[Cite as *Barber v. Ryan*, 2010-Ohio-3471.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MARY C. BARBER,	:	
Appellee,	:	CASE NO. CA2010-01-006
	:	O P I N I O N
- vs -	:	7/26/2010
MARSHA P. RYAN, Administrator, Ohio Bureau of Workers' Compensation, et al.,	:	
Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV09-04-1565

Stephen S. Mazzei, Martin M. Young, 1014 Vine Street, Suite 2400, Cincinnati, Ohio 45202, for appellee, Mary C. Barber

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HENDRICKSON, J.

{¶1} This is an appeal of a judgment of the Butler County Court of Common Pleas ruling on motions pertaining to a medical examination in a workers' compensation case. For the reasons outlined below, we dismiss the appeal.

{¶2} In July 2008, according to the allegations in the complaint, appellee, Mary C. Barber, sustained a cervical strain in the course of her employment at Premier Coatings, Ltd. Barber filed an application for workers' compensation based upon the injury. The claim was ultimately denied by the Industrial Commission of Ohio. Barber appealed the denial of her claim to the common pleas court pursuant to R.C. 4123.512. The complaint named Marsha P. Ryan, the Administrator of the Ohio Bureau of Workers' Compensation ("BWC" or "the agency"), and Premier Coatings as defendants.[1]

{¶3} During discovery, the BWC scheduled an appointment for Barber to undergo an independent medical examination with a physician chosen by the agency. Barber expressed her willingness to attend the examination, but only if certain conditions were satisfied. Among other things, Barber required that a member of her counsel's office (as later clarified, a licensed attorney) be permitted to attend the examination to observe and take notes.

{¶4} In October 2009, unwilling to accept Barber's conditions, the BWC moved to compel a physical and mental examination under Civ.R. 35(A). Barber subsequently filed a motion in limine requesting, inter alia, that all counsel, parties, experts, and any other testifying witnesses be prohibited from using the term "independent" to describe the examination.

{¶5} In an entry issued on January 6, 2010, the common pleas court ruled in favor of the BWC on its Civ.R. 35(A) motion. The court also granted Barber's motion in limine in part, ordering that all counsel, parties, experts, and any other witnesses were to refrain from using the adjective "independent" to describe the examination. This appeal

1. Although Premier Coatings, Ltd. was a defendant in the proceedings below, the entity is not a party to this appeal.

followed.

{¶6} Before reaching the merits of the BWC's single assignment of error, we must first determine whether the appeal is properly before us. Appellate courts have jurisdiction to review the final orders or judgments of inferior courts within their districts. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2501.02. This court is required to raise jurisdictional issues sua sponte and dismiss an appeal that is not taken from a final appealable order. See *Stevens v. Ackman*, 91 Ohio St.3d 182, 186, 2001-Ohio-249. In order for a judgment to constitute a final appealable order, the entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B).[2] *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus.

{¶7} In pertinent part, R.C. 2505.02(B) establishes that the following orders are final and appealable:

{¶8} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶9} " * * *

{¶10} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶11} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶12} "(b) The appealing party would not be afforded a meaningful or effective

2. The common pleas court's January 6, 2010 entry concluded with the following paragraph: "Finally, in accordance with *Ohio Revised Code §2505.02*, the Court determines that this Entry is a final appealable order and that there is no just cause to delay any appeal thereof." (Emphasis in original.) This does not relieve us of our obligation to determine whether we possess jurisdiction over the matter. A lower court's assertion that its order is final and appeal under R.C. 2505.02 or insertion of Civ.R. 54(B) language does not render appealable an otherwise nonappealable order. *State ex rel. Cook v. Seneca Cty. Bd. of Commrs.*, 175 Ohio App.3d 721, 2008-Ohio-736, ¶16.

remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶13} A survey of Ohio case law indicates that a number of decisions issued by the Tenth Appellate District have addressed whether an order compelling a party to undergo a

physical or medical examination pursuant to Civ.R. 35(A) is a final appealable order. In *Kinsey v. Erie Ins. Grp.*, Franklin App. No. 03AP-51, 2004-Ohio-579, the Tenth District answered this question in the affirmative. The court determined that the order in that case compelling an injured motorist to submit to a medical examination was a provisional remedy within the meaning of R.C. 2505.02(A)(3) and (B)(4). In reaching this conclusion, the court found that the order satisfied the following "provisional remedy" test enunciated by the Ohio Supreme Court in *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93:

{¶14} "[A]n order is a 'final order' [under R.C. 2505.02(B)(4)] if it satisfies each part of a three-part test: (1) the order must either grant or deny relief sought in a certain type of proceeding – a proceeding that the General Assembly calls a 'provisional remedy,' (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." Id. at 446.

{¶15} The *Kinsey* court determined that the order compelling the exam was a provisional remedy that was determinative of the issue and prevented a judgment in favor of the injured motorist, the appealing party, on that issue. *Kinsey* at ¶11-12. The

court further found that the injured motorist would not be afforded a meaningful or effective remedy on appeal from final judgment due to the fact that the Civ.R. 35(A) order did not specify the scope of the medical examination. Id. at ¶13-14. This omission, the court reasoned, could expose the motorist to an unjust invasion of privacy which would not be remedied on appeal after final judgment. Id. at ¶14. Finding the three *Muncie* elements met, the court concluded that the order granting the motion to compel the medical examination was a final appealable order. Id. at ¶15.

{¶16} The Tenth District revisited the issue a short time later in *Vetter v. Twesigye*, 159 Ohio App.3d 525, 2005-Ohio-201. After reviewing the decision reached in *Kinsey*, the court determined that the Civ.R. 35(A) order to compel a medical examination of the injured motorist in the case at bar arguably satisfied the first two *Muncie* elements. Id. at ¶12. However, the *Vetter* court found the third *Muncie* element to be lacking. Id. at ¶13. That is, the injured motorist failed to show that the order precluded a meaningful, effective remedy by appeal following final judgment. Id. Unlike the unfettered Civ.R. 35(A) order in *Kinsey*, the Tenth District found that the orders in *Vetter* prescribed conditions and set the scope of the medical examination. Id. at ¶15. This distinction removed the case from the privacy concerns articulated in *Kinsey*. See id. The appellate court went on to list a number of remedial measures the injured motorist could pursue following the examination. Id. at ¶13-14. The *Vetter* court thus concluded that the order granting the motion to compel the medical examination in that case was not a final appealable order. Id. at ¶18.

{¶17} Finally, the Tenth District returned to the issue in *Stratman v. Sutantio*, Franklin App. No. 05AP-1260, 2006-Ohio-4712. The court found the *Stratman* case to be akin to *Kinsey* in that the trial court's Civ.R. 35(A) order compelling the injured motorist to submit to a medical examination failed to establish the scope of the

examination in any way. Id. at ¶10. The court again expressed its concern that the injured motorist may be deprived of a meaningful or effective remedy by appeal after final judgment due to the danger of an unjust invasion of privacy. Id. Accordingly, the *Stratman* court ruled that the order granting the motion to compel the medical examination in that case was a final appealable order. Id.

{¶18} Following the Tenth District's decisions in the above cases, the Ohio Supreme Court issued a decision directly on point with the present matter in *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353. A city worker employed as a refuse collector was granted workers' compensation benefits after being injured on the job. The employee appealed the administrative denial of his amended claim seeking benefits for posttraumatic injuries to the common pleas court. The BWC filed a motion to compel the worker to attend a second medical examination, which was granted.

{¶19} On appeal, the Sixth Appellate District reversed. The appellate court found that an order compelling a medical examination was an order that affected a substantial right in a special proceeding, hence a final, appealable order under R.C. 2505.02(B)(2). However, the court found that Civ.R. 35(A) required the BWC to show good cause for requesting the second examination, which the agency failed to do.

{¶20} The Ohio Supreme Court accepted a discretionary appeal by the BWC. The court also determined that a conflict existed among the appellate districts, and certified the following question for resolution: "Is a ruling which grants a Civ.R. 35(A) motion for a physical or mental examination, made in a special proceeding such as a divorce case or a workers' compensation case, a final appealable order under either R.C. 2505.02(B)(2) or R.C. 2505.02(B)(4)?" *Myers v. Toledo*, 106 Ohio St.3d 1542, 2005-Ohio-5343.

{¶21} In conducting its analysis, the high court first examined whether an order

for an independent medical examination issued pursuant to Civ.R. 35(A) qualifies as a final, appealable order under the "special proceeding" provision of R.C. 2505.02(B)(2). The term "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). The court observed that a claim for workers' compensation was specially created by statute and did not exist at common law or in equity. *Myers*, 2006-Ohio-4353 at ¶15. Accordingly, a claim for workers' compensation entails a special proceeding within the meaning of the statute. Id.

{¶22} The high court then addressed whether the common pleas court's order compelling the injured worker to undergo an independent medical examination affected a substantial right. A "substantial right" is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). The court examined case law pertaining to the issue, after which it determined that a party in an action whose physical condition is in controversy does not retain a substantial right to prevent a court from ordering a physical examination. Id. at ¶22. The court concluded that an order compelling such a party to submit to a medical examination for good cause shown does not affect a substantial right. Id. Consequently, an order of this sort is not a final, appealable order under R.C. 2505.02(B)(2). Id.

{¶23} The high court next considered whether an order for an independent medical examination issued pursuant to Civ.R. 35(A) qualifies as a final, appealable order under the "provisional remedy" provision of R.C. 2505.02(B)(4). The court scrutinized the first prong of the *Muncie* test, examining whether the order at issue granted or denied relief in a proceeding deemed a "provisional remedy" by the General Assembly. Id. at ¶23.

{¶24} The term "provisional remedy" is defined as "a proceeding ancillary to an action, including, but not limited to, * * * discovery of privileged matter." R.C. 2505.02(A)(3). Prior to the amendment of the statute to include the provisional-remedy section, the high court ruled that discovery orders were neither final nor appealable due to their interlocutory nature. Id., quoting *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, paragraph seven of the syllabus.

{¶25} The *Myers* court conceded that a discovery order seeking privileged matter is a provisional remedy under the plain terms of R.C. 2505.02(A)(3). Id. at ¶24. Nonetheless, the high court noted, the General Assembly did not include *all* discovery orders in the definition of "provisional remedy." Id. Applying the canon of expressio unius est exclusio alterius, or the expression of one or more things implies the exclusion of those not expressed, the high court held that a Civ.R. 35(A) motion for a medical examination is not a provisional remedy and is therefore not a final, appealable order under R.C. 2505.02(B)(4). Id. at ¶24-25.

{¶26} We find the Ohio Supreme Court's decision in *Myers* to be controlling over the present matter. Accordingly, we hold that the common pleas court's order granting the BWC's motion to compel the medical examination and partially granting Barber's motion in limine was an interlocutory order that does not satisfy the requirements of R.C. 2505.02(B)(2) or (B)(4) and is therefore not a final, appealable order. Because we lack jurisdiction over the present matter, the appeal must be dismissed for lack of a final, appealable order.

{¶27} Appeal dismissed.

POWELL, P.J., and RINGLAND, J., concur.