

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Doretha Keller

Court of Appeals No. L-08-1315

Appellant

Trial Court No. CI 07-3362

v.

Johns Manville, et al.

DECISION AND JUDGMENT

Appellees

Decided: July 31, 2009

* * * * *

George N. Fell, II, for appellant.

Robert P. King and Mark S. Barnes, for appellee Johns Manville;
Richard Cordray, Attorney General of Ohio, and Carolyn S. Bowe,
Assistant Attorney General, for appellee Administrator, Bureau of
Workers' Compensation.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Doretha Keller, appeals a July 16, 2008 judgment of the Lucas County Court of Common Pleas in an administrative appeal to that court of an order allowing Keller to receive workers' compensation benefits for additional conditions

arising from an October 16, 1997 work related injury. Appellee is Johns Manville, Keller's employer at the time of injury.

{¶ 2} In November 2006, appellant filed a motion with the Bureau of Workers' Compensation to have her claim for benefits allowed for additional conditions arising from the October 16, 1997 injury. A staff hearing officer issued an order on February 9, 2007, that allowed Keller to participate in the workers' compensation fund for the additional conditions of "degenerative arthritis of left knee and lateral meniscus tear of the left knee on a flow through basis." The Industrial Commission refused Johns Manville's appeal from that order.

{¶ 3} Johns Manville filed a notice of appeal of the administrative order to common pleas court on May 1, 2007. On May 17, 2007, pursuant to R.C. 4123.512, appellant filed a complaint asserting her claim for benefits. On March 17, 2008, appellant voluntarily dismissed the complaint under Civ.R. 41(A)(1)(a) without prejudice.

{¶ 4} Thereafter, Johns Manville filed a motion "to reinstate the case on the Court's Docket." In a July 16, 2008 judgment, the court of common pleas granted the motion. It held that under recent amendments to R.C. 4123.512(D), Johns Manville's consent was required to permit a voluntary dismissal under Civ.R. 41(A)(1)(a) and that, consequently, appellant's voluntary dismissal was invalid. The court ordered that the case be reinstated on its docket. Appellant appeals that judgment to this court.

{¶ 5} Appellant asserts one assignment of error on appeal:

{¶ 6} "Assignment of Error

{¶ 7} "I. The Court of Common Pleas committed reversible error in granting the motion of Johns Manville to reinstate the instant workers' compensation case upon the court's docket after claimant Doretha Keller had voluntarily dismissed Johns Manville's R.C. 4123.512 appeal pursuant to Civil Rule 41(A)(1), as the amendments to R.C. 4123.512(D) by Amended Substitute Senate Bill 7 do not apply where the date of injury pre-dated the effective date of the statutory amendments."

{¶ 8} Am.Sub.S.B. No. 7 modified procedure in workers' compensation appeals to common pleas courts under R.C. 4123.512 effective August 25, 2006. *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, ¶ 5. One statutory change under Am.Sub.S.B. No. 7 modified voluntary dismissal procedure in workers' compensation appeals brought employers. Am.Sub.S.B. No. 7 "ended an employee-claimant's unilateral ability to voluntarily dismiss the complaint in an appeal brought by an employer. R.C 4123.512(D). Now, an employer must consent to the dismissal. Id." *Thorton* at ¶ 14.

{¶ 9} In *Thorton*, the Supreme Court of Ohio ruled that statutory changes under Am.Sub.S.B. No. 7 to voluntary dismissal procedure in employer workers' compensation appeals are prospective in operation only and apply to claims arising on or after Am.Sub.S.B. No. 7's effective date. *Thorton* at ¶ 15. The court considered uncodified Section 3 of the enactment in reaching its conclusion, concluding that "the General

Assembly included an uncodified provision stating its intent that, with one exception, all of the bill's amendments are prospective in effect. See Section 3 of Am.Sub.S.B. No. 7 (*'This act applies to all claims pursuant to [R.C. Chapter 4123] arising on and after the effective date of this act except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act'*). (Emphasis added.)" *Thorton* at ¶ 15.

{¶ 10} In *Thorton*, the Ohio Supreme Court ruled that the employee's claim for workers' compensation benefits arose on the date of his injury, citing *State ex rel. Schmiersal v. Indus. Comm.* (1944), 142 Ohio St. 477, 478. *Thorton* at ¶ 15. *Thorton*, the employee in the case, was injured in June 2005. *Id.* at ¶ 2. The court held that the employee's claim "arose before S.B. 7 became effective on August 25, 2006" and that the former provisions of R.C. 4123.512(D) applied to the claim. *Id.* at ¶ 20. As the prior version of R.C. 4123.512(D) applied, *Thorton* retained the right to voluntarily dismiss his appeal without the consent of his employer. *Id.* at ¶ 21.

{¶ 11} The court of common pleas in this administrative appeal did not have the benefit of the Ohio Supreme Court's decision in *Thorton* when it issued its judgment in this case. Under *Thorton*, the issue of whether the old or new voluntary dismissal procedures in employer appeals apply is resolved by looking to when the employee's claim for workers' compensation benefits arose. Only where the claim arises on or after August 25, 2006, does the new version of R.C. 4123.512(D) apply.

{¶ 12} The court in *Thorton* cited the decision of *State ex rel Schmursal v. Indus. Comm.* and concluded that the employee's workers' compensation claim in the case arose on the date of his injury. *Thorton* at ¶ 15. In *State ex rel. Schmursal v. Indus. Comm.*, the Supreme Court of Ohio cited and reaffirmed the prior decision of *Indus. Comm. v. Kamrath* (1928), 118 Ohio St.1 that with respect to employee claims for workers' compensation benefits, "[t]he cause of action of an injured employee accrues at the time he receives an injury in the course of his employment." *State ex rel. Schmursal v. Indus. Comm.* at 478, quoting, *Indus. Comm. v. Kamrath* at paragraph 3 of syllabus. The court in *Indus. Comm. v. Kamrath* reasoned that where an employee is injured, "[h]is right was a right to participate in the fund because of his injury, and accrued when the injury was sustained." *Indus. Comm. v. Kamrath* at 7.

{¶ 13} We considered this issue in the context of claims for an additional allowed condition in *Miller v. Land-O-Sun Dairies, LLC*, 6th Dist. No. L-07-2098, 2008-Ohio-2098. Miller was injured in a slip and fall on January 28, 2004, at work. His employer appealed a subsequent order permitting Miller to amend his claim to allow claim benefits based on an additional condition. *Id.* at ¶ 5. We held that the claim for benefits for the additional condition arose on the date of injury, January 28, 2004, before the changes to R.C. 4123.512(D) took effect. *Id.* at ¶ 10.

{¶ 14} Appellant has argued that claims for additional allowed conditions are new claims and that such claims arise on the date employees move to amend their workers'

compensation claims to allow for additional conditions. The court of common pleas based its judgment on that legal analysis.

{¶ 15} In our view, such an analysis is precluded by the Ohio Supreme Court's decision in *Thorton* and our prior decision in *Miller v. Land-O-Sun Dairies, LLC*. Under these decisions and the terms of uncodified Section 3 to Am.Sub.S.B. No. 7, the date of the injury on which the claim for workers' compensation benefits is based controls on whether statutory changes under Am.Sub.S.B. No. 7 apply. That date in this action is October 16, 1997, long before the effective date of Am.Sub.S.B. No. 7 of August 25, 2006.

{¶ 16} We find appellant's assignment of error well-taken. Appellant's voluntary dismissal pursuant to Civ.R. 41(A)(1), without Johns Manville's consent, that dismissed the administrative appeal without prejudice on March 17, 2008, was valid.

{¶ 17} The judgment of the Lucas County Court of Common Pleas granting the motion of appellee Johns Manville to reinstate the administrative appeal is reversed. Appellee Johns Manville is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Keller v. Johns Manville
C.A. No. L-08-1315

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.