

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEBORAH A. DEWALT

Plaintiff-Appellant

-VS-

TUSCARAWAS COUNTY HEALTH
DEPARTMENT, ET AL.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 2008 AP 06 0045

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case Nos. 2007-CW-01-0006 and 2007-
CW-07-0515

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

May 20, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

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Farmer, P.J.

{¶1} On June 28, 2006, appellant, Deborah Dewalt, filed a claim with the Bureau of Workers' Compensation for chemical pneumonitis. This claim was allowed. On February 1, 2007, appellee, the Tuscarawas County Health Department, filed an appeal with the Court of Common Pleas of Tuscarawas County. Appellant filed her complaint on February 1, 2007 (Case No. 2007-CW-01-0006).

{¶2} On January 29, 2007, appellant filed a claim to further allow for occupational asthma. The claim was allowed. On July 16, 2007, appellee filed an appeal with the Court of Common Pleas of Tuscarawas County. Appellant filed her complaint on August 9, 2007 (Case No. 2007-CW-07-0515).

{¶3} The cases were consolidated on March 19, 2008.

{¶4} On April 30, 2008, appellee filed a motion to dismiss the claim for occupational asthma. A hearing was held on May 15, 2008. By judgment entry filed May 27, 2008, the trial court granted the motion and dismissed appellant's claim for occupational asthma.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶6} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING APPELLEE, TUSCARAWAS COUNTY HEALTH DEPARTMENT'S, MOTION TO DISMISS THE CLAIM OF OCCUPATIONAL ASTHMA DUE TO THE FINDING THAT SUCH CLAIM CAN NOT BE AN 'INJURY' AS ALLOWED BY THE INDUSTRIAL COMMISSION OF OHIO."

I

{¶7} Appellant claims the trial court erred in dismissing her complaint for occupational asthma. We agree.

{¶8} In its judgment entry filed May 27, 2008, the trial court found "occupational asthma" was not an injury and therefore it lacked subject matter jurisdiction to consider appellant's claim:

{¶9} "The Court **FINDS** that after considering the legal arguments of Messrs. Tsangeos and Thomakos, both those contained in the **Memoranda of Law** and made orally on 5/15/2008, the undersigned concludes that this Court is without subject matter jurisdiction to consider Plaintiff's claim for 'Occupational Asthma' contained in the Complaint filed 8/9/2007 in Case No. 2007 CW 07 0515 under the authority of **R.C. 4123.01 (C)** and **Ward v. Kroger Co.**, (Ohio, 2005) 106 OH St. 3d 35, 25 OH 3560, 830 N.E. 2d1155. Plaintiff's claim for 'Occupational Asthma' is that of an 'occupational disease' as defined in **R.C. 4123.01(F)** and not an 'injury' as defined in **R.C. 4123.01 (C)**. Consequently, the Court is without subject matter jurisdiction to consider Plaintiff's claim in Case No. 2007 CW 07 0515 and this claim should be **dismissed** with prejudice to refiling."

{¶10} In *Ward v. Kroger Company*, 106 Ohio St.3d 35, 2005-Ohio-3560, the Supreme Court of Ohio resolved the jurisdictional issues raised in the area of workers' compensation claims. Specifically, the *Ward* court at syllabus held that claimants may only appeal to the Court of Common Pleas "those conditions that were addressed in the administrative order from which the appeal is taken."

{¶11} The specific administrative order was for an "Additional Allowance – Occupational Asthma," and said claim was allowed for "Occupational Asthma":

{¶12} "The Staff Hearing Officer's decision to grant the additional allowance in this claim is based upon Dr. Boutros' C-9, dated 01/08/2007, and his narrative report dated 10/20/2006. The Staff Hearing Officer also relies on Dr. Fagan's 02/28/2007 report. All of the aforementioned medical evidence establishes that the injured worker has occupational asthma as a result of her exposure in this claim. Finally, the Staff Hearing Officer relies upon the fact that the injured worker had no pulmonary problems prior to her exposure in this claim." See Claim No. 06-839815, attached to Appellant's May 14, 2008 Memorandum Contra as Exhibit 2.

{¶13} In support of its argument that appellant's claim is a "disease" versus an "injury," appellee relies upon the following exchange on cross-examination of Kathleen Fagan, M.D. in her deposition at 74-75:

{¶14} "Q. Doctor, occupational asthma, and we've talked about this, you said it's, it's occupational asthma because it's asthma and you related it to an occupation?

{¶15} "A. Correct.

{¶16} "Q. It's something that was occupational?

{¶17} "A. It's related to an exposure at work.

{¶18} "Q. It's a disease?

{¶19} "A. Asthma is a disease.

{¶20} "Q. Right. Essentially what we're dealing with here is an occupational disease?

{¶21} "A. Yes."

{¶22} Appellee seized upon this semantic confusion and sought to have the complaint for occupational asthma dismissed. The trial court also accepted this semantic dialogue and found appellant's claim was not for the "injury" of occupational asthma, but for an occupational disease.

{¶23} R.C. 4123.01(C) and (F) define "injury" and "occupational disease," and state the following, respectively:

{¶24} "(C) 'Injury' includes 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.***

{¶25} "(F) 'Occupational disease' means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general."

{¶26} As cited supra, there is a clear and distinct methodology that separates a "disease" from an "injury." The claim appealed sub judice was for an "injury" and not an "occupational disease."

{¶27} Upon review, we find the trial court erred in dismissing appellant's complaint for "Occupational Injury – Occupational Asthma." Under *Ward*, the trial court had jurisdiction to hear the complaint. The fact that a witness may be tested for credibility and reliability on the issue of occupational asthma is for the trier of fact to determine.

{¶28} The sole assignment of error is granted.

{¶29} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio
is hereby reversed.

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

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