed with the court of common pleas pursuant to R.C. 4123.512. Id. at syllabus. The voluntary dismissal by the claimant does not affect the employer's notice of appeal, which remains pending until the refiling of the complaint. Id. at 415.

Pursuant to R.C. 2305.19, upon voluntary dismissal of a complaint, "the plaintiff *** may commence a new action within one year after such date." Thus, a plaintiff is precluded from refiling a claim more than a year from the time of the dismissal of the original complaint. The Supreme Court has held that "R.C. 2305.19, the savings statute, is applicable to worker's compensation complaints filed in the common pleas courts." Lewis v. Connor (1985), 21 Ohio St.3d 1, at syllabus. As the workers' compensation claimant is considered the plaintiff regardless of who brings the appeal under R.C. 4123.512, the claimant is permitted to refile the complaint within one year. Id. at 4; see, also, Kaiser at 415. Should the claimant fail to refile within the statutory time frame, the claimant forfeits the right to prove the right to participate in the fund. Kaiser at 415.

Because the claimant cannot delay the refiling of the complaint, the employer suffers no prejudice. Id. The employer will be reimbursed for any sum which is wrongfully paid from the state surplus fund. The Supreme Court has held that this right to reimbursement satisfies the right to a remedy guaranteed by Section 16, Article I, of the Ohio Constitution. Sysco v. Food Services of Cleveland, Inc. (2000), 89 Ohio St.3d 612. Because this remedy

exists, the Supreme Court has further held that R.C. 4123.512 does not unconstitutionally require employers to pay benefits for conditions which are not work-related. Kaiser, 84 Ohio St.3d 411, 415.

As R.C. 4123.512 provides the exclusive mechanism for appealing a determination of a claimant's right to participate in the workers' compensation fund, the trial court was without jurisdiction to consider that portion of Harsco's complaint which alleged that Bishop could not establish her right to participate. Harsco's remaining allegations fail to present a real, justiciable controversy. The Supreme Court of Ohio has expressly found that R.C. 2305.19 applies to workers' compensation appeals, Connor, 21 Ohio St.3d at syllabus, and has declared that R.C. 4123.512 does not violate the constitutional rights of employers. Kaiser at 415. The assignment of error is overruled.

The judgment of the trial court is affirmed.

YOUNG, P.J., and POWELL, J., concur.

[Cite as *Harsco Corp. v. Bishop*, 2001-Ohio-8714.]