[Cite as *Chaffee v. Daimler Chrysler Corp.*, 2004-Ohio-5165.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

LEON CHAFFEE Appellant v. DAIMLER CHRYSLER CORPORATION, et al. Appellees	C .A. No. 22029 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. AC 2003-03-1451

DECISION AND JOURNAL ENTRY

Dated: September 29, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam.

{¶1} Appellant, Leon Chaffee, appeals from the decision of the Summit County Court of Common Pleas that granted summary judgment in favor of Appellee, Daimler Chrysler Corporation. We affirm.

I.

{¶2} Appellant worked for Appellee in Twinsburg, Ohio in Summit County. Appellant asserts that in the course and scope of his employment with Appellee he was exposed to asbestos, and that as a result of this exposure he contracted asbestosis. Appellant filed a workers' compensation claim seeking

benefits for the alleged contraction of asbestosis, which Appellee rejected. Appellee, the Ohio Bureau of Workers' Compensation (the "BWC"), referred the disputed claim to the Industrial Commission of Ohio (the "Industrial Commission"). In July 2002, a district hearing officer at the Industrial Commission disallowed Appellant's claim for insufficient evidence. In December 2002, a staff hearing officer affirmed the district hearing officer's decision due to lack of medical evidence. Thereafter, Appellant appealed the staff hearing officer's decision, which the Industrial Commission refused.

{¶3} On March 5, 2003, Appellant filed a notice of administrative appeal and complaint in the Summit County Court of Common Pleas pursuant to R.C. 4123.512. Appellant's case is one of many factually identical workers' compensation asbestos cases filed in the common pleas court. The complaint named the Administrator of the BWC and Appellee as defendants. The BWC and Appellee filed separate answers to the complaint.

{¶4} Thereafter, Appellee filed a motion for summary judgment, asserting that Appellant failed to comply with the administrative requirements of the Industrial Commission Resolution 96-1-01. Appellant responded to this motion. On February 25, 2004, the trial court granted summary judgment, incorporating by reference the rationale it articulated in a previously determined asbestos case, *Davis v. Daimler Chrysler Co.* (Jan. 23, 2004), Summit Cty. No. AC 2002-11-

6366.[1] In the instant case, the trial court noted that Appellant conceded in his response to the summary judgment motion that he had not complied with the requirements of Industrial Commission Resolution 96-1-01, and further concluded that Appellant "has yet to meet the threshold, ministerial qualification for merit determination of his claim before the Bureau of Workers['] Compensation."

{¶5} Appellant appealed from this decision, assigning three errors. As all three assignments of error involve similar questions of law and fact, we address them together.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON A FINDING THAT PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES[.]"

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN THIS WORKERS' COMPENSATION MATTER WHEN IT GRANTED DEFENDANT EMPLOYER'S MOTION FOR SUMMARY JUDGMENT BASED UPON A FINDING THAT A PLAINTIFF EMPLOYEE CANNOT APPEAL TO THE COURT OF COMMON PLEAS FROM A DENIAL OF THE CLAIM BY THE INDUSTRIAL COMMISSION OF OHIO WITHOUT FIRST SUBMITTING TO A STATE SPECIALIST EXAMINATION, EVEN THOUGH THERE IS NO OTHER REMEDY AVAILABLE[.]"

[1] In *Davis*, the trial court concluded that Appellant had failed to exhaust the Industrial Commission's administrative process as set forth in Resolution 96-1-01.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED DEFENDANT EMPLOYERS' MOTION FOR SUMMARY JUDGMENT BASED SOLELY UPON A FINDING THAT PLAINTIFFS [sic] EMPLOYEES DID NOT ATTEND AN EXAMINATION BY A STATE MEDICAL SPECIALIST EVEN THOUGH NO SUCH EXAM WAS SCHEDULED BY THE STATE[.]"

{¶6} In these assignments of error, Appellant contends that the court erred in granting summary judgment. This Court disagrees.

{¶7} Appellate review of a lower court's entry of summary judgment is *de novo*, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id.

{¶8} Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶9} Pursuant to our decision in *Esters v. Daimler Chrysler Corp.*, 9th Dist. No. 22030, 2004-Ohio-4586, we find that the trial court properly granted summary judgment in this case. In *Esters*, which involved a factually identical workers' compensation matter, this Court upheld the trial court's decision to grant summary judgment based upon the finding that the plaintiff-appellant in that case had not fully complied with Industrial Commission Resolution 96-1-01. In granting summary judgment, the trial court in *Esters* also adopted and applied to Appellee's motion in that case the order issued in *Davis*, supra.

{¶10} This Court applies and adopts our decision in *Esters* to the instant case, and accordingly concludes that the trial court did not err in granting summary judgment in this case. Appellant's assignments of error are overruled.

III.

{¶11} Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

WILLIAM G. BATCHELDER
FOR THE COURT

BATCHELDER, J.
BOYLE, J.
CONCUR

CARR, P.J.
DISSENTS, SAYING:

{¶12} I respectfully dissent. I do not consider an appellant's failure to comply with the requirements of Resolution 96-1-01 to be a refusal to submit to a medical examination with a "qualified medical specialist" pursuant to R.C. 4123.68(Y).

{¶13} Ohio Workers' Compensation statutes are to be liberally construed in favor of a claimant. *State ex rel. Riter v. Indus. Comm.* (2001), 91 Ohio St.3d 89, 91. R.C. 4121.13 authorized the Industrial Commission to adopt rules pertaining to the exercise of the Commission's powers, as well as rules regarding its proceedings and the mode and manner of investigations and hearings. R.C. 4121.13(E). Such rules and regulations are valid and enforceable unless found to be unreasonable or in conflict with statutes concerning the same subject matter. *Columbus & S. Ohio Elec. Co. v. Indus. Comm.* (1992), 64 Ohio St.3d 119, 122, citing *State ex rel. DeBoe v. Indus. Comm.* (1954), 161 Ohio St. 67, paragraph one of the syllabus.

{¶14} Resolution 96-1-01 is a rule adopted by the Industrial Commission that directs a claimant as to the actions he or she must take before the administrator of the Industrial Commission can refer the claim to a qualified medical specialist pursuant to R.C. 4123.68(Y). Therefore, a claimant must comply with the requirements of Resolution 96-1-01 before the mandates of R.C.

4123.68(Y) come into play. In this case, appellant has still not fulfilled all of the requirements set forth in Resolution 96-1-01. Resolution 96-1-01 does not state the implications of a claimant's failure to submit the necessary evidence. However, until a claimant submits all the necessary evidence, the administrator cannot refer him or her to a qualified medical specialist per R.C. 4123.68(Y).

{¶15} While R.C. 4123.68(Y) does state that a claimant forfeits his or her right to participate in the fund by a refusal to submit to an examination pursuant to notice from the administrator, the statute does not say that a claimant forfeits this right if he or she fails to submit the materials outlined in Resolution 96-1-01. The Industrial Commission cannot use the penalty provision of R.C. 4123.68(Y) to forfeit a claimant's right to participate for violation of a separate administrative procedure.

{¶16} In the instant case, the Industrial Commission administrator has not yet referred appellant to a qualified medical specialist. While I acknowledge that such a referral has not occurred because of appellant's failure to submit all the requisite evidentiary materials under Resolution 96-1-01, this does not obviate the fact that appellant could not have possibly refused to submit to an examination until he has first been referred for such an examination.

{¶17} Furthermore, I find it important to note that the Industrial Commission passed Resolution 03-1-02 in 2003, which substantively modified Resolution 96-1-01. Of particular significance is the language of Resolution 03-1-

02 that provides that the evidentiary materials must be provided by the injured worker "*prior to the adjudication of a contested claim* filed for any asbestos-related occupational disease[.]" (Emphasis added.) While the appellant in this case cannot avail himself of Resolution 03-1-02, the language of Resolution 03-1-02 nevertheless elucidates the fact that it could not have been intended that a claimant forfeits his or her right to participate in the workers' compensation fund by a mere noncompliance with the Industrial Commission's resolution.

{¶18} Thus, construing R.C. 4123.68 liberally in favor of appellant, I would conclude that appellant could not have forfeited his claim until he refuses to submit to a medical examination pursuant to notice from the administrator of the Industrial Commission.

APPEARANCES:

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