[Cite as *Willis v. Ohio Dept. of Transp.* , 2016-Ohio-1593.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

MICHAEL E. WILLIS,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 15CA13
OHIO DEPARTMENT OF TRANSPORTATION, (ODOT)	:	
	:	
And		DECISION AND
	:	JUDGMENT ENTRY
STEPHEN BUEHRER, ADMINISTRATOR OHIO BUREAU OF WORKERS' COMPENSATION	:	RELEASED: 04/12/2016
	:	
Defendants-Appellees		

APPEARANCES:

David R. Spears, Spears & Associates Co., L.P.A., Ironton, Ohio for appellant Michael Willis.

J. Miles Gibson, Isaac Wiles Burkholder & Teetor, LLC, Columbus, Ohio for appellee Ohio Department of Transportation.

Michael DeWine, Ohio Attorney General and Latawnda N. Moore, Assistant Attorney General, Columbus, Ohio for appellee Stephen Buehrer, Administrator, Ohio Bureau of Workers' Compensation.

Hoover, J.

{¶ 1} Plaintiff-appellant Michael E. Willis ("Willis") appeals a decision from the Lawrence County Common Pleas Court granting summary judgment in favor of defendants-appellees Ohio Department of Transportation ("ODOT") and Stephen Buehrer, Administrator, Ohio Bureau of Workers' Compensation ("BWC"). Willis brought an appeal before the

Lawrence County Common Pleas Court from an Ohio Industrial Commission ("Commission") order pursuant to R.C. 4123.512. Willis specifically appealed the denial of his request to participate in the Ohio workers' compensation fund for the condition of post-laminectomy syndrome. Willis and ODOT both filed separate motions for summary judgment. ODOT argued that a workers' compensation claim is not recognized for a symptom such as post-laminectomy. The Administrator joined ODOT's motion for summary judgment. The trial court granted summary judgment in favor of ODOT and the Administrator.

{¶ 2} Willis now presents two assignments of error challenging the trial court's decision to grant summary judgment in favor of ODOT and the Administrator. First, Willis argues that the trial court erred in finding that post-laminectomy syndrome is a symptom and not a medical condition. Second, Willis argues that the trial court committed reversible error when it indicated that mandamus would be his appropriate course of action in this case.

{¶ 3} The trial court granted summary judgment in favor of ODOT and the Administrator because it found that post-laminectomy syndrome is a symptom rather than a condition and is not compensable under Ohio workers' compensation law. The trial court relied upon *Edney v. Life Ambulance Serv., Inc.*, 10th Dist. No. 11AP-1090, 2012-Ohio-4305 and other appellate decisions that found certain symptoms do not rise to the level of a condition for purpose of workers' compensation claims. However, a BWC policy specifically recognizes "postlaminectomy syndrome" as an allowed condition in a workers' compensation claim. We find that *Edney* is distinguishable from the case at hand because the claimant in *Edney* requested recognition of a generic condition of chest pain. Here, Willis sets forth a specific condition of post-laminectomy syndrome that the BWC has recognized as allowable. We find that the trial court erred in relying on *Edney* to find that post-laminectomy is not a compensable condition.

{¶ 4} We also find that the trial court's conclusion prevented it from addressing the question of fact of whether Willis may participate in the workers' compensation fund for the condition of post-laminectomy. We decline to answer that question of fact here. Therefore, Willis's first assignment of error is sustained; and the trial court's decision granting summary judgment in favor of ODOT and the Administrator is reversed.

{¶ 5} Willis's second assignment of error asserts that the trial court committed reversible error by suggesting that mandamus would be the appropriate action to obtain the relief he desires. Because our disposition of his first assignment of error reversed the trial court's decision granting summary judgment, Willis's second assignment of error is rendered moot.

{¶ 6} Therefore, we reverse the decision of the trial court granting summary judgment in favor of ODOT and the Administrator and remand this cause to the trial court for proceedings consistent with this opinion.

I. Facts and Procedural Posture

{¶ 7} We note that of the three parties to this appeal, only Willis provided a statement of facts. The Administrator accepted and adopted the statement of the case and statement of facts set forth by Willis in his appellate brief. Like the Administrator, ODOT failed to provide a statement of facts and also failed to provide a statement of the case. However, ODOT did not adopt the facts as set forth in Willis's appellate brief. Therefore, besides what is contained in the parties' motions in the trial court below, Willis's statement of facts is uncontroverted.

{¶ 8} Willis suffered an injury in February 1990 while he was employed by ODOT. Willis then sought to participate in the workers' compensation fund for his injuries. Willis's claim, number PEL235134, was allowed for multiple conditions including disc displacement, sciatica, bulging disc at L4-L5 and L5-S1, and left lateral herniated disc at L5-S1.

{¶ 9} In March 2004, Willis underwent lumbar spinal surgery. The BWC and the Managed Care Organization approved and paid for the operation. Willis was able to return to work thereafter. However, Willis sought additional treatment for his back in 2012. Willis received treatment from Dr. David Caraway. Dr. Caraway recommended and requested that Willis be evaluated for a spinal cord stimulator trial. Both the BWC and the Commission denied Willis's request for a spinal cord stimulator. The Commission concluded that the treatment of a spinal cord stimulator was directed at non-allowed conditions.[1]

{¶ 10} In response to the denial of treatment, Willis requested that the condition of post-laminectomy syndrome be added to his claim. According to Willis, the district hearing officer granted his request. However, at the next level, the staff hearing officer vacated the decision of the district hearing officer and denied Willis's request. Willis then filed an appeal of the staff hearing officer's decision with the Commission. The Commission refused to hear the appeal of the staff hearing officer's order.

{¶ 11} In October 2013, Willis filed a notice of appeal with the Lawrence County Common Pleas Court pursuant to R.C. 4123.512. Soon after, Willis filed a complaint.

{¶ 12} In February 2015, ODOT filed a motion for summary judgment, arguing that post-laminectomy syndrome is a description of Willis's pain after a failed spinal surgery and that subjective pain syndromes are not allowable. ODOT attached an affidavit of Dr. Edwin Season

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[1] In his appellate brief, Willis references a medical examination by Dr. James Sardo. Willis states that Dr. Sardo opined, "there were currently no claim allowances to support spinal cord stimulator trial." Willis attached a medical report written by Dr. Sardo, as "Exhibit A," to his appellate brief. Willis also attached to his appellate brief, as "Exhibit B," the District hearing officer's order regarding his request to approve a psychologist referral to consider whether he was a spinal cord stimulator candidate. However, we may not consider exhibits attached to appellate briefs that are not part of the record. *Dagostino v. Dagostino*, 165 Ohio App.3d 365, 2006-Ohio-723, 846 N.E.2d 582, fn. 2 (4th.Dist.). App.R. 9(A) limits our consideration to the "original papers and exhibits thereto filed in the trial court."

to its motion for summary judgment. Dr. Season opined that post-laminectomy syndrome is a description of Willis's pain after a failed spinal surgery, and not an allowed condition.

{¶ 13} Willis also filed a motion for summary judgment, arguing (1) that post-laminectomy syndrome is a condition, not a symptom, (2) that the BWC has made a specific rule that post-laminectomy syndrome is a compensable injury, and (3) that both medical opinions before the trial court are consistent with the criteria needed to diagnose post-laminectomy syndrome. Willis attached both the affidavit of Dr. Season and an affidavit from Dr. D.J. Carey II to his motion for summary judgment. In his affidavit, Dr. Carey states that Willis has clearly met all the criteria for the diagnosis of post-laminectomy syndrome.

{¶ 14} Thereafter, the Administrator filed a motion joining ODOT's motion for summary judgment. We note that in the motion, the Administrator stated that the Commission was not a party to this action and "Thus, the commission's policies have little if nothing to do with the issue at hand. Instead, if Willis chooses to challenge the commission's denial of a pain pump (the issue at the heart of this case), his remedy is to challenge that decision in mandamus."

{¶ 15} In April 2015, the trial court found that Willis's requests "deal with a symptom rather than a condition and are not compensable under Ohio Workers' Compensation Law." The trial court also stated, "Additionally, both parties' Counsel seem to agree that a mandamus action against the Ohio Industrial Commission is the appropriate way to try to obtain the relief which Plaintiff desires concerning his failed lumbar back syndrome, i.e. post-laminectomy syndrome." Thus, the trial court overruled Willis's motion for summary judgment and granted summary judgment in favor of ODOT and the Administrator.

{¶ 16} In June 2015, the trial court filed its judgment entry stating, "Accordingly, the appeal filed by Plaintiff pursuant to O.R.C. 4123.512 requesting recognition of additional

conditions is hereby denied, and the claim is specifically denied for the condition post laminectomy syndrome." Willis then filed this timely appeal.

II. The Common Pleas Court's Jurisdiction Pursuant to R.C. 4123.512(A)

{¶ 17} As a preliminary matter, we will determine whether the trial court had jurisdiction over this case. In particular, did Willis's notice of appeal to the trial court substantially comply with R.C. 4123.512, and thereby vest jurisdiction in the Lawrence County Common Pleas Court? We believe that it did.

{¶ 18} Willis's notice of appeal before the trial court stated:

> Plaintiff-Appellant hereby serves Notice of Appeal and does appeal from an Order of the Ohio Industrial Commission dated September 10, 2013, which affirmed a decision of the Staff Hearing Officer of the Ohio Industrial Commission dated August 20, 2013. Plaintiff-Appellant further states that the employer is Chillicothe, Ohio Department of Transportation, P.O. Box 899, Columbus Ohio 43216. The claim number is PEL235134.

{¶ 19} Pursuant to R.C. 4123.512(A), a claimant or an employer may appeal an order of the Commission to the common pleas court. Also, "[l]ike appeal may be taken from an order of a staff hearing officer* * * from which the commission has refused to hear an appeal." R.C. 4123.512(A). Accordingly, "[w]here the Industrial Commission refuses to review a decision of a staff hearing officer, the proper order from which an appeal may be taken is the order of the staff hearing officer." *Connelly v. Parma Community General Hosp.*, 8th Dist. Cuyahoga No. 83747, 2004-Ohio-3738, ¶ 11.

{¶ 20} Here, in his notice of appeal, Willis indicated to the trial court that he was appealing the September 10, 2013 order from the Commission. Willis's notice of appeal also

references the August 20, 2013 decision of the staff hearing officer. On appeal, the Fourth District Court of Appeals Magistrate issued an order directing Willis to address whether jurisdiction was properly vested in the trial court. In his response to the Magistrate's order, Willis stated, "On 9-10-13 the Ohio Industrial Commission issued an order wherein it refused further appeal from the order of the Staff Hearing Officer dated 8-20-13, and refused to allow discretionary appeal to the Ohio Industrial Commission."[2] Therefore, pursuant to R.C. 4123.512(A), Willis should have appealed the staff hearing officer's order, and not the order of the Commission.

{¶ 21} However, "[i]n *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 505 N.E.2d 975, paragraph one of the syllabus, the [Ohio Supreme Court] held that the jurisdictional requirements of R.C. 4123.519 (now R.C. 4123.512) are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of the statute." *Akers v. Johnson Controls, Inc.* 4th Dist. Highland No. 96CA900, 1997 WL 360569, *7. "Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. [4123.512] includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities." *Fisher* at paragraph two of the syllabus.

{¶ 22} R.C. 4123.512(A) also provides, "The filing of the notice of the appeal [with the common pleas court] is the only act required to perfect the appeal." "The notice of appeal shall state the names of the administrator of workers' compensation, the claimant, and the employer; the number of the claim; the date of the order appealed from; and the fact that the appellant appeals therefrom." R.C. 4123.512(B).

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[2] Neither ODOT nor the Administrator responded to Willis's memorandum addressing the Magistrate's order.

{¶ 23} In *Fisher*, a plaintiff's notice of appeal to the Franklin County Common Pleas Court stated that "[plaintiff] hereby gives[s] notice of his appeal from the decision [*sic*] of the Industrial Commission of Ohio dated May 2nd, 1984* * *[.]" *Id.* at 8. In that case, the plaintiff filed an application for workers' compensation benefits. *Id.* The district hearing officer denied plaintiff's claim. *Id.* Plaintiff appealed to the Columbus Regional Board of Review, which affirmed the district hearing officer's order in all respects. *Id.* Plaintiff then pursued an appeal to the Commission. *Id.* The Commission refused to hear the appeal in an order dated April 20, 1984. *Id.*

{¶ 24} The Ohio Supreme Court rejected strict compliance with R.C. 4123.519 (now R.C. 4123.512) in favor of a substantial compliance standard. *Id.* at 10-11. Thus, the Ohio Supreme Court found that the notice of appeal, incorrectly designating the refusal order as the appealed order, still substantially complied with R.C. 4123.519. *Id.* at 11. The court further stated, "[b]y correctly designating the parties to the action, and the case number, all concerned parties had sufficient information from which they could determine that a particular claim or action was forthcoming. No party has alleged, and no party can now demonstrate, surprise or unfair prejudice to its interest." *Id.*

{¶ 25} In *Day v. Mayfield*, 3d Dist. Shelby No. 17-85-19, 1987 WL 10646 (Apr. 30, 1987), appellant filed a notice of appeal to the common pleas court from an order of the Columbus Regional Board of Review because the Commission had refused appeal. *Id.* at *1. However, the Commission, in fact, had heard and denied the appeal. *Id.* at *2. Therefore, the Commission's order was the appealable order and not the order of the Columbus Regional Board of Review. *Id.* The common pleas court granted appellee's motion to dismiss the appeal because the court lacked jurisdiction under the provisions of R.C. 4123.519. *Id.* The Third District Court

of Appeals reversed the decision of the trial court because of the Ohio Supreme Court's previous decisions determining that courts should consider if an appellant substantially complied with the statutory provisions. *Id.* at *3. The District Court noted that the notice of appeal referenced the decision and date of the decision that actually should have been appealed. *Id.*

{¶ 26} In *Hamilton v. Cuyahoga Community College*, 167 Ohio App.3d 114, 2006-Ohio-3017, 854 N.E.2d 218 (8th Dist.), the Eighth District Court of Appeals addressed whether a notice of appeal to the common pleas court substantially complied with R.C. 4123.512 when the notice of appeal was "somewhat inartfully [sic] phrased." *Id.* at ¶ 17. In *Hamilton*, an appellant's notice of appeal stated:

> [Appellant] hereby gives notice of its appeal from the decision of [the district hearing officer]. Thereafter a Staff Hearing Officer affirmed [the district hearing officer's order] from which decision the Industrial Commission of Ohio* * * refused to permit Employer's appeal directly to the three member Industrial Commission, in an order dated January 16, 2003, and received by [appellant] on January 21, 2003.
>
> Said order is appealable to this Court pursuant to the provisions of Section 4123.512, Revised Code.

Id. at ¶¶ 5-6.

{¶ 27} The Eighth District concluded that the record demonstrated that appellee was put on notice as to what was being appealed. *Id.* at ¶ 17. Therefore, the court held that the "[appellant] substantially complied with the requirements of R.C. 4123.512 and that [appellee] was not surprised or unfairly prejudiced by the appeal and, thus, the notice of appeal was sufficient to confer jurisdiction on the common pleas court." *Id.* at ¶ 25.

{¶ 28} In some other cases involving a notice of appeal that signifies appeal from an incorrect order, courts have found substantial compliance. *See e.g. Connelly,* 2004-Ohio-3738 (finding notice of appeal substantially complied with R.C. 4123.512 when it referred to the Commission's refusal order because the notice of appeal correctly identified the parties and claim number and the staff hearing officer's decision was detailed in the complaint); *State ex. rel. Ernest Auto Body Shop,* 30 Ohio St.3d 138, 507 N.E.2d 1128 (1987) (declining to issue a writ of prohibition to prevent review where notice of appeal referred to an incorrect order but otherwise complied with the statutory requirements of R.C. 4123.519); *Dorrington v. John Hancock Mut. Life Ins. Co.,* 8th Dist. Cuyahoga Nos. 50694 & 50617, 1986 WL 9956, *3 (Sept. 11, 1986) (finding notice of appeal from an order of the Commission refusing to hear an appeal from an order of the Regional Board of Review substantially complied with statutory provisions, because it was "readily apparent" that the claimant appealed from the board's decision, since a clamant cannot appeal a denial order); *State v. ex rel. Ormet Corp. v. Burkhart*, 25 Ohio St.3d 112, 495 N.E.2d 422 (1986) (reversing a trial court's decision to dismiss for lack of jurisdiction even though the notice of appeal incorrectly identified the Commission's refusal order as the appealed order).

{¶ 29} Here, we find that Willis's notice of appeal to the Lawrence County Common Pleas Court substantially complied with the jurisdictional requirements of R.C. 4123.512. At no time has ODOT nor the Administrator asserted that Willis's appeal was not proper or that they were unfairly prejudiced because of Willis's notice of appeal. Furthermore, the notice of appeal references both the Commission's decision, dated September 10, 2013 and the staff hearing officer's decision, dated August 20, 2013. The notice of appeal contains the names of the Administrator, the claimant and the employer, and the number of the claim. We find that the

notice of appeal contained sufficient information from which the parties could determine that a particular claim or action was forthcoming. *See Fisher*, 30 Ohio St.3d at 11, 505 N.E.2d 975 (1987). Accordingly, we conclude that Willis's notice of appeal substantially complied with the statutory requirements of R.C. 4123.512. Therefore, the Lawrence County Common Pleas Court had jurisdiction to hear this case.

III. Assignments of Error

{¶ 30} Willis presents the following assignments of error for our review:

Assignment of Error No. 1:

THE TRIAL COURT'S FINDING THAT A POST-LAMINECTOMY SYNDROME IS A SYMPTOM AND NOT A MEDICAL CONDITION CONSTITUTED REVERSIBLE ERROR.

Assignment of Error No. 2:

THE DECISION OF THE TRIAL COURT INDICATING THAT MANDAMUS WOULD BE AN APPROPRIATE COURSE OF ACTION IN THIS PARTICULAR CASE IS REVERSIBLE ERROR.

{¶ 31} Both appellees, ODOT and the Administrator filed appellate briefs. ODOT sets forth its arguments as the following assignments of errors:

Assignment of Error No. 1:

THE TRIAL COURT'S FINDING THAT POST-LAMINECTOMY SYNDROME IS A SYMPTOM AND NOT A MEDICAL CONDITION THAT IS COMPENSABLE WAS PROPER.

Assignment of Error No. 2:

THE TRIAL COURT'S DISCUSSION OF A MANDAMUS ACTION IS AT WORSE HARMLESS ERROR.

{¶ 32} ODOT does not challenge the ruling of the trial court, but instead asserts that the trial court's decision was correct and should be affirmed. *See* App.R. 3(C)(2) (provides that a party "who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal or to raise a cross-assignment of error."). Therefore, we will not separately address ODOT's arguments as "assignments of error," but we will consider them as arguments in support of its position.

{¶ 33} Here on appeal, the Administrator requests that we remand this matter to the trial court for a determination of whether Willis can prove that his subjective complaints arise to a compensable claim. The Administrator argues that post-laminectomy syndrome is a recognized condition for which Willis may seek to participate in the workers' compensation fund. This is a change from the Administrator's position below, as it joined with ODOT's motion for summary judgment before the trial court.

{¶ 34} However, the Administrator did not file a cross-appeal. Because the Administrator's argument seeks to change the trial court's judgment, he was required to file a cross-appeal. *See* App.R. 3(C)(1) ("A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4"); *Nagel v. Horner*, 4th Dist. Scioto No. 04CA2975, 2005-Ohio-3574, ¶ 10. Since the

Administrator did not file a cross-appeal and since he seeks to change the trial court's judgment, we may not consider the Administrator's arguments here on appeal.

IV. Standard of Review for Summary Judgment

{¶ 35} In this appeal, we are reviewing the trial court's decision to grant summary judgment in favor of ODOT and the Administrator. We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 36} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate

that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293; Civ.R. 56(E).

V. Workers' Compensation Appeals- R.C. 4123.512

{¶ 37} R.C. 4123.512 authorizes appeals from industrial commission orders, but only in limited circumstances. *Benton v. Hamilton City. Educational Serv. Cir.*, 123 Ohio St.3d 347, 2009-Ohio-4969, 916 N.E.2d 379, ¶ 10, citing *Felty v. AT & T Technologies, Inc.*, 65 Ohio St.3d 234, 238, 602 N.E.2d 1141 (1992). R.C. 4123.512(A) limits courts of common pleas jurisdiction to appeals from industrial commission orders "in any injury or occupational disease case, other than a decision as to the extent of disability." The Ohio Supreme Court has construed R.C. 4123.512(A) as limiting appeals to cases involving the claimant's "right to participate" in the workers' compensation fund. *Benton* at ¶ 8; *White v. Conrad*, 102 Ohio St.3d 125, 2004-Ohio-2148, 807 N.E.2d 327, ¶¶ 10-13; *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 279, 737 N.E.2d 519 (2000). A decision regarding the extent of a claimant's disability is not appealable to the common pleas court, but instead, must be challenged in a mandamus action. *Benton* at ¶ 8; *Thomas v. Conrad*, 81 Ohio St.3d 475, 477, 692 N.E.2d 205 (1998).

{¶ 38} The common pleas court's review in a R.C. 4123.512 appeal is de novo, and the claimant bears the burden of proving a right to participate in the workers' compensation fund regardless of the decision below. *Donini v. Manor Care, Inc.*, 4th Dist. Scioto No. 13CA3583,

2014-Ohio-1767, ¶ 11, citing *Bennett v. Admr., Bur. of Workers' Comp.,* 134 Ohio St.3d 329, 2012–Ohio–5639, 982 N.E.2d 666, ¶ 17. The only right-to-participate question that is subject to judicial review is " 'whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment.' " *Benton* at ¶ 8, quoting *State ex rel. Liposchak v. Indus. Comm.,* 90 Ohio St.3d 276, 279, 737 N.E.2d 519 (2000); *Felty,* paragraph two of the syllabus; *State ex rel. Evans v. Indus. Comm.,* 64 Ohio St.3d 236, 594 N.E.2d 609 (1992); *Afrates v. Lorain,* 63 Ohio St.3d 22, 584 N.E.2d 1175 (1992), paragraph one of the syllabus. "An Industrial Commission decision does not determine an employee's right to participate in the State Insurance Fund unless the decision finalizes the allowance or disallowance of the employee's claim." *Evans* at paragraph one of the syllabus. The decision must "foreclose all future compensation under that claim." *Id.* at 240, 584 N.E.2d 1175. Thus, "[o]nce the right of participation for a specific condition is determined by the Industrial Commission, no subsequent rulings, except a ruling that terminates the right to participate, are appealable pursuant to R.C. 4123.512.' " *White* at ¶ 13; *Felty,* 65 Ohio St.3d at 240, 602 N.E.2d 1141; *Zavatsky v. Stringer,* 56 Ohio St.2d 386, 384 N.E.2d 693 (1978), paragraph one of the syllabus.

VI. Law and Analysis

A. Assignment of Error No. 1- The Allowable Condition of Post-Laminectomy Syndrome

{¶ 39} In his first assignment of error, Willis argues that the trial court erred by granting summary judgment in favor of ODOT and the Administrator. In support of his argument Willis asserts the following: (1) the BWC has identified International Classification of Diseases, 9th Revision, Clinical Modification ("ICD-9-CM") code 722.8, post-laminectomy syndrome, as a medical condition, which could be recognized provided the diagnostic criteria was met; (2) his medical records indicate the presence of post-laminectomy syndrome; and (3) the trial court

incorrectly relied on *Edney*, *supra*, as the case did not address the specific condition at issue here. Willis argues that the trial court's decision should be reversed; and he claims that his motion for summary judgment should have been granted in its entirety.

{¶ 40} In rebuttal, ODOT argues that the trial court's decision granting summary judgment in its favor was proper. In support of its argument, ODOT asserts the following: (1) the law that a workers' compensation claim cannot be recognized for a symptom, such as laminectomy syndrome is abundantly clear and (2) the *Edney* decision, along with other cases, clearly recognized that various forms of pain do not constitute compensable injuries under workers' compensation law. ODOT requests that we affirm the judgment of the trial court.

{¶ 41} The trial court granted summary judgment in favor of ODOT and the Administrator, because it found "* * *that the Plaintiff [Willis]'s requests deal with a symptom rather than a condition and are not compensable under Ohio Workers' Compensation Law." In support of that conclusion, the trial court relied upon the decision of the Tenth District Court of Appeals in *Edney*, *supra*. The trial court cited *Edney* and several other Ohio appellate court decisions while stating that they "* * *all hold and give examples of symptoms that do not rise to the level of a condition in order to become compensable under Ohio Workers' Compensation Law." The trial court also acknowledged the BWC policy upon which Willis relies, titled "BWC Recognition of ICD-9-CM Codes for Pain." The trial court referred to the policy as "Administrative Rules." The trial court stated, "The Administrative Rules (supra) date from the year 2002, while several of the cases, cited by both parties, predate 2002, however, at least one Ohio Case is from 2012 (Edney). The trial court continued, "* * *the Edney decision is well after the Administrative Rules (supra), and Edney cites the cases of Foor, Kaplan, and Beard."

{¶ 42} Willis attached the BWC policy to his motion for summary judgment. The Administrator also cited the same policy in his appellate brief. The policy states:

> Authorization, delivery, and payment of medical services and other benefits in the Ohio Workers' Compensation System is dependent on a medical diagnosis (condition) being recognized as an "allowed" condition in a claim. Once a condition is recognized as "allowed," BWC assigns the condition a code based on the *International Classification of Diseases, 9th Revision, Clinical Modification (ICD-9-CM).*
>
> * * *
>
> Through the years BWC has recognized most but not all codes listed in *ICD-9-CM*. Several codes (and the associated medical conditions/diagnoses) are not related to work injuries or occupational diseases. Also, BWC has required that a code be descriptive of the condition to the extent of representing some degree of linkage of the code to a work injury. Codes describing symptoms such as pain, nausea, vomiting, fever, etc. are not recognized. For example, an individual who sustains low back pain while lifting on the job may describe "back ache or back pain". [sic] These descriptors of symptoms are not recognized by BWC, but the more descriptive diagnosis of "sprain/strain lumbar spine" is recognized. The treatment of the diagnosis would also include treatment of the symptoms in the vast majority of claims.
>
> In recent years the medical community has had increased focus on the treatment of pain and particularly chronic pain. In response, in 2002, BWC recognized several *ICD-9-CM* diagnostic codes to appropriately represent chronic pain as

> allowed conditions. These codes include the following which may be currently allowed in a claim:
>
> * * *
>
> -722.8 Postlaminectomy syndrome

https://www.bwc.ohio.gov/basics/PolicyLibrary/FileShell.aspx?file=%2fMedical+Policy%2fBWC+Recognition+of+ICD-9-CM+Codes+for+Pain.htm.

The BWC's policy defines post-laminectomy as:

> Ongoing pain symptoms of at least 12 months duration post competition of definitive surgical procedure such as discectomy, laminectomy, fusion, etc. (Surgical procedures does not include epiduroscopy, epidural steroid injection, myelogram, or discograms.) provided medical records indicate that pain is primary factor limiting performance of activities and focus of medical care is toward controlling/relieving pain. Medical records should document there has been ongoing medical care and attempts to identify and treat the source of pain. Such attempts should include appropriate diagnostic studies and consultations.

Id.

{¶ 43} In *Edney*, an employee submitted a claim for workers' compensation benefits for a condition of "chest pain NOS [not otherwise specified]." *Id.*, 2012-Ohio-4305 at ¶ 13. The Tenth District cited R.C. 4123.01(C), which defines "injury" as "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." *Id.* at ¶ 14. The Tenth District concluded, "* * *that appellant's claim for chest pain was not compensable because he had not established that he suffered an injury within the statutory definition." *Id.* at ¶ 15. The court noted that Edney's

medical records indicated that he was diagnosed with chest pain of an unclear etiology or cause. *Id*. Further, the court cited the following appellate decisions that have held that various forms of pain do not constitute compensable injuries under workers' compensation:

> *See Foor v. Rockwell Internatl.,* 5th Dist. No. 92 CA 109 (Aug. 10, 1993) (holding that radiculopathy and/or pain is not a separate injury, but that pain was a symptom flowing from the initial injury for which a claim had been allowed); *Kaplan v. Mayfield,* 7th Dist. No. 86–J–25 (July 8, 1987) (holding that angina was a symptom, rather than a disease or injury, and was not compensable); *Brown v. Connor,* 2d Dist. No. CA 8943 (Apr. 10, 1985) (holding that chest pain called angina was not a compensable injury). Although we have not previously addressed whether pain is compensable, this court has previously held that atrial fibrillation, or a rapid irregular heartbeat, is not an injury for purposes of workers' compensation law, absent a showing that the atrial fibrillation caused a physical injury. *Beard v. Mayfield,* 73 Ohio App.3d 173, 176, 596 N.E.2d 1056 (10th Dist.1991)

Id. at ¶ 16.

{¶ 44} The parties presented two different medical opinions in their respective motions for summary judgment. ODOT relied on the affidavit of Dr. Edwin Season. In his affidavit Dr. Season stated:

> In my professional opinion post laminectomy syndrome, lumbar, is a description of the injured worker's pain condition after a failed spinal surgery. It is not a specific diagnosis based on objective evidence, but rather describes the subjective

> pain complaints after failed spinal surgery. Generally, allowed conditions are not granted for subjective pain syndrome or conditions.

Willis presented the affidavit of Dr. D.J. Carey II. In his affidavit, Dr. Carey stated:

> 8. Post-laminectomy syndrome is a recognized diagnosis covered in a number of ICD codes. The Ohio Bureau of Workers' Compensation has policy concerning recognition of ICD-9 CM codes for pain.
>
> * * *
>
> 9. In my opinion Michael Willis has clearly met all the criteria for the diagnosis of post-laminectomy syndrome. He has subjective evidence of pain to the signal region for years following a surgical procedure, and diagnostic studies have not revealed the presence of other recurrent herniated disc or other symptoms causing symptoms post-operatively. He has undergone multiple modalities including injections without significant relief of pain. He has demonstrated radicular symptoms consistent with nerve compression at he L4-5 and L5-S1 levels.

{¶ 45} In an appeal under R.C. 4123.512, the issues to be addressed by the trial court would be those relating to the presence of a medical condition and whether or not it was a work-related injury. *State ex rel. Forrest v. Anchor Hocking Consumer Glass*, 10th Dist. Franklin No. 03AP-190, 2003-Ohio-6077, at ¶ 6. The Ohio Supreme Court has construed R.C. 4123.512(A) as limiting appeals to cases involving the claimant's "right to participate" in the workers' compensation fund. *Benton*, *supra*, at ¶ 8. The only right-to-participate question that is subject to judicial review is " 'whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment.' " *Id.* quoting *Liposchak*, 90 Ohio St.3d at 279, 737 N.E.2d 519; *Felty*, 65 Ohio St.3d 234, 602 N.E.2d 1141, paragraph two of the syllabus.

{¶ 46} It appears that the trial court relied on the Tenth District's decision in *Edney* to find that post-laminectomy syndrome is a symptom and not a condition for which Willis may seek to participate in the workers' compensation fund. We find the reliance upon *Edney* was misplaced. Although we appreciate the reasoning of our sister appellate court, we find the decision in *Edney* is distinguishable from the facts present here. In *Edney*, the claimant sought to participate in the workers' compensation fund for the condition of "chest pain NOS [Not otherwise specified]." *Id.*, 2012-Ohio-4305, at ¶ 2. This is a generic description of a symptom that the Tenth District decided was not an injury within the statutory definition pursuant to R.C. 4123.01(C). The other cases, cited in *Edney* and by the trial court, concerned injuries other than post-laminectomy syndrome. *See Foor*, 1993 WL 364927 (claimant requested the condition of radiculopathy); *Kaplan*, 1987 WL 14030 (claimant requested the condition of angina); *Beard*, 73 Ohio App.3d 173 (claimant requested the condition of chest pain and angina). None of these asserted conditions are listed in the BWC's policy regarding allowable pain conditions.

{¶ 47} According to the cited BWC policy, the BWC specifically recognizes post-laminectomy syndrome as an allowed condition. The same policy states that descriptors of symptoms, such as backache or back pain are not recognized. Therefore, it appears that *Edney* was decided in accordance with the specific policy discussed here, and not in conflict with it, as the trial court seemed to suggest.

{¶ 48} Furthermore, numerous Ohio appellate decisions exist that include a fact pattern where the BWC allowed a claim for post-laminectomy syndrome. *See e.g. State ex rel. Ohio Univ. v. Indus. Comm.*, 10th Dist. Franklin No. 14AP-695, 2015-Ohio-3779, ¶ 12 ("After he had been awarded PTD compensation, claimant's claim was additionally allowed for 'lumbar post laminectomy pain syndrome' following a hearing before a district hearing officer ("DHO") on

July 29, 2009."); *Collins v. Interim Healthcare of Columbus, Inc.*, 5th Dist. Perry No. 13-CA-00003, 2014-Ohio-40, ¶ 2 ("She filed a workers' compensation claim which was allowed for lumbar region sprain, lumbosacral spondylosis, radiculopathy lumbosacral, degenerative disc disease at L4–L5, epidural fibrosis, post laminectomy syndrome, and sacroiliitis."); *Johnson-Floyd v. REM Ohio, Inc.*, 5th Dist. Fairfield No. 11-CA-25, 2011-Ohio-6542, ¶ 2 ("Appellant filed a workers' compensation claim for the injuries she sustained. The Ohio Bureau of Workers' Compensation allowed her claims for 'lumbar disc displacement, lumbar sprain, disorders of the sacrum and post-laminectomy syndrome.' ").

{¶ 49} Therefore, we find that the trial court's reliance on *Edney* in finding that Willis's "requests deal with a symptom rather than a condition and are not compensable under Ohio Workers' Compensation Law" was misplaced. According to the cited BWC policy, post-laminectomy syndrome is a recognized condition. It appears that the trial court only considered if Willis could actually assert a claim for post-laminectomy syndrome. We answer that he indeed can; but we will not decide the ultimate question of whether or not Willis should be allowed to participate in the Ohio workers' compensation fund for the additional condition of post-laminectomy syndrome. The question of fact left for consideration before the trial court is "whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *Benton, supra*, at ¶ 8; *see also Bradley v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-409, 2012-Ohio-451, ¶ 34, citing *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 830 N.E.2d 1155, 2005-Ohio-3560, ¶ 8-9 ("Thus, the question before a finder of fact in an R.C. 4123.512 appeal is whether a claimant may participate in the workers' compensation fund for the medical condition asserted at the administrative level* * *.").

{¶ 50} Because a genuine material issue of fact exists as to whether Willis may participate in the workers' compensation fund for the medical condition of post-laminectomy syndrome, we find that the trial court erred in granting summary judgment in favor of ODOT and the Administrator. Willis's first assignment of error is sustained. We remand this cause to the trial court for proceedings consistent with this decision.

B. Assignment of Error No. 2

{¶ 51} Willis's second assignment of error asserts that the trial court committed reversible error when it stated the following in its decision granting summary judgment in favor of ODOT and the Administrator:

> The Court further notes some confusion as to the fact that the Industrial Commission is not listed as a party to this litigation, although the Plaintiff in the memorandum in support of motion for summary judgment states "This is a Workers' Compensation appeal, filed by Plaintiff-Appellant, Michael Willis, from a final Order of the Industrial Commission of Ohio, denying his rights to participate in the workers' compensation system for the additional condition of post-laminectomy syndrome. [sic] Additionally, both parties' Counsel seem to agree that a mandamus action against the Ohio Industrial Commission is the appropriate way to try to obtain the relief which Plaintiff desires concerning his failed lumber back syndrome, i.e. post-laminectomy syndrome.

However, because we have sustained the first assignment of error and reversed the trial court's finding of summary judgment, Willis's second assignment of error is rendered moot.

VII. Conclusion

{¶ 52} We sustain Willis's first assignment of error and reverse the decision of the trial court granting summary judgment in favor of ODOT and the Administrator. Willis's second assignment of error is rendered moot. We remand this cause to the trial court for proceedings consistent with this decision.

JUDGMENT IS REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment and Opinion
McFarland, J.: Dissents

For the Court

BY: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.