

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

Kathy S. Young

Appellee/Cross-Appellant

Court of Appeals Nos. WD-14-068  
WD-14-073  
WD-14-077

v.

Trial Court No. 2013CV0328

Craig Transportation Co., et al.

Appellants/Cross-Appellees

**DECISION AND JUDGMENT**

Decided: March 31, 2016

\* \* \* \* \*

Steven G. Thomakos, for appellee/cross-appellant.

Mark A. Shaw and Richard L. Johnson, for appellant/cross-appellee, Craig Transportation Co.

Michael DeWine, Ohio Attorney General, and Carolyn S. Bowe, Assistant Attorney General, for appellant/cross-appellee, Ohio Bureau of Workers' Compensation.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is a consolidated, administrative appeal and cross-appeal from a judgment of the Wood County Court of Common Pleas, in which the trial court granted summary judgment to appellee/cross-appellant, Kathy S. Young, allowing her to file a workers' compensation claim in Ohio that was previously paid through the Indiana Workers' Compensation Board.

{¶ 2} Young, an Ohio resident, was employed by Craig Transportation Company ("Craig"), an Ohio company, as a long-distance truck driver in March 2012. As part of her employment orientation, Young signed an Employment Agreement Letter ("agreement letter") in which she purportedly agreed to file any workers' compensation claims "arising from an incident outside the state of Ohio" with Craig's workers' compensation company based in Columbus, Indiana.

{¶ 3} On July 18, 2012, Young was injured when a plastic and metal tote fell from the back of her semi-trailer and hit her on the head while she was working in Aurora, Illinois. Young sustained a head laceration, for which she received medical treatment. As stated in the agreement letter, Young's claim was processed by Midwestern Insurance Alliance ("MIA"), Craig's out-of-state workers' compensation insurer. On August 7, 2012, Young and Craig executed an "Agreement to Compensation of Employee & Employer," Indiana form No. 1043, which was approved by the Indiana Workers' Compensation Board on August 10, 2012. Pursuant to the terms of form 1043, Young

received compensation from MIA in the amount of \$7,343.42 in lost wages, plus payment of her medical expenses. Her payments ceased when she returned to work in October 2012.

{¶ 4} In January 2013, Young experienced an episode of vertigo while backing her semi-truck up to a loading dock in Ohio. When Michael Craig, vice-president of safety, maintenance and compliance for Craig Transportation, said that she had no basis to reopen her Indiana claim, Young filed a claim for benefits with appellant/cross-appellee, the Ohio Bureau of Workers' Compensation ("BWC"). (Claim No. 12-869272.)

{¶ 5} Young's claim for Ohio benefits was initially denied by the Administrator on February 8, 2013. Young appealed that decision to the Ohio Industrial Commission, and a hearing was held on March 12, 2013, at which the district hearing officer ("DHO") considered evidence, including reports by the Rush-Copley Medical Center in Illinois, Abhilasha Jones, M.D. (dated July 18, 2012), and Nicholas Varrati, M.D. (dated October 30, 2012, and February 13, 2013). Based on that evidence, the DHO found that: (1) Young completed her employment application and paperwork, including the agreement letter, in Ohio, (2) Young "is now and was at the time of her injury a resident of the State of Ohio," (3) she received her employee orientation and driver's examination in Ohio, and (4) Ohio taxes are deducted from her paychecks.

{¶ 6} The DHO found no evidence that Craig complied with the requirements of R.C. 4123.54(H) which states that, for an election of workers' compensation benefits in a state other than Ohio to be effective, the employment contract must be executed outside

the state of Ohio, and a copy of any agreement to be bound by another state's workers' compensation laws must be filed with the Ohio Bureau of Workers' Compensation within ten days after its execution. The DHO determined that Young was not barred from filing an Ohio claim for workers' compensation benefits for the conditions of "concussion with brief coma, cervical sprain/strain and open wound of the head." The DHO further stated that:

any amount of compensation awarded to the Injured Worker under her Indiana claim shall be credited on the amount of any award of compensation of benefits paid by the Bureau of Workers' Compensation in Ohio, pursuant to Revised Code 4123.54(H)(2).

{¶ 7} Craig and BWC filed timely appeals from the DHO's decision to the Ohio Industrial Commission ("Commission"). On April 22, 2013, the staff hearing officer ("SHO") for the Commission found that R.C. 4123.54(H)(2) is inapplicable to the facts of the case, because Young's claim was "filed first and accepted by the Employer prior to the filing of a claim in Ohio \* \* \*." Young timely appealed both the DHO's and the SHO's decisions. On May 16, 2013, her appeal was denied without a hearing. Young filed a notice of appeal in the Wood County Common Pleas Court ("trial court") on June 3, 2013. Young, BWC and Craig each filed cross-motions for summary judgment.

{¶ 8} In support of her summary judgment motion, Young argued that: (1) Ohio has jurisdiction over her workers' compensation claim because the employment agreement letter was not filed in compliance with R.C. 4123.54H(A)(1), and (2) R.C.

4123.542 does not bar her Ohio claim because no “decision on the merits” was made as evidenced by Indiana form 1043. Young concluded that the DHO correctly found that she is entitled to Ohio benefits, subject to offset in the amount of the benefits that were paid by MIA, as contemplated by R.C. 4123.54(H)(2). Attached to Young’s memorandum was the affidavit of Randal M. Klezmer, an Indiana attorney who stated that, based on his experience, Young’s Ohio claim is not barred by R.C. 4123.542 because the Indiana claim was paid pursuant to the parties’ execution of form 1043, and not because a decision was made on the merits.

{¶ 9} In their summary judgment motions, Craig and BWC argued that a “decision on the merits” of Young’s claim was made prior to her receiving payments from MIA. Accordingly, Young is barred by R.C. 4123.542 from receiving Ohio workers’ compensation benefits. Craig and BWC each filed motions to strike Klezmer’s affidavit, in which they argued that the issue of whether or not there was a “decision on the merits” in Indiana is a matter of statutory interpretation to be decided by the trial court, not by a plaintiff’s purported expert witness.

{¶ 10} On May 7, 2014, BWC filed the affidavit of Thomas E. Lieser, M.D. who stated that, based on his review of Young’s medical records, she did not suffer from a “concussion with brief coma” as a result of her work-related injury. BWC also filed a motion to strike Varrati’s affidavit, in which he opined that appellant did suffer from “concussion with brief coma.” In support, BWC argued that Varrati’s affidavit did not

comply with Civ. 56(E) and Evid.R. 702-705 because it did not set forth an explanation of the medical basis for his diagnosis, and did not say which medical records he relied upon.

{¶ 11} On June 16, 2014, the trial court granted the motion to strike Klezmer's affidavit and denied the motion to strike Varrati's affidavit. In addition, the trial court found that: (1) Young had "nothing to do" with the decision to file her claim in Indiana, (2) her claim was filed in Ohio because she was denied benefits in Indiana after returning to work in October 2012, (3) the Indiana Industrial Board's approval of Young's claim does not constitute a "decision on the merits" of the claim, and (4) no evidence was presented to show that Young experienced a loss of consciousness. Accordingly, Young's Ohio claim for benefits due to her work-related injury on July 18, 2012 is not barred by R.C. 4123.542. Based on these findings, the trial court granted Young's motion for summary judgment, and stated that Young "is entitled to participate in the Ohio Workers' Compensation fund for the conditions of "concussion, cervical sprain/strain and open head wound."

{¶ 12} On July 16, 2014, the BWC and Craig filed separate notices of appeal from the trial court's June 16 order, and Young filed a notice of cross-appeal on July 25, 2014. (Appellate case No. WD-14-049.) On August 4, 2014, Young asked the trial court to award her costs and attorney fees. On August 12, 2014, BWC filed a memorandum in opposition and a motion to stay any award of attorney fees pending appeal. On August 15, 2014, Young filed a response in opposition to the stay and a motion to dismiss

appellate case No. WD-14-049, in which she argued that the trial court had not yet ruled on Young's request for attorney fees and costs. This court granted the motion to dismiss on August 28, 2014.

{¶ 13} On September 11, 2014, the trial court awarded Young \$4,200 in attorney fees. Pursuant to R.C. 4123.512F, the trial court also ordered BWC to pay Young \$447 in costs (\$180 in filing fees and \$266 in stenographic fees for depositions), and \$30.66 in postage fees. On September 22 and 29, 2014, BWC and Craig filed their respective notices of appeal from the trial court's September 11 order. (Appellate case No. WD-14-068.) On September 30, 2014, BWC filed a motion to stay proceedings in the trial court pending the outcome of appellate case No. WD-14-068, which the trial court granted on October 2, 2014.

{¶ 14} On October 9, 2014, Young filed a "Notice of Cross-Appeal" in appellate case No. WD-14-068, in which she challenged both the trial court's award of attorney fees and costs in the September 11 order, and its June 16 decision to strike Varrati's affidavit. That same day, Craig filed an amended notice of appeal to include the trial court's June 16 order, and BWC filed a new notice of appeal from the trial court's June 16 and September 11 orders. (Appellate case No. WD-14-073.) On October 22, 2014, Young asked the trial court to reconsider its June 16 stay pending appeal.

{¶ 15} On October 28, 2014, this court consolidated appellate case Nos. WD-14-068 and WD-14-073 under case No. WD-14-068. On October 31, 2014, the trial court denied Young's motion for reconsideration of the stay. Young filed a notice of appeal on

November 3, 2014, (appellate case No. WD-14-077) and a separate notice of cross-appeal in consolidated appellate case No. WD-14-068, in which she challenged the order granting the stay. On November 18, 2014, this court sua sponte consolidated case No. WD-14-077 with case No. WD-14-068. On December 5, 2014, BWC filed a motion to dismiss Young's cross-appeal, which we granted on January 26, 2015.

{¶ 16} On appeal, appellant/cross-appellee BWC sets forth the following four assignments of error:

Assignment of Error No. 1:

The trial court erred by granting Young's motion for summary judgment and denying the bureau of Workers' Compensation [sic] motion for summary judgment because R.C. 4123.542 barred Young from receiving Ohio Workers' Compensation benefits.

Assignment of Error No. 2:

The trial court erred in failing to strike the affidavit of Dr. Varrati as the affidavit does not comply with Civ. 56 and Evid.R. 702-705.

Assignment of Error No. 3:

The trial court erred by finding Young was entitled to participate in the workers' compensation fund for the condition of "concussion" for two reasons: (1) the court lacked subject matter jurisdiction over that condition, and (2) Young failed to offer any evidence that she suffered from that condition.



Assignment of Error No. 4:

The trial court erred in awarding Young \$266.00 in deposition costs because Young failed to support her motion with actual evidence [that] those were the costs of the stenographic deposition.

{¶ 17} Appellee/cross-appellant, Craig, sets forth the following assignment of error on appeal:

Assignment of Error No. 1: The trial court erred in granting summary judgment to plaintiff-appellee Kathy S. Young and denying summary judgment to defendant-appellants Craig Transportation Co. (“Craig Transportation”) and the Ohio Bureau of Workers’ Compensation (“BWC”) because R.C. 4123.542 bars Ms. Young from filing a claim for benefits and compensation under the Ohio Workers’ Compensation Act.

{¶ 18} In addition, Young sets forth the following two cross-assignments of error on appeal:

Cross Assignment of Error 1

The trial court erred as a matter of law by granting [BWC’s] motion to stay the judgment pending appeal.

Cross Assignment of Error 2

The trial court erred as a matter of law by not considering the affidavit of Indiana attorney Randall M. Klezmer.

{¶ 19} In their first assignments of error, BWC and Craig each argue that the trial court erroneously found that Young’s participation in the Ohio fund was not barred by R.C. 4123.542. These assignments of error will be considered together.

{¶ 20} Our review of a summary judgment determination is conducted on a de novo basis, applying the same standard used by a trial court. *Powell v. Toledo Pub. Schools*, 6th Dist. Lucas No. L-09-1140, 2010-Ohio-1602, ¶ 7. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of a nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 21} R.C. 4123.542 states, in relevant part, that:

An employee or the dependents of an employee who receives a decision on the merits of a claim for compensation or benefits \* \* \* under the workers’ compensation laws of another state shall not file a claim for compensation and benefits under this chapter \* \* \* for the same injury, occupational disease, or death.

As used in this section, a “decision on the merits” means a decision determined or adjudicated for compensability of a claim and not on jurisdictional grounds.

{¶ 22} BWC and Craig argue that the purpose of R.C. 4123.542 is to prevent an injured worker from receiving duplicate benefits in more than one state for the same injury. They rely on the agreement letter, which designated Indiana as the state through

which Young would receive benefits for a work-related injury in a state other than Ohio. In response, Young argues that her Ohio claim is not barred by R.C. 4123.542 because she agreed to seek benefits through MIA, not the state of Indiana, the “merits of [her] claim” were never determined in Indiana, and any agreement to file an Indiana claim is ineffective because Craig did not file the letter in Ohio within ten days, as required by R.C. 4123.54(H)(1). However, because it is undisputed that Young’s injuries arose out of the course of her employment, her “right to participate” is not at issue in this case. Instead, the relevant question is whether the court of common pleas had jurisdiction to consider the commission’s denial of Young’s appeal after the SHO denied her the right to participate in Ohio’s state insurance fund.

{¶ 23} The right to appeal the commission’s decision to the court of common pleas is governed by R.C. 4123.512. Pursuant to R.C. 4123.512(D), on appeal, “the court, or the jury under the instructions of the court, \* \* \* shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.” The court’s review in such cases is *de novo*. *Moore v. Natl. Castings, Inc.*, 6th Dist. Lucas No. L-92-331, 1993 WL 332332 (Sept. 3, 1993), *Felty v. AT&T Technologies, Inc.*, 65 Ohio St.3d 234, 239, 602 N.E.2d 1141 (1992).

{¶ 24} At least one Ohio court has held that the execution of an agreement purportedly settling a worker’s compensation claim does not bar an appeal from the denial of a later claim for additional benefits. *See Stow v. Clem*, 25 Ohio App.3d 50, 51, 495 N.E.2d 960 (9th Dist. 1985). (Finding that “a decision involving the validity of the

release [of a claim] is a reevaluation of the right to participate \* \* \*.”) However, more recently, the Third District Court of Appeals held that *Stow v. Clem* is no longer dispositive of this issue in light of the Ohio Supreme Court’s decision in *State ex rel Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 737 N.E.2d 519 (2000). See *Wise v. Urban Indus.of Ohio, Inc.*, 158 Ohio App.3d 244, 2004-Ohio-2361, 814 N.E.2d 1232, ¶ 10 (3d Dist. 2004). (Finding that an appeal for the purpose of invalidating a settlement agreement to allow an increase in benefits “clearly goes to the extent of the disability and is unappealable.”)

{¶ 25} In *Liposchak*, the Ohio Supreme Court held that the only right-to-participate question that is appealable to the court of common pleas is “whether an employee’s injury, disease, or death occurred in the course of and arising out of his or her employment.” *Id.* at 279. Therefore, once a claimant establishes the threshold issue of his or her right to participate in the fund it is the commission, and not the court of common pleas, that has jurisdiction to establish the extent of the disability. *Id.*<sup>1</sup> See also *State ex rel. Wheeling-Pittsburgh Steel Corp. v. Indus. Comm. of Ohio*, 10th Dist. Franklin No. 06AP-175, 2007-Ohio-2728, ¶ 19, citing *Afrates v. Lorain*, 63 Ohio St.3d 22, 584 N.E.2d 1175 (1992). (Ohio courts have held that a challenge based on the commission’s alleged failure to follow statutory process “does not fit the criterion for

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<sup>1</sup> In cases where a claimant’s right to participate is not directly at issue, the proper remedy is to challenge the commission’s decision in mandamus, not through an appeal. See *State ex rel Liposchak*, *supra* at 280, citing *State ex rel. Ross v. Indus. Comm.*, 84 Ohio St.3d 364, 369, 703 N.E.2d 1765 (1999).

appeal under R.C. 4123.512 \* \* \*.”), and *State ex rel. Wells v. Indus. Comm. of Ohio*, 10th Dist. Franklin No. 04AP-758, 2006-Ohio-2738, ¶ 11 (The court of common pleas cannot correct the commission’s granting or denial of a request for reconsideration).

{¶ 26} On consideration, this court finds that, since Young’s right to participate in the fund was not at issue, the trial court did not have jurisdiction to hear an appeal from the commission’s refusal to reconsider Young’s claim pursuant to R.C. 4123.512. Accordingly, BWC’s and Craig’s first assignments of error are sustained, although for a different reason than those argued on appeal.

{¶ 27} In its third assignment of error, BWC asserts that the trial court lacked subject matter jurisdiction to consider whether Young was entitled to participate in the workers’ compensation fund for the condition of “concussion.” In support, BWC argues that the commission found that Young sustained a “concussion with brief coma,” which is not the same medical condition as “concussion,” and Young did not meet her burden to present admissible evidence pursuant to Civ. 56(E) in support of her medical claim.

{¶ 28} The Supreme Court of Ohio has held that “R.C. 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level.” *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E. 2d 1155, ¶ 11. Therefore, “[t]he claimant in an R.C. 4123.512 appeal may seek to participate in the Workers’ Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal was taken.” *Id.* at syllabus. As stated above, any review by the court of common pleas of a claimant’s right to participate is strictly

limited to determining “whether an employee’s injury, disease, or death occurred in the course of and arising out of his or her employment.” *State ex rel Liposchak*, 90 Ohio St.3d 276, 737 N.E.2d 519.

{¶ 29} Young’s Ohio claim was initially allowed for “concussion with brief coma, cervical sprain/strain and open head wound.” Later, on appeal, the trial court found no evidence of a coma and amended Young’s claim to include “concussion, cervical sprain/strain and open head wound.” The trial court’s omission of the diagnosis “brief coma” from Young’s claim constitutes a medical decision as to the extent of Young’s claim, which exceeds the scope of its permissible review as defined in *Liposchak*, supra. Accordingly, we find that the trial court did not have jurisdiction to decide that Young suffered from a “concussion” as a result of her work-related injury. BWC’s third assignment of error is well-taken.

{¶ 30} In its second assignment of error, BWC asserts that the trial court erred by failing to strike Varrati’s affidavit. In support, BWC argues that Varrati’s affidavit does not comply with Civ.R. 56 or Evid.R. 705 because it did not contain an explanation of his diagnosis of “concussion with brief coma,” and did not say which medical records were relied on in reaching his conclusion.

{¶ 31} On consideration of our determination as to BWC’s third assignment of error, we find that the issue raised in this assignment of error is moot. BWC’s third assignment of error is not well-taken.

{¶ 32} In its fourth assignment of error, BWC asserts that the trial court erred by awarding Young \$266 in deposition costs. In support, BWC argues that no actual bills for stenographic services were presented to the trial court in order to justify payment for those services pursuant to R.C. 4123.512(D).

{¶ 33} In Ohio, the assessment of attorney fees and costs “are within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.” *Taylor v. McCullough-Hyde Mem. Hosp.*, 116 Ohio App.3d 595, 600, 688 N.E.2d 1078 (12th Dist.1996). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 34} In this case, a “Transaction Detail by Account” was attached to Young’s motion for fees and costs. In that document, Young’s attorney listed a payment to Seagate Reporting in the amount of \$266, paid by check number 6061. On consideration, we cannot say that the trial court abused its discretion by awarding Young \$266 for stenographic services. However, we are compelled to find that BWC’s fourth assignment of error is moot, based on our determinations as to BWC’s other assignments of error.

{¶ 35} In her first cross-assignment of error, Young asserts that the trial court abused its discretion by granting a stay pending appeal. In support, Young argues that the stay violates R.C. 4123.512(H)(1), which states that, a court shall not impose a stay

pending the outcome of an appeal from an “order \* \* \* or any action filed in court in a case in which an award of compensation or medical benefits has been made \* \* \*.”

{¶ 36} As set forth in our determination as to BWC’s and Craig’s first assignments of error, the trial court did not have subject matter jurisdiction to hear Young’s appeal. Accordingly, the issue of whether the trial court abused its discretion by staying its order pending the outcome of this appeal is moot. Young’s first cross-assignment of error is not well-taken.

{¶ 37} In her second cross-assignment of error, Young asserts that the trial court erred by striking Klezmer’s affidavit. In support, Young argues that Klezmer’s affidavit would have “[aided] the court in understanding Indiana law.”

{¶ 38} On consideration of our determination as to BWC’s first assignment of error, we find that Young’s second cross-assignment of error is moot and not well-taken.

{¶ 39} On consideration whereof, we find further that there remain no other genuine issues of material fact and that reasonable minds can only conclude that Young is not entitled to summary judgment as a matter of law. Accordingly, the trial court erred by granting summary judgment to appellee/cross-appellant Young and failing to grant summary judgment to Craig and BWC.

{¶ 40} The judgment of the Wood County Court of Common Pleas is reversed and the case is remanded for further proceedings consistent with this decision. Costs are assessed to appellee/cross-appellant, 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.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

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>.