

[Cite as *Smith v. Ohio Bur. of Workers' Comp.*, 2002-Ohio-4260.]

IN THE COURT OF CLAIMS OF OHIO

ROBERT L. SMITH :
 :
 Plaintiff : CASE NO. 2002-04402
 :
 v. : DECISION
 :
 BUREAU OF WORKERS' :
 COMPENSATION :
 :
 Defendant :
 :::::::::::::::

{¶1} Plaintiff filed this action against defendant on April 29, 2002. On June 4, 2002, defendant filed a motion to dismiss. On June 18, 2002, plaintiff filed a memorandum in opposition to defendant's motion. The matter is now before the court for determination.

{¶2} Although plaintiff's complaint contains 13 "charges and/or violations," the court construes the allegations as setting forth causes of action for: 1) wrongful termination of workers' compensation benefits; 2) fraud; 3) intentional infliction of emotional distress; and, 4) civil conspiracy. Defendant contends that these claims should be dismissed pursuant to both Civ.R. 12(B)(1) and (6), because this court lacks subject matter jurisdiction and because plaintiff has failed to state a claim upon which relief can be granted.

{¶3} Under Civ.R. 12(B)(1), the question presented is whether plaintiff has alleged any cause of action cognizable in this forum. Under Civ.R. 12(B)(6) the question is whether it can be determined beyond doubt, from the complaint, that plaintiff can prove no set of facts that entitle him to recovery. In construing a complaint under this section, the court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*

(1988), 40 Ohio St.3d 190, 192. However, the court need not presume the truth of conclusions unsupported by factual allegations. *Id.* at 193.

{¶4} In plaintiff's complaint, plaintiff alleges that he sustained a work-related injury in the course of his private employment with National Electric Coil; that he was subsequently unable to perform certain duties required of his position; that he received temporary total compensation benefits for four months; that he was thereafter offered a modified job created by his employer; that he elected not to take the modified job; and that his benefits were wrongfully terminated by defendant, Bureau of Workers' Compensation (BWC), pursuant to R.C. 4123.56.

{¶5} Defendant contends that once plaintiff's benefits were terminated, his only recourse was to challenge the termination under R.C. 4123.512, which states, in pertinent part: "[t]he claimant or the employer may appeal an order of the industrial commission *** in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county ***." Additionally, challenges to decisions involving the extent of disability may be reviewed only by way of an action in mandamus. Similarly, "[a] decision going to a claimant's right to participate or to continue to participate in the workers' compensation fund must be appealed to the common pleas court." *Robinson v. AT & T Network Systems*, Franklin App. No. 01AP-817, 2002-Ohio-1455 (citing *Zavatsky v. Stringer* (1978), 56 Ohio St.2d 386, 403).

{¶6} Some of plaintiff's claims appear to the court to concern the termination of his workers' compensation benefits, his right to participate or continue to participate in the fund, and otherwise to challenge the determination concerning his degree of disability. However, plaintiff alleges that his claims are "derivative" and are based upon "the factor of [defendant] not applying case laws, current statutes, ohio revised codes, [and] Ohio administrative codes that apply ***." In other words, it is not the decision itself, but the manner in which it was made.

{¶7} Drawing all reasonable inferences in favor of plaintiff, the court concludes that, regardless of phraseology, the nature of this portion of plaintiff's claim is a challenge

to the denial of workers' compensation benefits. Since the court has no jurisdiction over such claims, they shall be DISMISSED.

{¶8} Plaintiff's cause of action in fraud fails to state a claim against defendant since the operative facts are not directed at defendant. Rather, plaintiff alleges that his private employer falsely notified both himself and defendant that his attending physician had released him to return to work. Plaintiff states that his physician never gave plaintiff permission to return to work, and that his employer "fabricated" the letter. Plaintiff's civil conspiracy claim concerns defendant's use of this letter, and defendant's alleged failure to properly apply the law. These accusations, even if accepted as true, fail to support either a claim of fraud or civil conspiracy. To the contrary, if believed, the complaint supports a theory that defendant was the victim of a fraud perpetrated by plaintiff's employer. As such, defendant cannot be considered a "conspirator" under Ohio law since defendant did not participate in the alleged fraud, but rather, may itself be a victim of such fraud. See *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 1995-Ohio-61; *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219. Therefore, plaintiff's claims of fraud and civil conspiracy must be DISMISSED.

{¶9} Plaintiff's claims concerning infliction of emotional distress stem from the same allegations discussed above, namely, failure to properly apply the law, fraud and civil conspiracy. As stated above, the court has found that plaintiff's complaint fails to set forth sufficient facts to support such claims. The court further finds that allegations of plaintiff's complaint cannot possibly be construed as extreme and outrageous conduct as that term is defined under Ohio law. Accordingly, plaintiff's complaint fails to state a claim upon which relief can be granted.

{¶10} For the foregoing reasons, plaintiff's complaint shall be dismissed.

JUDGE

Entry cc:

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