**IN THE SUPREME COURT OF OHIO**

**ROSALIND D. HENDERSON**

Plaintiff-Appellant,

v.

**CANTON CITY SCHOOLS, et al.,**

Defendants-Appellees.

**Appeal of Fifth Appellate District Court of Appeals Decision of February 19, 2019**

**Case No. 2019-0456**

# RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE CANTON CITY SCHOOL DISTRICT

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## I. STATEMENT OF THE CASE

This case originates from multiple appeals filed by Appellant from Industrial Commission decisions denying her request to participate in the benefits of the Workers' Compensation system resulting from an injury she sustained on March 17, 2014 to her left shoulder. The Industrial Commission initially allowed Appellant's claim for right and left shoulder sprain. The Appellant subsequently filed separate motions in this single claim asking the Industrial Commission further allow the claim for "partial thickness tear left supraspinatus." In the first motion, Appellant argued that the partial thickness tear was directly and proximately caused by the injury on March 17, 2014 (referred to as "Henderson I"). In the second motion, Appellant argued that the partial thickness tear was actually a pre-existing condition and the injury aggravated the condition (referred to as "Henderson II").

Both motions were denied by the Industrial Commission and the Appellant filed separate appeals in the Stark County Common Pleas Court. Both cases appeared on the Stark County Court of Common Pleas docket at similar times, and both were voluntarily dismissed and subsequently re-filed. At no time did the Appellant ever make any effort to consolidate the cases. On February 21, 2018, Appellant voluntarily dismissed her first case Henderson I a second time, which pursuant to the Ohio Rules of Civil Procedure represented a decision on the merits, fully and finally denying her claim for the partial thickness tear left supraspinatus.

Soon thereafter, Appellee filed a motion for summary judgment in Henderson II based on *res judicata*. The Trial Court granted Appellee's motion. The Fifth District Court of Appeals affirmed and Appellant filed its appeal to this Court.

Henderson I and II involve the same injured worker and employer, arise from the same alleged industrial injury, and the same Workers' Compensation claim. Both cases were premised

on the testimony, albeit recklessly inconsistent, from the same medical expert witness. Most importantly, in both cases, the Appellant requested that her claim be further allowed for the identical medical condition – "thickness tear, left supraspinatus". The only difference between the two cases is the theory of the causation – direct versus substantial aggravation.

## II. APPELLEE'S REPLY STATEMENT ON JURISDICTION

In the Appellant's Statement on Jurisdiction, she states that the case at bar is a case of "first impression" and that the issues are of "public or great general interest." The Appellant is wrong on both accounts. This case is not a case of first impression. This Court already addressed this specific issue. More importantly, the well-established *res judicata* jurisprudence at issues in this case is so well established that there is no reason to revisit it and there exists no benefit to the public in doing so.

### A. NOT A CASE OF FIRST IMPRESSION

This case involves basic principles of *res judicata* that have been addressed by this Court and Appellate Court hundreds of time over the last half century. The specific issue raised in Appellant's decision has already been addressed by this Court, by the Tenth District Court of Appeals in two separate cases and now the Fifth District Court of Appeals. The conclusions in all of these cases are consistent, well grounded on basic procedural precedent, and have laid down a clear and concise roadmap for Workers' Compensation practitioners.

The issue that Appellant is asking this Court to accept for consideration is the very same issue that this Court addressed in *Starkey v. Builders First Source Ohio Valley, LLC,* 130 Ohio St. 3d 114, 2011-Ohio-3278, 957 NE 2d. 267 (Ohio 2011). In *Starkey,* this Court phrased the issue before it as "whether a claim for a certain condition by way of direct causation must necessarily include a claim for aggravation of that condition for purposes of either R.C. §

4123.512 or *res judicata*." (Id. at 114, emphasis added). This Court went ahead and answered that question ruling that "because aggravation of a pre-existing medical condition is a type of causation, it is not a separate condition or distinct injury as defined in R.C. § 4123.01 and an appeal taken pursuant to R.C. § 4123.512 allows the claimant to present evidence on any theory of causation pertinent to a claim for a medical condition that has already been addressed administratively." (Id). The Court went on to rule that an appeal from an Ohio Industrial Commission order requires a Common Pleas Court to decide "the claimant's right to participate in the fund for a specific injury, not for a specific type of causation." (Id. at 119 emphases in the original). The question this Court raised in *Starkey* is the very same question Appellant wants the Court to answer in this case. This Court's decision in *Starkey* established that a failure to combine theories of recovery for the same Workers' Compensation injury and/or additional condition would have *res judicata* affect.

The Tenth District Court of Appeals in *Robinson v. AT&T Network Systems,* 10th Dist. No. 032703 OHCA10, 02 AP 807, 2003-Ohio-1513 (March 27, 2003), on facts nearly identical to the ones at bar, held that "an employee who presents a condition as directly caused by an injury must also present at the same time any claim he or she may have that the same condition is pre-existing and was aggravated by the employee's employment."

The Tenth District Court of Appeals revisited this issue in *Holbrook v. Ohio Health Corp., et al.* 10th Dist. No. 061115 OHCA 10, 14AP-507, 2015-Ohio-2354 (June 11, 2015). Citing *Robinson,* and this Court's decision in *Starkey,* the Court ruled that *res judicata* barred the plaintiff's efforts to have his knee claim allowed based upon a "flow through theory" since he had already litigated the very same condition under a theory of substantial aggravation.

The Fifth District Court of Appeals decision in this case is the forth one addressing the question of whether *res judicata* applies when a party splits the theories of recovery involving the additional allowance of a Workers' Compensation injury.

This is not a case of first impression. All four of the decisions discussed above have created a solid frame work upon which Workers' Compensation practitioners base their procedural practice. It is well established that a party must present all theories of recovery in an appeal to Court in order to establish an allowance or additional allowance in a Workers' Compensation claim. *Res judicata* will bar subsequent filings.

## B. THIS CASE DOES NOT RAISE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

In her jurisdictional statement, Appellant asserts that this case presents an issue of public or great general interest. This statement, however, is unsupported by any argument whatever. Other than simply arguing that the lower Court's decision is wrong, Appellant presents no comments on the unique nature of this case, and why it would do anything to serve the interests of the public or Ohio Jurisprudence.

As stated, experienced Workers' Compensation practitioners know quite well that multiple theories can (*Starkey supra)* and must (*Robinson supra)* be presented in a single case or suffer *res judicata* if brought separately. The Ohio Industrial Commission has indeed adopted as policy in Industrial Commission Memo S11 the mandates passed down by this Court in *Starkey* and in *Robinson.* Memo S11 provides that all theories of recovery can be presented at one time in a single motion before the Industrial Commission on questions of allowances or additional allowances. Attorneys, third party administrators and the Ohio Industrial Commission have consistently followed this orderly and sound principle of law.

*Res judicata* as applied in Workers' Compensation cases here is well established. Accepting this appeal would add nothing new to Workers' Compensation procedural jurisprudence. There is nothing unresolved in these cases. There is no stone unturned.

Accordingly, Appellee respectfully requests that this Court decline jurisdiction and refuse to hear Appellant's appeal.

## III. APPELLANT'S PROPOSITIONS OF LAW ARE WITHOUT MERIT

The appellant raised two propositions of law in support of her memorandum in support of jurisdiction. In the first proposition, Appellant argues that the Fifth District Court of Appeals misinterpreted this Court's decision in *Starkey, supra.* In the second, Appellant argues that the Court of Appeals erred in dismissing the Appellant's second case based on the theory of *res judicata.* In actuality, these propositions of law constitute a single argument and for that reason, Appellee will address them as one argument.

The Fifth District Court of Appeals properly affirmed summary judgment in favor of Appellee based upon the theory of *res judicata.* The lower Court did not misinterpret this Court's decision in *Starkey, supra.* As stated, this Court specifically phrased the issues in *Starkey* in the first paragraph in the decision as "whether a claim for a certain condition by way of direct causation must necessarily include a claim for aggravation of that condition for purposes of ... *res judicata.*" (Id. at 114). By answering that specific question in the affirmative, this Court could not have sent a more clear message to lower Courts. *Res judicata* will always bar a second attempt to litigate the same medical question albeit under a different theory.

Just because the facts were different in *Starkey* does not make the legal decision *dicta* as argued by Appellant in their Memorandum in Support of Jurisdiction. Once the Supreme Court stated that all theories of recovery can be raised in a single case, the message to practitioners was

loud and clear that they must in order to avoid *res judicata* affect. This Court's phrasing of the previously cited question at the beginning of the decision established this point.

The next argument presented in Appellant's brief focuses on the differences between the theories of recovery in direct versus substantial aggravation cases. The Appellee does not dispute that the theories are different. That has never been an issue in this case. Spending multiple pages on how they are different therefore has no relevancy whatsoever to the issue before the Court.

Appellant also argues that she should be able to pursue two separate cases for the same condition since the Industrial Commission adjudicated each claim separately. This argument is not only devoid of any supportive case law, and is contrary to this Court's decision in *Starkey,* it runs contra to the basic tenant of Workers' Compensation jurisdiction – that appeals from the Industrial Commission are heard *de novo* by Common Pleas Courts. *See Bennett v. Administrator Ohio Bureau of Workers' Compensation* 134 Ohio St.3d 329 (2012). (The Claimant bears the burden of proving all of the elements of his or her right to participate in the Workers' Compensation fund regardless of what the Industrial Commission decided).

The Appellant's argument that she should be able to proceed with separate cases since the Industrial Commission adjudicated them separately is also recklessly misleading and disingenuous since the Appellant herself is the one who set the cases up by filing separate motions in the first place. The Industrial Commission did not make a conscious decision to adjudicate separate claims. It simply adjudicated the claims in the manner Appellant presented them.

Finally, the Appellee respectfully requests that this Court find no sympathy in her lament that she could not argue both theories of recovery in a single case for fear that she would have to

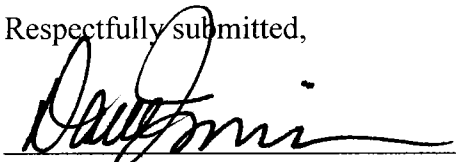
present contradictory expert medical evidence resulting in the denial of the conditions under both causal theories. Appellant's alleged strategic dilemma was self-inflicted. The Appellant should have focused on one theory, or at least retained an expert chiropractor with the integrity to issue causation opinions that did not directly conflict with each other.

What Appellant should have done was to combine her causes of recovery pursuant to Ohio Civil Rule 18 and consolidate the cases. Appellee respectfully submits that Appellant's refusal to do so was strategic. It had nothing to do what the Industrial Commission did. Appellant wanted multiple bites of the apple. Appellant admits she did not want to argue both theories in a single case, because they contradicted each other and would put them at a strategic disadvantage. The Appellant however, must accept the consequences of this failed strategy.

## CONCLUSION

For all of the reasons set forth above, Appellee Canton City Schools asks that this Court refuse to accept jurisdiction of the Appellant's appeal.

Respectfully submitted,



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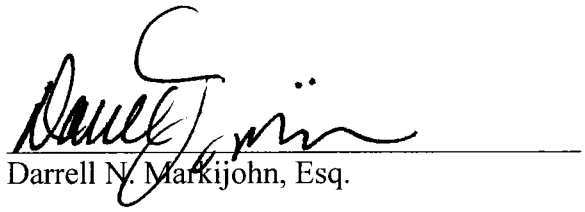

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