

IN THE SUPREME COURT OF OHIO

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CASE NO.: 2022-1446

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**DOMINGO A. RAMOS**  
Plaintiff-Appellant.

-vs-

**FRESH MARK CANTON**  
Defendant-Appellees,

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**ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT**  
**STARK COUNTY, OHIO**  
**CASE NO. 2021 CA 00076**

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**MEMORANDUM IN OPPOSITION OF DEFENDANT-APPELLEE**  
**FRESH MARK - CANTON**

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## **STATEMENT OF CASE AND FACTS**

Appellant, Domingo A. Ramos, was hired by Appellee, Fresh Mark, Inc., on September 15, 2016. At that time Appellant was using the name Samuel Martinez and presented documents to Fresh Mark which purported to confirm that identity. On December 16, 2017, the employee then known as Samuel Martinez apparently climbed over a wall for unknown reasons to a location where a meat grinder was in operation. His clothing became caught in the grinder, pulling him into the grinder. He died almost instantly. It was not until after his death that Fresh Mark became aware of the true identity of Appellant.

As a self-insured employer, Appellee followed the provisions of R.C. 4123.28 and Bureau of Workers' Compensation's Procedural Guide for Self-Insured Claims Administration and, because there was no period of total disability in excess of seven days and no disability benefits would be payable under R.C. 4123.56, R.C. 4123.57 or R.C. 4123.58, Appellant treated this claim as a no lost time claim, which by statute, is not required to be filed with the Bureau of Workers' Compensation pursuant to R.C. 4123.38.

The Industrial Commission denied the death claim filed on behalf of the dependents of Ramos on the basis that the claim had not been timely filed. The Stark County Common Pleas Court granted Appellee's Motion for Summary Judgment on that same basis. The Fifth District Court of Appeals affirmed the trial court's decision with three separate opinions. The opinion of Judge Wise was that Appellee was required to report the death of Ramos to the Bureau of Workers' Compensation, but R.C. 4123.28 does not extend the statute of limitations for *death* claims if the employer fails to make the required report. The opinion of Judge Baldwin was that the trial court's decision was correct because Appellee had no duty to report the death to the Bureau of Workers' Compensation. Judge Baldwin's opinion went on to agree with Judge Wise

that R.C. 4123.28 does not extend the statute of limitations in *death* claims even if such a duty existed. The opinion of Judge Hoffman would have reversed the trial court's decision.

**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR IS OF GREAT GENERAL INTEREST.**

Despite Appellee's Memorandum in Support of Jurisdiction characterization to the Court of Appeals decision as "fractured," the decisions in this claim and case have been consistent from the initial filing of the claim through the Fifth District Court's decision. The initial claim was considered at three levels of the Industrial Commission. The claim was denied by the District Hearing Officer, the Staff Hearing Officer and the Industrial Commission itself. The trial court granted Defendant's Motion for Summary Judgment and the Fifth District Court of Appeals affirmed the trial court's ruling. This is *not* a situation in which the underlying rulings have been inconsistent. All of these decisions considered the language contained in R.C. 4123.28 and determined that Plaintiff's claim was not timely filed.

Furthermore, the decision of the Court of Appeals was agreed to by two of the three judges, both of whom found that, even if Defendant had an obligation to file Plaintiff's claim with the Bureau of Workers' Compensation, the statute of limitations was not tolled by Defendant's failure to do so by the clear language of R.C. 4123.28. While the two opinions differ on whether Appellee had such an obligation, the end result is the same. The application filed by Appellant was not timely filed and the Industrial Commission was correct in denying the claim.

Accordingly, there is no reason for this Court to grant jurisdiction in this matter.

## **APPELLEE'S POSITION REGARDING APPELLANT'S PROPOSITION OF LAW**

**PROPOSITION OF LAW:** R.C. 4123.28 EXTENDS THE STATUTE OF LIMITATIONS FOR FILING A CLAIM FOR WORKERS' COMPENSATION BENEFITS WHEN AN EMPLOYER FAILS TO REPORT A WORKPLACE DEATH TO THE BUREAU OF WORKERS' COMPENSATION

### **LAW AND ARGUMENT**

#### **I. Appellee did not have a duty to file a report with the Bureau of Workers' Compensation.**

Ohio Revised Code Section 4123.84, effective 9/29/2017, requires that a workers' compensation claim for injury or death be filed within one year after the injury or death.

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 one year after the injury or death:

.... (4) Written or facsimile notice of death has been given to the commission or bureau.

In this case, Appellant's injury and death occurred on December 16, 2017. Appellant's death claim was not filed until December 5, 2019, clearly outside the one-year statute of limitations.

Appellant argues that Fresh Mark had a duty to report Appellant's death pursuant to R.C. 4123.28. However, it is clear that as a self-insured employer Fresh Mark was not required to file an injury or claim considered to be "medical only." Such a report need only be made if the claim results in seven or more days of total disability.

Every employer in this state shall keep a record of all injuries and occupational disease, fatal or otherwise, received or contracted by his employee in the course of their employment *and resulting in seven days or more of total disability.* (Emphasis added)

In this case, Appellant died on the date of the injury and thus there was no period of total disability as defined in R.C. 4123.56, R.C. 4123.57 and R.C. 4123.58. Accordingly, Appellant had no obligation to file a report of the injury.

This is further confirmed by the Bureau of Workers' Compensation's Procedural Guide for Self-Insured Claims Administration, which states at page 12:

#### Medical-only claims

A medical-only claim is categorized as a claim of seven or fewer days of lost time due to a work-related injury *with no compensation paid pursuant to ORC 4123.56(A) or (B), ORC 4123.57, or ORC 4123.58*. A medical-only claim *is not required to be reported to the BWC*, unless the employer is disputing the claim. (Emphasis added)

The provisions referred to in the Procedure Guide include R.C. 4123.56(A) and (B) which provide for the payment of temporary total compensation and wage loss compensation. Clearly neither type of compensation would have been paid in this claim. It must be noted that payment of death benefits is set forth in R.C. 4123.59. That provision is not referenced at all in the Procedural Guide. Temporary total compensation is governed by R.C. 4123.56 and is paid for a period when the injured worker is temporarily unable to return to work. Wage loss compensation is also governed by R.C. 4123.56 and is only paid when an injured worker is unable to return to the former position of employment as a result of restrictions due to the allowed conditions and suffers a wage loss as a result. Neither situation applies to Appellant's claim. R.C. 4123.57 provides for partial disability compensation in the event of loss or loss of use of a body part, such as a finger or arm. This section is clearly not applicable in this claim. R.C. 4123.58 provides for payment of compensation for permanent and total disability and is only payable for a period of time from when an injured worker is found to be permanently and

totally disabled until his or her death. Since Appellant died immediately following his injury, no permanent and total disability benefits would be paid in this claim.

In this case, it was clear at the time the incident occurred that no benefits would be paid under the Revised Code sections referenced above. Accordingly, Appellee followed the provisions in the Bureau of Workers' Compensation's Procedural Guide for Self-Insured Claims Administration and determined that this claim would be considered a "medical only" claim.

Appellant argues that R.C. 4123.28 must be interpreted and construed. However, as noted by this Court, it is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation. *Wingate v. Hordge*, 60 Ohio St.2d 55, 58 (1979). A court cannot employ interpretive methods to discern the meaning of a clearly written statute. See *Kimble v. Kimble*, 97 Ohio St.3d (2002); *Harsco Corp. v. Tracy*, 86 Ohio St.3d 189 (1999). In the instant case the statute is clear that a reporting is only required when there are seven or more days of disability. That is not the situation in this case. As also noted by the trial court, if the legislature had intended the first sentence of R.C. 4123.28 to include death, it could have included the words "or death" at the end of the sentence.

Appellant reaches outside the Ohio Workers' Compensation Act to find a legal definition of total disability. However, the Ohio workers' compensation system is a creation of statute *Westenberger v. Industrial Commission of Ohio* (1939), 135 Ohio St. 211. While R.C. 4123.95 requires statutes to be liberally construed in favor of employees and their dependents, an accurate explanation of R.C. 4123.28 requires a complete understanding of Chapter 4123, the workers' compensation system and the types of compensation which can be paid as set forth in that Chapter.

Accordingly, even if R.C. 4123.28 were ambiguous, “disability benefits” are defined and paid only pursuant to the sections referred to in the Bureau of Workers’ Compensation’s Procedural Guide for Self-Insured Claims Administration, i.e., R.C. 4123.56, R.C. 4123.57 and R.C. 4123.58. Since none of those provisions are applicable in this case, even a liberal interpretation of the provisions of R.C. 4123.28 must be done with the definitions provided in those sections in mind. Furthermore, courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise and to which the legislature has delegated the responsibility of implementing the legislative command. *State, ex rel. McLean v. Industrial Commission of Ohio*, (1986), 26 Ohio St.3d 90. In this case the Industrial Commission specifically determined that R.C. 4123.28 does not apply to the instant case. Due deference should be given to the Industrial Commission’s determination on this issue.

**II. Even if Appellee was required to file a report with the Bureau of Workers’ Compensation, the statute of limitations for filing a claim is not extended due to its failure to do so.**

The last paragraph of R.C. 4123.28 states:

Each day that an employer fails to file a report required by this section constitutes an additional day within the time period given to a claimant by the applicable statute of limitations for the filing of a claim based on the *injury* or *occupational disease*, provided that a failure to file a report shall not extend the applicable statute of limitations for more than two additional years. (Emphasis added.)

The language of this section does not include any reference to death claims. Because the first paragraph of this section does make specific reference to “death” the failure of the legislature to include “death” claims in this paragraph is significant and clearly shows that although the legislature was aware of the potential for deaths resulting from an injury or

occupational disease, it chose not to extend the statute of limitations for a *death* claim. The opinion of Judge Baldwin cites several cases in support of this reading of R.C. 4123.28.

Based upon the foregoing, the tolling provisions of R.C. 4123.28 for an employer's failure to report a claim when it has a duty to do so, is not applicable to death claims. Thus, the one-year statute for filing the claim was not tolled in this instance and Appellant's claim was not timely filed when it was filed on December 5, 2019.

### **CONCLUSION**

For the above reasons, Appellee, Fresh Mark, Inc. respectfully request that this Court decline jurisdiction in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was sent by email to the following, this 20<sup>th</sup> day of December, 2022:

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Brief of Defendant-Appellee in Opposition