[Cite as *Leiter v. Pentair Pump Group, Inc.*, 2009-Ohio-2528.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEBORAH LEITER	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-COA-032
PENTAIR PUMP GROUP, INC.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas Case No. 08-CIV-027
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	May 27, 2009

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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Delaney, J.

{¶1} Plaintiff-Appellant, Deborah Leiter appeals the September 15, 2008 judgment entry of the Ashland County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, Pentair Pump Group, Inc. The facts giving rise to this appeal are as follows.

{¶2} On January 22, 2001, Appellant sustained an injury to her left shoulder in the course and scope of her employment with Appellee. Appellee is a self-insuring employer. Appellant filed a First Report of Injury, or FROI-1, with the Ohio Bureau of Workers Compensation ("BWC"), which assigned her claim number 01-830339 ("2001 claim"). The Industrial Commission recognized Appellant's claim for the conditions of a sprained left shoulder/arm, bursitis of the left shoulder and left shoulder impingement syndrome.

{¶3} On November 16, 2004, Appellant injured her left shoulder while lifting and handling a 45-pound impeller in the course and scope of her employment with Appellee. Appellant completed a FROI-1 and company accident report on November 18, 2004 and submitted them to Appellee.

{¶4} Appellant began medical treatment on her left shoulder, with the resulting medical bills paid by Appellee. On January 4, 2005, Appellee's Human Resources Administrator met with Appellant to discuss her 2004 claim. On that date, Appellant signed a statement that stated, "I am not pursing a new claim for the 11/16/04 date of injury but a re-activation of my 1/22/01 claim." The statement is signed and dated by Appellant.

{¶5} Appellant underwent a diagnostic arthroscopic procedure to her left shoulder on August 5, 2005. As a result of the surgery, the physician diagnosed Appellant with a superior labral anterior-posterior lesion, referred to as a SLAP lesion or tear. Appellee paid the medical bills for Appellant's surgery.

{¶6} On February 12, 2007, Appellant filed a motion with the Industrial Commission under her 2001 claim to request additional claim allowances for a degenerative AC joint and SLAP lesion of the left shoulder. At the hearing before the District Hearing Officer of the Industrial Commission on April 9, 2007, Appellant dismissed the request for the SLAP lesion.

{¶7} On April 23, 2007, Appellant filed a FROI-1 with the BWC, alleging she sustained the SLAP lesion as a new injury on November 16, 2004. The matter came on for hearing before the District Hearing Officer on September 17, 2007. In its record of proceedings mailed on September 19, 2007, the District Hearing Officer dismissed Appellant's FROI-1 filed on April 23, 2007 because he found the claim was time barred by the two-year statute of limitations pursuant to R.C. 4123.84. Under this statute, the District Hearing Officer stated the Industrial Commission did not have jurisdiction to adjudicate the claim.

{¶8} The matter was then heard before a Staff Hearing Officer of the Industrial Commission. The Staff Hearing Officer affirmed the decision of the District Hearing Officer, finding a lack of jurisdiction to adjudicate the April 23, 2007 FROI-1 application on its merits as the claim was untimely filed under the dictates of R.C. 4123.84.

{¶9} Appellant then brought an R.C. 4123.512 appeal of the Industrial Commission's ruling in the Ashland County Court of Common Pleas. On July 23, 2008,

Appellant filed a motion for partial summary judgment, arguing she was entitled to judgment as a matter of law on the issue of whether Appellant's April 23, 2007 FROI-1 was timely filed under R.C. 4123.84. Appellee filed an opposition to Appellant's partial motion for summary judgment and its own motion for summary judgment, arguing the trial court did not have subject matter jurisdiction over the appeal because it involved a question about Appellant's extent of disability, not right to participate in the workers' compensation program. In the alternative, Appellee argued that Appellant's April 23, 2007 FROI-1 application was barred by the two-year statute of limitations found in R.C. 4123.84.

{¶10} On September 15, 2008, the trial court granted summary judgment in favor of Appellee on its motion for summary judgment and dismissed Appellant's complaint. The trial court found that it lacked subject matter jurisdiction to adjudicate Appellant's appeal of the Industrial Commission's decision because it involved the extent of disability rather than the right to participate. The trial court did not address any other issues raised in Appellant's motion for partial summary judgment or Appellee's motion for summary judgment.

{¶11} It is from this decision Appellant now appeals. Appellant raises two Assignments of Error:

{¶12} "I. IN THIS WORKERS' COMPENSATION ACTION, THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHERE THE CONCLUSION THAT THE COURT DID NOT HAVE THE JURISDICTION TO HEAR THIS CASE, DESPITE THE INDUSTRIAL COMMISSION'S DENIAL OF THE CLAIM IN ITS ENTIRETY ON A STATUTE OF LIMITATIONS

ARGUMENT, DID NOT, IN FACT, CONSTITUTE A DENIAL OF THE RIGHT TO PARTICIPATE IN THE OHIO WORKERS' COMPENSATION SYSTEM DESPITE SPECIFIC EVIDENCE OF A NEW INJURY THAT OCCURRED IN THE COURSE AND SCOPE OF PLAINTIFF-APPELLANT'S EMPLOYMENT WITH DEFENDANT-APPELLEE. (APPENDIX 1, ORDER GRANTING SUMMARY JUDGMENT)

{¶13} "II. IN THIS WORKERS' COMPENSATION ACTION, THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE, AS A MATTER OF LAW, THE EVIDENCE ESTABLISHED THAT DEFENDANT-APPELLEE, A SELF INSURED EMPLOYER UNDER THE WORKERS' COMPENSATION SYSTEM, HAD TIMELY NOTICE OF PLAINTIFF-APPELLANT'S ACCIDENT, AND THE BODY PART THAT SHE INJURED IN THE ACCIDENT."

I.

{¶14} Appellant argues in her first Assignment of Error the trial court erred in granting summary judgment in favor of Appellee and dismissing Appellant's complaint for lack of subject matter jurisdiction over Appellant's R.C. 4123.512 appeal. We agree.

{¶15} This appeal comes to this Court pursuant to Civ.R. 56. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶16} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it

appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶17} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶18} "Under R.C. 4123.512, claimants and employers can appeal Industrial Commission orders to a common pleas court only when the order grants or denies a claimant's right to participate. Determinations as to the extent of a claimant's disability, on the other hand, are not appealable and must be challenged in mandamus." *State ex rel. Liposchak v. Indus. Comm*., 90 Ohio St.3d 276, 278-279, 2000-Ohio-73, 737 N.E.2d 519.

{¶19} The trial court interpreted Appellant's appeal of the Industrial Commission decision to dismiss Appellant's April 23, 2007 FROI-1 application as an "extent-of-disability" question, rather than a "right-to-participate" question. Differentiating between an appealable right-to-participate order and a nonappealable extent-of-disability order is difficult, but the Ohio Supreme Court attempted to clarify the determination in *Liposchak*, supra:

{¶20} "The only right-to-participate question that is appealable is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment. (Citations omitted). When the answer to this question is 'no,' all compensation, expenses, and awards of every kind must be denied because the commission has no jurisdiction in such cases. *Lewis v. Trimble* (1997), 79 Ohio St.3d 231, 244, 680 N.E.2d 1207, 1217, citing 3 Larson, Workmen's Compensation Law (1996) 15-959 to 15-961, Section 80.41. When the answer is 'yes,' the claimant has cleared the first hurdle, and then may attempt to establish his or her extent of disability. It follows that these claimants may qualify based either on the extent of their own disability or the extent to which they were legally dependent on the injured employee. But either way, the issue is no longer whether the commission has jurisdiction to award benefits in the employee's case; the question instead becomes how much the system must pay. *Zavatsky,* 56 Ohio St.2d at 396, 10 O.O.3d at 509, 384 N.E.2d at 699."

{¶21} Appellee argued in its motion for summary judgment, and the trial court agreed, that there was no question of fact that Appellant was injured in the course and scope of employment. Appellee agreed with Appellant that she should be permitted to participate in the workers' compensation system for the injuries she incurred because of the November 16, 2004 accident. In fact, Appellee does not dispute Appellant's participation for the SLAP lesion discovered in 2005 and she is currently receiving benefits for that injury under the 2001 claim. A review of the trial court's judgment entry demonstrates that because the parties agreed on Appellant's right-to-participate, therefore the question must pertain to Appellant's extent-of-disability. Moreover, as has

been previously stated, a trial court does not have jurisdiction over an extent-of-disability order.

{¶22} A review of the Industrial Commission's order, however, shows that while Appellee may have agreed to Appellant's right to participate for her November 16, 2004 injury and resulting SLAP lesion, the Industrial Commission determined otherwise. The District Hearing Officer and Staff Hearing Officer stated in their orders that Appellant's April 23, 2007 FROI-1 application was dismissed for lack of jurisdiction because it was untimely filed. The Staff Hearing Officer's order specifically states, "[t]he injured worker's re-filing of the FROI-1 application on 4/23/2007 is barred by the two-year statute of limitations under ORC 4123.84."

{¶23} R.C. 4123.84(A) states in pertinent part,

{¶24} "In all cases of injury or death, claims for compensation or benefits for the specific part or parts of the body injured shall be forever barred unless, within two years after the injury or death:

{¶25} "(1) Written or facsimile notice of the specific part or parts of the body claimed to have been injured has been made to the industrial commission or the bureau of workers' compensation;

{¶26} "(2) The employer, with knowledge of a claimed compensable injury or occupational disease, has paid wages in lieu of compensation for total disability;

{¶27} "(3) In the event the employer is a self-insuring employer, one of the following has occurred:

{¶28} "(a) Written or facsimile notice of the specific part or parts of the body claimed to have been injured has been given to the commission or bureau or the

employer has furnished treatment by a licensed physician in the employ of an employer, provided, however, that the furnishing of such treatment shall not constitute a recognition of a claim as compensable, but shall do no more than satisfy the requirements of this section;

{¶29} "(b) Compensation or benefits have been paid or furnished equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code.

{¶30} "* * *"

{¶31} It was the Industrial Commission's decision that Appellant did not have the right-to-participate for her 2004 claim pursuant to R.C. 4123.84. It is from this order Appellant filed her R.C. 4123.512 appeal with the court of common pleas.

{¶32} The issue before the trial court then is whether Appellant's April 23, 2007 FROI-1 application was barred by two-year statute of limitations under R.C. 4123.84. It has been determined that the issue of whether the statute of limitations under R.C. 4123.84 bars participation in the workers' compensation fund is one that can be resolved upon appeal to the common pleas court. *State ex rel. General Electric Co. v. Indus. Comm*., Franklin App. No. 06AP-648, 2007-Ohio-3293, at ¶ 24; *State ex rel. Ellwood Eng. Casting Co. v. Indus. Comm*., Franklin App. No. 01AP-1065, 2002-Ohio-3335, at ¶ 62. The Ohio Supreme Court has also held that where the Industrial Commission rules that further participation in the workers' compensation fund is barred by R.C. 4123.52's ten-year statute of limitations, that decision must be challenged by way of appeal. *State ex rel. Hinds v. Indus. Comm*., 84 Ohio St.3d 424, 425, 1999-Ohio-472, 704 N.E.2d 1222.

{¶33} Upon our de novo review of the record, we find the trial court does have jurisdiction to consider Appellant's appeal of the Industrial Commission's determination that Appellant's April 23, 2007 FROI-1 was untimely filed and barred by R.C. 4123.84. Appellant's first Assignment of Error is therefore sustained.

{¶34} As the trial court dismissed Appellant's appeal upon the lack of subject matter jurisdiction, the trial court did not reach the merits of Appellant's or Appellee's arguments under their respective motions for summary judgments. As stated above, Appellee stated in its motion for summary judgment that if the trial court found that it did have subject matter jurisdiction to consider Appellant's appeal, Appellee then alternatively argued that Appellant's claim was barred by the two-year statute of limitations. Likewise, Appellant argued in her motion for partial summary judgment that her April 23, 2007 FROI-1 application was not barred by the statute of limitations. Specifically, R.C. 4123.28 contains tolling provisions to the statute of limitations requirements for a self-insuring employer under R.C. 4123.84.

{¶35} Appellant raises these arguments in her second Assignment of Error, but we decline to consider these arguments for the first time on appeal. In *Young v. University of Akron,* 10th App. No. 06AP-1022, 2007-Ohio-4663, the Tenth District Court of Appeals stated, "Generally, appellate courts do not address issues which the trial court declined to consider." *Id.* at ¶ 22, citing *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643, 671 N.E.2d 578, citing *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384. See also, *Warner v. Uptown-Downtown Bar* (Dec. 20, 1996), Wood App. No. WD-96-024 (appellate court declined to review argument made in summary judgment motion but not addressed by trial court's

decision); *Manda v. Stratton* (Apr. 30, 1999), Trumbull App. No. 98-T-0018 (noting that it would be premature for appellate court to address claims of common law negligence that were not addressed by trial court, where trial court resolved summary judgment only on strict liability claims); *Stratford Chase Apts. v. Columbus* (2000), 137 Ohio App.3d 29, 33, 738 N.E.2d 20 (appellate court's independent review of summary judgment decision should not replace trial court's function of initially determining propriety of summary judgment).

{¶36} We therefore remand this matter for the trial court to consider these arguments. Appellants' second Assignment of Error is overruled at this time.

{¶37} Accordingly, the judgment of the Ashland County Common Pleas Court is reversed and the matter is remanded for further proceedings consistent with this opinion.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *Leiter v. Pentair Pump Group, Inc.*, 2009-Ohio-2528.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DEBORAH LEITER	:	
	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
PENTAIR PUMP GROUP, INC.	:	
	:	Case No. 08-COA-032
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is reversed and remanded for further proceedings consistent with this opinion and judgment entry. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS