In the
Supreme Court of Ohio

BRIAN CALDWELL, ET AL.,	:	Case No. 2023-0809
	:	
Appellants,	:	On Appeal from the
	:	Marion County
v.	:	Court of Appeals,
	:	Third Appellate District
WHIRLPOOL CORP.,	:	
	:	Court of Appeals
Appellee.	:	Case No. 9-22-61

MERIT BRIEF OF APPELLANT OHIO BUREAU OF WORKERS' COMPENSATION

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TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Other Authorities

INTRODUCTION

Brian Caldwell did everything right in seeking workers'-compensation coverage for an "additional condition" that he said arose from an earlier, recognized claim. No one disputes that he timely filed an administrative request for such coverage, triggering review before the Industrial Commission. That body has continuing jurisdiction for five years after a last medical or compensation payment to modify an award to cover additional conditions. R.C. 4123.52. And no one disputes that, after he was unsuccessful before the Commission, he timely filed his appeal to a common pleas court under R.C. 4123.512 to challenge the Commission's order and obtain a court declaration of his right to participate in the system for that additional condition. So the court should have reached the merits of his claim of entitlement to coverage for an additional condition.

But the court threw out his case, without reaching the merits, because, it said, it was too late—not that it was *filed* too late, but that the court no longer had time to decide it. The common pleas court said a clock had run out on his claim—not a clock requiring Caldwell to do anything, but a ticking clock that required *the court* to resolve his claim before it ran out. Both that court and the Third District said that R.C. 4123.52's five-year limit on the *Commission's* continuing jurisdiction means that administrative clock keeps ticking in the background even after the action moves to court. So if *courts* do not resolve a case fast enough, the *claimant* loses. That reasoning and result are wrong, as a matter of statute, fairness, and common sense. The Court should reverse that mistake.

Specifically, the Court should explain that R.C. 4123.52 sets only an *administrative* time limit on Commission power, and nothing in that statute controls the timing in court. Further, R.C. 4123.512, which governs a common-pleas court's jurisdiction and substantive review of a claim, does not mandate following the earlier administrative clock. To the contrary, R.C. 4123.512(G) expressly provides that a later court decision favoring a claimant will be treated "as if" the Commission had reached that result, thus relating back in both substance and time to direct the Commission to declare coverage and award benefits to a claimant like Caldwell.

That result is further confirmed by the rest of the statutory scheme, and by the General Assembly's admonition for courts to read statutes to reach reasonable results. Nowhere else in Ohio law does a statute tell a party that his claim will get thrown out if he cannot somehow make a court decide fast enough to meet some statutory deadline. And *this* Ohio law does not do that, either. The General Assembly, not Kafka, wrote this scheme.

Because the court below was wrong, and because Caldwell played by the rules, the Court should reverse.

STATEMENT

A. Ohio law allows injured workers, after receiving workers'-compensation coverage, to seek coverage for "additional conditions" through both the administrative process and court appeals.

The Ohio workers'-compensation system includes multiple steps to resolve whether a worker claiming a workplace injury will receive any form of workers' compensation, or what form of compensation (e.g., medical payments for treatment, or compensation for time lost from work, or temporary or permanent disability in part or totally). Those many steps, whether for an initial claim after an injury, or for "additional conditions" that later arise from the same injury, fall under three basic stages. First, a claim is reviewed by either the employer, if the employer is self-insured, or by the Bureau, if the employer participates in the Bureau's "State Fund." Second, a claim can be reviewed by an administrative process under the independent Industrial Commission. Finally, either a claimant or an employer can appeal to the courts regarding the claimant's right to participate in the system.

Relevant here, a claimant who has already been found entitled to compensation, and has received some form of benefits, may seek coverage of an "additional condition"—a medical condition that arises from the same injury for which the claimant received coverage. A worker seeking recognition of an additional condition starts with his employer, if it is self-insured, or with the Bureau, if not, and that stage is not at issue here.

A claimant has a time limit for requesting additional-condition coverage to be added to an existing claim, and that request is resolved administratively by the Industrial Commission, which may do so up to five years from the time of the last relevant payment. Specifically, that limit is framed in terms of a limit on the Industrial Commission's continuing jurisdiction to grant additional conditions, set by R.C. 4123.52. That statute, which has been repeatedly amended, said this in the version that applied to Caldwell:

> (A) *The jurisdiction of the industrial commission* and the authority of the administrator of workers' compensation over each case *is continuing*, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which *event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation* or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.

R.C. 4123.52(A) (2011 version, later amended in 2020, 2023) (emphases added). Within the Industrial Commission stage, a request for an additional condition can go through three steps—review by a district hearing officer, the staff hearing officer, and the Commission itself.

If either party is unhappy with a Commission order, "[t]he claimant or the employer may appeal an order of the industrial commission" to the courts. R.C. 4123.512(A). Such appeals are a hybrid between a typical administrative appeal and a typical cause of action filed directly in common-pleas court. The appeals follow some rules set by workers'-compensation statutes, and others set by the Civil Rules.

Either party has sixty days to appeal, measured from the last step at the Commission. "[T]he appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision . . . ." *Id.* That ensures jurisdiction: "The filing of the notice of the appeal with the court is the only act required to perfect the appeal." *Id.* Although the appeal flows from a Commission decision, the statute makes the Bureau's Administrator (not the Commission) an automatic party. R.C. 4123.512(B). After those statutory requirements are met, the claimant files a complaint, and the Civil Rules take over from there. R.C. 4123.512(D).

The common-pleas court then resolves whether the claimant has a "right to participate" in the system for the additional condition, just as common-pleas courts decide whether a claimant's initial claim is valid. *Id.* Parties are entitled to jury trials if the case goes to trial. *Id.* The court does not decide payment amounts; it just declares the right to participate for the initial claim or additional condition, and returns the case to the administrative process to take it from there:

> (G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, *the commission* and the administrator *shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission*, subject to the power of modification provided by section 4123.52 of the Revised Code.

R.C. 4123.512(G) (emphases added). As with any case, parties unhappy with a common-pleas court decision may appeal to a court of appeals and to this Court. R.C. 4123.512(E).

B. Brian Caldwell timely asked the Industrial Commission to recognize an additional condition, and after losing, appealed to court.

Brian Caldwell, Plaintiff-Appellant here, was injured in the course of his employment with Defendant-Appellee Whirlpool. He was injured on March 23, 2015. App.Op. ¶2. His claim for workers' compensation was allowed, and his last payment of any type under this claim was a permanent-partial-disability payment on January 11, 2017. *Id.*

Caldwell timely sought an allowance for an additional condition less than three years after his last relevant payment, filing his request on December 5, 2019. *Caldwell v. Whirlpool Corp.*, 2023-Ohio-1530 (3d Dist.) ("App.Op."), ¶3. Both the district hearing officer and staff hearing officer denied that request, and the full Commission declined further review. *Id.* The Commission's denial was issued on April 17, 2020, and mailed April 21, 2020. Compl. ¶9.

Caldwell then timely appealed to the Marion County Court of Common Pleas, filing on June 16, 2020. *Id.;* Notice of Appeal in 2020-CV-0231, June 16, 2020. (The appellate opinion mistakenly says June 19, but the time-stamped documents show June 16, and even the later date would not change things. *See* App.Op. ¶3.) That date was within the

sixty-day period to appeal from receipt of the Commission's denial. That June 2020 appeal was also within five years of Caldwell's last payment, which, again, was in January 2017. So about three-and-a-half years had passed from his last payment to his appeal to the common-pleas court.

Caldwell voluntarily dismissed his appeal on April 30, 2021, and refiled less than a year later, on April 20, 2022. App.Op. ¶¶3–4.

Whirlpool then moved for summary judgment on May 27, 2022, arguing that Caldwell's claim had "expired" because it was now more than five years since Caldwell's last payment. *Id.* That five-year period, it said, ran out on January 11, 2022. *Id.*

C. The trial and appeals courts both said that Caldwell's claim expired after he had appealed, because, they said, the administrative time limit can run out even when a claim is in court.

The common-pleas court granted Whirlpool's summary-judgment motion. App.Op. ¶4; Judgment Entry (Marion Cty. Com. Pl. Oct. 3, 2022) ("Com.Pl.Op."). The court, adopting a magistrate's decision and rejecting Caldwell's objections, agreed with Whirlpool that the claim had "expire[d]." Com.Pl.Op. at 8. It said that R.C. 4123.52's five-year clock keeps running while a case was pending in court, such that if it ran out before a court ruled in a claimant's favor, the whole claim died, including the pending additional-condition request. *Id.*

The common-pleas court explained that its decision was mandated by a then-recent Third District decision, *Chatfield v. Whirlpool Corp.*, 2021-Ohio-4365, which had ruled

similarly the year before. *Id.* at 1, 8 (citing *Chatfield*). The common-pleas court further reasoned that R.C. 4123.52's five-year time limit operated more like a statute of repose than like a statute of limitations. *Id.* at 3. It asked the appeals court to review that point. *Id.* at 4.

The court acknowledged that its judgment seemed "fundamentally unfair" to Caldwell or any similar claimant to "lose a case" merely because the Court did not act fast enough, even after "the injured worker . . . took the steps necessary" to advance the case. *Id.* at 5. But, said the Court, a claimant "would be prudent to seek a schedule that allows for" enough time to have a case resolved, by filing far in advance of the statutory deadline for filing with the Commission. *Id.*

The Third District affirmed, likewise relying on its own earlier *Chatfield* decision. App.Op. ¶6 (citing *Chatfield*, 2021-Ohio-4365, ¶15). It cited *Chatfield* for the idea that "R.C. 4123.52 . . . essentially places a statute of limitations on workers' compensation claims." *Id.* (citing *Chatfield*, 2021-Ohio-4365, ¶10). It said that under *Chatfield*'s reading of R.C. 4123.52, "Caldwell's claim had expired by operation of law by January 11, 2022," that is, five years from his last payment, and it did not matter that he had filed administratively and even appealed to court by that date. *See Id.* at ¶13.

The Third District also explained that Caldwell's use of the savings statute was irrelevant. *Id.* at ¶¶14–15. It did not matter whether he had a year from dismissal to re-file, because all that mattered was that the Commission's administrative clock ran out

before Caldwell could succeed in obtaining a court victory and resulting coverage; it did not matter that his filing or re-filing were perfectly timely. *See id.*

Caldwell appealed to this Court, which granted review on both of Caldwell's propositions of law. *08/29/23 Case Announcements*, 2023-Ohio-2972. The Court then granted the Bureau's motion to realign as an Appellant. *11/3/23 Case Announcements #3*, 2023-Ohio-4016. As that motion explained, the Bureau agrees with Caldwell that he deserves his day in court to have his case decided on the merits, but it does not endorse his challenge to the Commission's rejection of his request for additional-condition coverage.

ARGUMENT

Caldwell's two propositions of law are both correct. R.C. 4123.52's five-year limit for additional-condition coverage is for *administrative* requests that go to the Commission, and that clock does not affect a common-pleas court's jurisdiction under R.C. 4123.512. Separately, Caldwell validly filed on time to start the case, and he then validly re-filed under the savings statute. Consequently, the trial court and Third District were both wrong to throw out Caldwell's procedurally valid claim.

Ohio Bureau of Workers' Compensation's Proposition of Law No. 1:

The five-year limitation under R.C. 4123.52 does not apply to an R.C. 4123.512 appeal.

Caldwell filed his claim on time at the Commission, and it did not "expire" after he had already filed his appeal to court. That is shown by the plain statutory text, reinforced by other statutes and case law, and by common sense. Parties must be diligent to

protect their *own* rights, but parties' timelines do not run out because a court or other party does not do their part fast enough. The appeals court's contrary view was mistaken, so this Court should reverse, and give Caldwell his day in court.

A. R.C. 4123.52's five-year deadline for administrative jurisdiction applies only to an injured worker's obligation to file administratively on time, and the clock does not "run out" or extinguish a claim that is already on appeal in the courts under R.C. 4123.512.

1. The plain text of R.C. 4123.52 governs only the Commission's jurisdiction, not the courts', and nothing in R.C. 4123.512 sets an expiration date on a timely filed claim.

This case, like all cases of statutory construction, "begins with the statutory text, and ends there as well if the text is unambiguous." *State v. Bortree*, 170 Ohio St. 3d 310, 2022-Ohio-3890, ¶10. In this tale of two statutes, both support Caldwell: R.C. 4123.52 governs only the Commission, not the court, in setting a five-year deadline, while R.C. 4123.512 nowhere tells a court to throw a case out based on that administrative clock.

Start with R.C. 4123.52. As quoted above (at 3) (again, using the then-applicable version), the five-year period for adding conditions is stated in terms of the Commission's continuing jurisdiction. "The jurisdiction of the industrial commission . . . over each case is continuing," and the Commission "may make such modification . . . as, in its opinion is justified." *Id.* But "[n]o modification . . . shall be made" after five years from an injury if no relevant benefits are paid, or, if benefits have been paid, "the modification, change, finding, or award shall be made within five years from the date of the last payment of

compensation." *Id.* That is it: The Commission is told to make any changes within five years after the last relevant payment, and after that, its continuing jurisdiction expires.

Nothing about that time limit, on its own terms, tells a court to do anything. True, if the Commission tried to act administratively on a new request after its jurisdiction expired, *that* would be an error, and a reviewing court could address it. But that would occur only if the *Commission* tried to act administratively—that is, absent a court order authorizing it—after the clock had run, by, for example, accepting a too-late request and trying to grant it. *See Perez v. Univ. Hosp. Health Sys.*, 2012-Ohio-5896, ¶19 (8th Dist.).

A common-pleas court's jurisdiction is separately governed by RC. 4123.512, which is straightforward in providing the court's own jurisdictional rules. An appeal must be filed within sixty days of the last relevant Commission decision, and that is all. R.C. 4123.512(A). "The filing of the notice of the appeal with the court is the *only act required to perfect the appeal*." *Id.* (emphasis added); *Fisher v. Mayfield*, 30 Ohio St. 3d 8, syl. ¶1, 11 (1987). The *only* act. Jurisdiction is then "perfect[ed]"—not partially perfected, and not requiring anything else. Nothing tells the court to keep an eye on any still-continuing clock.

Other statutes and this Court's guidance tell a Court to resolve all such workers'-compensation claims *promptly*, whether for allowance of an initial claim or for additional-condition coverage, but none set a time limit for resolution. Appeals under R.C. 4123.512 "shall be preferred over all other civil actions" on the docket except election cases. R.C.

4123.512(I). To highlight that, this Court's case-reporting form requires courts to track statistics regarding workers' compensation appeals against other case categories. *See* Superintendence Rules 37, 39, and Statistical Form A; *Ferguson v. State,* 151 Ohio St. 3d 265, 2017-Ohio-7844, ¶37. But no binding law requires a court to keep an eye on some still-ticking administrative clock over at the Commission, and to wrap up a case before that alarm goes off.

Thus, an employer cannot challenge a trial court's *statutory jurisdiction* to hear a case, if it was filed on time, based on either the plain text of R.C. 4123.52 or R.C. 4123.512. Even if the administrative clock "runs out" when a case is in court (and it does not), it is inaccurate to say that the claimant did not file in time administratively, or to say that a claimant did not file in time at the court. If an employer had any such deadline-based theory at all, it should be analyzed as a form of *mootness.* That is, an employer's argument would be this: "As of today (after the clock runs), the Commission would not be able to give relief even if the court rules for the claimant, therefore, the court can give no effective remedy, so the case is moot."

But any mootness approach would also be mistaken, for, as shown in the next section, R.C. 4123.512 also accounts for what happens after a case returns to the Commission.

2. R.C. 4123.512(G) provides that court decisions favoring workers will relate back as if the court's judgment were the Industrial Commission's decision, and that relation back covers the timing of the decision as well.

While R.C. 4123.512 does not tell courts to resolve cases in time to meet the administrative text, it does include a provision that governs the return of the case to the agency after a court finds in favor of a claimant. Part (G) says:

> If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim *as if the judgment were the decision of the commission*, subject to the power of modification provided by section 4123.52 of the Revised Code.

R.C. 4123.512(G). That "as if" provision empowers—and directs—the Commission to implement the Court's decision by recognizing the additional condition and awarding any benefits flowing from that recognition. In other words, the statute expressly contemplates that the court will return a case to the Commission, and it tells the Commission to proceed "as if" the court's judgment had been its own.

That means that if the court finds that a worker has the right to participate for a certain additional condition, the Commission shall proceed "as if" it had granted, rather than denied, the worker's request in the first place. A natural reading of that clause covers both substance and timing. It changes the substance from a denial to a grant, and it puts the worker back in the same place that he had been at the Commission a year or more before—with a timely claim pending before the Commission. That gives the worker

the right to pursue any medical benefits or indemnity associated with that additional condition.

Nor is that "as if" clause negated by the provision's last clause, which provides that the as-if relation-back is "subject to the power of modification provided by section 4123.52 of the Revised Code." *Id.* That clause allows for *further* modification, for example, if the claimant later comes back to establish yet *another* additional condition. After all, it speaks of the "power of modification," not a *limit* on power.

For several reasons, that "subject to" clause cannot be reasonably read to provide that the Commission's power to award coverage, after a court finding, is somehow limited by some still-ticking time clock from the previous round at the Commission. First, if the General Assembly meant to *limit* the Commission's power to award coverage after that time, it naturally would have used language like "subject to the time limits in," not the affirmative "power of modification." Second, it makes no sense to send someone back to the Commission with a victory in hand, and then have them cut off from cashing it in. Third, nor does it make sense to have a court even resolve a case in a claimant's favor if the Commission cannot implement it. Yet the entire provision is framed as what to do with the judgment when going from court to Commission, which presupposes that the court finishes the case. If the Assembly meant to cut off the case midway, it could have and would have just said *that* directly, without using this circumlocution to get there.

Thus, R.C. 4123.512 provides for a case to be completed, and then sent back to the Commission to implement a decision granting additional-condition coverage.

Notably, this interplay between R.C. 4123.52 and 4123.512 is, at every turn, about the *power* of the agency, and then the *power* of the court, to *resolve* the claim before each body, after that claim is timely *initiated* in the agency or court. It is not a matter of "tolling," because that term of art refers to giving a party more time to file something or do something, whether a complaint or appeal or any step.

3. Other statutes confirm Caldwell's view.

While the plain text of both R.C. 4123.52 and 4123.512 resolve this case in favor of a claim lasting until court resolution, other provisions further confirm that reading.

For starters, R.C. 4123.95 instructs courts that provisions in all of Chapter 4123 "shall be liberally construed in favor of employees." That liberal-construction mandate applies to questions of the Commission's continuing jurisdiction. The Court has already said that "language provided in R.C. 4123.52"—i.e., the statute at issue here, governing Commission jurisdiction—"should be liberally construed in favor of the injured worker." *State ex rel. General Refractories Co v Industrial Comm.*, 44 Ohio St. 3d 82, 84 (1989).

Next, several other provisions governing payments show that the entire system presumes that cases will reach court resolution, that is, that cases will jump from the Commission to the courts, and that payment or other steps will then proceed after a case comes back to the Commission. For example, R.C. 4123.511(H) governs timing of

"payments of compensation to a claimant"—and here, "compensation" refers to certain types of direct compensation, not payment of medical bills—arising from any Commission order. It says that payment begins after all the dust settles—after an agency order *or after a final court order*: "if no appeal of an order has been filed under this section [i.e., appeals within the Commission levels] or to a court under section 4123.512," then payment is after "the expiration of the time limitations for the filing of an appeal of an order." R.C. 4123.511(H). That pay-after-finality shows the presumption that cases may go through many levels of agency and court adjudication—perhaps even to this Court—before being finalized. That is inconsistent with the clock running out before a court can resolve a claim.

Likewise, R.C. 4123.511(I) provides that "payments of medical benefits" shall begin upon the earlier of a staff hearing officer's determination, R.C. 4123.511(I)(1), or the "date of the final administrative or judicial determination," R.C. 4123.511(I)(2). Again, that shows the system is premised upon working through whichever final determination, and then moving on to payment—not cutting off a court's power to decide. *See also* Ohio Admin. Code 4123-3-23(A) (administrative bill-paying deadlines incorporate R.C.4123.511(I), thus incorporating "final administrative or judicial determination").

Notably, R.C. 4123.52, which contains the five-year continuing-jurisdiction provision in R.C. 4123.52(A), also has payment-timing provisions in R.C. 4123.52(B) and (D). Those provisions likewise assume a world of awaiting finality from either an

administrative or court decision. For example, R.C. 4123.52(B) invokes the timing from R.C. 4123.511(I), which, as noted just above, incorporates a "judicial determination" date.

Finally, in addition to these specific workers'-compensation statutes, if any ambiguity remained, the statutory canons of construction support Caldwell here. The Bureau urges that these need not be reached, as no ambiguity exists, based on the plain text of R.C. 4123.512 and R.C. 4123.52, or after looking at all of the workers' compensation statutes. But *if* the Court finds ambiguity, the general canons seal the deal. In particular, R.C. 1.47 mandates presumptions that "(B) The entire statute is intended to be effective; (C) A just and reasonable result is intended; [and] (D) A result feasible of execution is intended." Further, R.C. 1.49(E) tells courts to consider the "consequences of a particular construction." As shown below, allowing a timely filed claim to continue to resolution is the only reading that meets all of those tests of effectiveness, reasonableness, and fairness.

4. Cutting off a worker's rights mid-case due to factors outside his control is an unreasonable and unfair result.

As just noted, classic canons of statutory construction instruct courts, when they face ambiguity, to read statutes to be reasonable and just and give effect to a statute's purpose. Here, the purpose of each *filing* deadline is to ensure that a claimant *files* timely, but no such purpose is met by setting a deadline on a court's decision-making—with a claimant paying the price. That should be self-evident, but if any doubt remains, breaking it down proves the point.

First, the purpose of the court-appeal process is to allow courts to decide whether a claimant is entitled to participate in the system and gain coverage, whether for an initial claim or for an additional condition. Courts cannot do so if they are presented with cases with no time to resolve them before the clock runs out. Keep in mind not just the time in a common pleas court, but the average time for an appeal to a court of appeals and then to this Court. A full cycle through this Court alone takes typically over a year, so working through three court tiers could take three years, or even more if there is a remand and another up-and-down along the way. That means that a claimant would have to back up his "five years" for filing not by a year, but by three or four years, i.e., filing within one year of the last payment to be safe.

Second, that same reality—that a claimant has very little time to file—shows not only unreasonableness, but of course great unfairness. Deadlines and ticking clocks are meant to incentivize a party to act on time and not sit on his rights, but it is unfair to cut off a party's rights because someone else—not just the courts, but even an opposing party—runs out the clock.

Indeed, a *defendant's* ability to slow the clock is notable here, as a claimant is not merely subject to the court's calendar control—that is bad enough—but to his opponent's ability to slow the clock. Defendants in all manner of cases frequently do so, and the usual incentive—delaying paying on a claim—is amplified when delay buys *dismissal and thus no payment*, not just later payment.

This Court dealt with the flip side of that in *Ferguson,* in which the Court upheld a statute requiring a claimant-plaintiff in an employer-filed appeal to obtain the employer-defendant's consent to file a Rule 41 dismissal and buy a year to refile. 151 Ohio St. 3d 265. The Court noted that because claimants received payments during an appeal, "there was an incentive" for claimants to buy time and "partially insulate themselves from a potential reversal." *Id.* at ¶34. The court acknowledged that "delay for delay's sake was a rational strategy given the lay of the land legally." *Id.* at ¶37. The continued payments meant that "[j]ustice delayed paid." *Id.* The court noted that "[t]his is a distinction without parallel in other civil litigation." *Id.* at ¶34. Thus, the court found it rational for the General Assembly to want to remedy that unfairness and level the playing field. *Id.* at ¶38.

This case is the mirror of *Ferguson,* but even stronger. Here, a defendant is incentivized not just by delaying payment, but by the promise of denying it completely by running out the clock. Every minor move—scheduling depositions and the like—holds promise to kill the case. If it was rational for the General Assembly to enact the law in *Ferguson* to *correct* unfairness arising from the claimant's controlling the clock to the defendant's detriment, then surely it would be *irrational* to *create* such an unfair incentive by setting up a time clock outside of the claimant's control that nevertheless harms him.

The Court addressed—and rejected—the inherent unfairness of such arrangements in a strikingly similar non-workers'-compensation case, *2200 Carnegie, L.L.C. v.*

Cuyahoga Cty. Bd. of Revision, 135 Ohio St. 3d 284, 2012-Ohio-5691. In *2200 Carnegie,* parties contesting property valuations before a board of revision had to file a complaint by a deadline, and then the *county auditor*, a third party, had to notify other parties within thirty days after that. The Court found that the first deadline, in the party's control, was jurisdictional. *Id.* at ¶26. But the second requirement was not, because it was outside the party's control: "conferring jurisdictional significance on the 30–day time limit [for notification] would violate basic fairness, given that an administrative official is the one required to act." *Id.* at ¶27. The Court contrasted the initial "requirement that an administrative proceeding be timely instituted, which is an act within the control of the instigating party," with "the timeliness of the auditor's action," which "lies outside the control of either the owner or the school board." *Id.*

So, too, here. A party cannot be expected to control a court's resolution of a claim any more than it can be expected to make an auditor do her job, and a party especially cannot hurry along its opponent. Indeed, not only is that an unreasonable way to read a statute if any ambiguity exists, but it might be unconstitutional to do so, triggering the duty to read statutes to preserve their constitutionality. *State v. Jeffries*, 160 Ohio St. 3d 300, 2020-Ohio-1539, ¶27 (noting duty to read statutes to preserve constitutionality); *Buchman v. Wayne Trace Loc. Sch. Dist. Bd. of Edn.*, 73 Ohio St. 3d 260, 269 (same).

After all, this Court, when it first upheld the validity of R.C. 4123.52's deadline for claimants to administratively file a request for additional conditions, explained that

"[s]tatutes of limitation for the prosecution of actions and the assertion of substantive rights have been held constitutionally valid, if the period within which the right must be asserted is reasonable." *Sechler v. Krouse*, 56 Ohio St. 2d 185, 190 (1978). That standard is not met under Whirlpool's view, regardless of whether it is viewed as Caldwell's duty to control the court's calendar, or Caldwell's duty to file years earlier administratively, which, again, shrinks to an unknowable and near-zero timeline. Similarly, the United States Supreme Court found a due process violation when a state administrative body rejected a civil-rights complaint because the agency did not process it quickly enough. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

In sum, asking the impossible is unreasonable.

5. Caldwell filed in time administratively and in court, and that is enough.

Under the above legal principles, applying the law to Caldwell's facts is straightforward. No one disputes that he filed in time administratively, as his December 2019 filing was *less than three years* after his last payment in January 2017. And no one disputes that he filed his court appeal on time under R.C. 4123.512, as his June 2020 filing was within the sixty-day period after the Commission's last order. While the five-year timeline no longer applies once in the courts, as explained above, even if it did, Caldwell met that, too, as his June 2020 appeal was filed in court just four years and one month after his last medical payment. Thus, if the common pleas court had heard and resolved his

case in his favor in under eleven months, with a bit of time for processing at the Commission, he could have received payment, and we would not be here.

But if Caldwell were required to file *even earlier*, to allow time for further review, when would that have been? His under-three-year filing—pretty early for a five-year period—did not leave him time to get through even the common pleas court. If his clock could run out in court, as Whirlpool says, Caldwell needed to back up to allow for an appeal to this Court. After all, if the clock can run out while a claim is pending in common-pleas court, it presumably could in any court. That means that Caldwell was likely too late even if he filed on day one of the five-year period.

One remaining wrinkle, covered in Proposition No. 2 below, was Caldwell's dismissal and re-filing, as the five-year clock, if it were running, ran out during the year between his dismissal and re-filing. As detailed below, though, that does not matter, and even the appeals court did not seem to disagree with that. This case turns on the first proposition.

B. The appeals court's contrary analysis was wrong.

Against all that above, the appeals court's contrary view was mistaken. Whether one looks at the opinion below in *Caldwell*, or in the Third District's earlier *Chatfield* decion, the court's analysis and conclusion were wrong.

First, the court used the wrong framework by accepting Whirlpool's framing of the issue as a question of "tolling" a "statute of limitations." *See Chatfield,* 2021-Ohio-

4365, ¶15 ("the mere filing of Chatfield's motion for the additional conditions was not sufficient to toll the statute of limitations regarding the expiration of her claim"); App.Op. ¶15 (Caldwell's court filing "did not toll the period set forth in R.C. 4123.52"). A statute of limitations, by definition, is the time established for a party to *file* something. That term has never been used, to the Bureau's knowledge, to describe any scheme whereby a party must ensure another party acts in time, let alone controlling a court's time for decision. Likewise, "tolling" is a term used to mean pausing a clock for a party to act, not a clock by which a party spurs a court to decide. As noted above, even if the court were right in its view of the clock here—and it is not—then the common pleas court should have analyzed the case under mootness doctrine. Mootness would purportedly arise because of a newly arising inability (again, if it were true) for the Commission to award Caldwell coverage.

For similar reasons, the common-pleas court's entire discourse regarding statutes of limitations vs. statutes of repose was irrelevant. That court rightly described *both* categories as "limit[ing] the time in which a plaintiff may *file* an action." Com.Pl.Op. at 3 (quoting *Wilson v. Durrani*, 164 Ohio St. 3d 419, 2020-Ohio-6827, ¶11 *reconsideration granted in part*, 161 Ohio St. 3d 1453, 2021-Ohio-534) (emphasis added). But again, no one disputes that Caldwell *filed* timely in both places.

Second, by using that wrong framework, the appeals court failed to analyze the plain text of either R.C. 4123.52 or 4123.512 to discern whether either directed a court to

halt a case already pending—and neither does. In particular, the court did not even cite, let alone address, R.C. 4123.512(G)'s relation-back language, which, as detailed above, ensures that a court decision will be treated "as if" the Commission had ruled that way to start.

Finally, the appeals court did not wrestle at all with the unreasonableness or unfairness of its view. It never asked what Caldwell was expected to do here—force a court to decide overnight, or file with years to spare, or what? At least the common-pleas court acknowledged that its outcome "would seem fundamentally unfair," even if it mistakenly adopted that unfair view anyway. Com.Pl.Op. at 5.

Thus, the Third District was wrong.

Ohio Bureau of Workers' Compensation's Proposition of Law No. 2:

The savings statute applies to an R.C. 4123.512 appeal, and R.C. 4123.52 does not.

If the Court agrees with Caldwell and the Bureau on Proposition No. 1, as it should, it need not tarry long with Proposition No. 2, regarding the savings statute. Both the statute and the Court's settled law make this part easy.

The unique hybrid character of appeals under R.C. 4123.512 means that it is both an administrative appeal and a de-novo civil action. The administrative-appeal aspect, controlled by R.C. 4123.512, ensures that jurisdiction is "perfected" by timely filing a notice of appeal. Caldwell did just that. From there, the savings statute allows him to dismiss and re-file within a year. Caldwell re-filed within the allowed year.

During the time between dismissal and refiling, jurisdiction *under 4123.512* did not disappear. It remained perfected, and thus subject to the right to re-file.

The Court long ago held that the savings statute applies to cases under R.C. 4123.512. *Lewis v. Connor*, 21 Ohio St. 3d 1, 4 (1985). Nothing about that changes due to the earlier administrative timeline provided in R.C. 4123.52. Since that clock no longer "runs" once the notice of appeal is filed, it does not matter whether the process in the common-pleas court takes years to conclude, or if the process includes a hiatus under the savings statute. A case does not "expire" from any continuing five-year clock, regardless of whether that purported clock "runs out" while the case is in active litigation or on savings-statute hiatus.

The appeals court did not even disagree with that, as its decision on the first proposition rendered the savings statute irrelevant. On that score, it was conditionally right, in that the savings-statute issue neither added to, nor subtracted from, Caldwell's claim. It turns on the first proposition.

In sum, Caldwell timely filed his notice of appeal, and that perfected jurisdiction. The dismissal and re-filing of the *complaint* changed nothing, and his claim did not "expire" from his use of the savings statute.

CONCLUSION

The Court should reverse the judgment of the Third District and reinstate Caldwell's claim for resolution on the merits in the common-pleas court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Ohio Bureau of Workers' Compensation was served this 13th day of November, 2023, by e-mail on the following:

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APPENDIX

Exhibit A

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

BRIAN P. CALDWELL,

PLAINTIFF-APPELLANT,

v.

WHIRLPOOL CORP., ET AL.,

DEFENDANTS-APPELLEES.

CASE NO. 9-22-61

JUDGMENT ENTRY

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGE

JUDGE

JUDGE

DATED: MAY 08 2023

Exhibit B

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

BRIAN P. CALDWELL,

CASE NO. 9-22-61

PLAINTIFF-APPELLANT,

v.

WHIRLPOOL CORP., ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Marion County Common Pleas Court
Trial Court No. 22 CV 127

Judgment Affirmed

Date of Decision: May 8, 2023

APPEARANCES:

Michael P. Dusseau **for Appellant**

Mark S. Barnes **for Appellee**

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant Brian P. Caldwell ("Caldwell") appeals the judgment of the Marion County Court of Common Pleas, arguing that the trial court erred in granting summary judgment. For the reasons set forth below, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} Caldwell was an employee of the Whirlpool Corporation ("Whirlpool") who suffered a compensable injury on March 23, 2015. Doc. 1. Caldwell filed a claim with the Ohio Bureau of Workers' Compensation that was subsequently allowed. On May 2, 2016, the last medical bill was paid under this claim. On January 11, 2017, a permanent partial disability payment was made to Caldwell and was the last payment that was made under this claim.

{¶3} On December 5, 2019, Caldwell sought an allowance of additional conditions in his case. After a hearing on this matter, the district hearing officer denied this request. This decision was appealed and subsequently affirmed by a staff hearing officer. The Industrial Commission then declined to hear Caldwell's appeal. On June 19, 2020, Caldwell filed an appeal with the Marion County Court of Common Pleas. However, he voluntarily dismissed this matter on April 30, 2021.

{¶4} On April 20, 2022, Caldwell refiled his appeal with the Marion County Court of Common Pleas. On May 27, 2022, Whirlpool filed a motion for summary judgment, pointing to the fact that more than five years had elapsed since Caldwell

had received his last payment for this claim on January 11, 2017. Whirlpool argued that Caldwell's claims had, therefore, expired by January 11, 2022 because the five-year period allotted by R.C. 4123.52 had ended. On October 3, 2022, the trial court granted summary judgment in favor of Whirlpool.

{¶5} Caldwell filed his notice of appeal on November 2, 2022. On appeal, he raises the following two assignments of error:

First Assignment of Error

> **This Court should vacate the Trial Court's entry granting summary judgment and remand the case to the Trial Court for further proceedings. The Trial Court failed to correctly apply the savings statute when it concluded that the statute of limitations had passed since no benefits or compensation had been paid for five years despite the voluntary dismissal of the prior complaint.**

Second Assignment of Error

> **The Trial Court's reliance on *Chatfield v. Whirlpool Corp.*, 2021-Ohio-4365 was misplaced and the holding in *Chatfield* should be reexamined as the application of this decision creates due process and other procedural issues and is a change in practice from prior case law.**

In our analysis, we will consider Caldwell's second assignment of error before his first assignment of error.

Second Assignment of Error

{¶6} Caldwell contends that this Court should reconsider its prior decision in *Chatfield v. Whirlpool Corp*, 3d Dist. Marion No. 9-21-20, 2021-Ohio-4365, ¶ 15. As the appellant has not offered any compelling reasons for us to reexamine our

prior decision, we decline to revisit this precedent at this juncture. Accordingly, Caldwell's second assignment of error is overruled.

First Assignment of Error

{¶7} Caldwell argues that the trial court erred by granting Whirlpool's motion for summary judgment.

Legal Standard

{¶8} "Appellate courts consider a summary judgment order under a de novo standard of review." *Bates Recycling, Inc. v. Conaway*, 2018-Ohio-5056, 126 N.E.3d 341, ¶ 10 (3d Dist.), quoting *James B. Nutter & Co. v. Estate of Neifer*, 3d Dist. Hancock No. 5-16-20, 2016-Ohio-7641, ¶ 5. Under Civ.R. 56(C),

> **[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law * * *. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.**

Civ.R. 56(C). Thus, summary judgment is to be granted

> **only when it is clear '(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.'**

Beair v. Management & Training Corp., 3d Dist. Marion No. 9-21-07, 2021-Ohio-4110, ¶ 15, quoting *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978).

{¶9} Initially, "[t]he party moving for summary judgment has the initial burden 'to inform the trial court of the basis for the motion, identifying the portions of the record, including the pleadings and discovery, which demonstrate the absence of a genuine issue of material fact.'" *Middleton v. Holbrook*, 3d Dist. Marion No. 9-15-47, 2016-Ohio-3387, ¶ 8, quoting *Reinbolt v. Gloor*, 146 Ohio App.3d 661, 664, 767 N.E.2d 1197 (3d Dist. 2001). "The burden then shifts to the party opposing the summary judgment." *Schmidt Machine Company v. Swetland*, 3d Dist. Wyandot No. 16-20-07, 2021-Ohio-1236, ¶ 23, quoting *Middleton* at ¶ 8. "In order to defeat summary judgment, the nonmoving party may not rely on mere denials but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, quoting Civ.R. 56(E).

{¶10} "[B]ecause summary judgment is a procedural device to terminate litigation, it must be awarded with caution." *Williams v. ALPLA, Inc.*, 2017-Ohio-4217, 92 N.E.3d 256 (3d Dist.), quoting *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992). "The court must thus construe all evidence and resolve all doubts in favor of the non-moving party * * *." *New Technology Products Pty Ltd. v. Scotts Miracle-Gro Co.*, 3d Dist. Union No. 14-21-22, 2022-

Ohio-3780, ¶ 52, quoting *Webster v. Shaw*, 2016-Ohio-1484, 63 N.E.3d 677, ¶ 8 (3d Dist.).

{¶11} Further, "R.C. 4123.52 governs the continuing jurisdiction of the Industrial Commission of Ohio and essentially places a statute of limitations on workers' compensation claims." *Chatfield, supra*, at ¶ 10, quoting *Perez v. Univ. Hosp. Health Sys.*, 8th Dist. Cuyahoga No. 98427, 2012-Ohio-5896, ¶ 12. This provision reads, in its relevant part, as follows:

> **The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.**

R.C. 4123.52(A). "The Supreme Court of Ohio has recognized R.C. 4123.52 'permit[s] finality [of the claim] through extinguishment after a set period of

inactivity.'" *Chatfield, supra*, at ¶ 14, quoting *State ex rel. Romans v. Elder Beerman Stores, Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.3d 82, ¶ 8.

> **Moreover, it is well-settled that it is incumbent upon a workers' compensation claimant to timely invoke the continuing jurisdiction granted to the Industrial Commission by R.C. 4123.52 for additional compensation. *Sechler* [*v. Krouse*], 56 Ohio St.2d [185,] at 190[, 383 N.E.2d 572 (1978)]. Further, the Supreme Court of Ohio has held that 'the de novo nature of an R.C. 4123.512 appeal proceeding [to the common pleas court] puts at issue all elements of a claimant's right to participate in the workers' compensation fund.' *Bennett v. Admr., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, ¶ 2.**

Chatfield, supra, at ¶ 14. *See also Williams v. Bur. of Workers' Comp.*, 12th Dist. Preble No. CA2013-09-006, 2014-Ohio-1889, ¶ 17.

Legal Analysis

{¶12} In *Chatfield v. Whirlpool Corp.*, the final payment to Chatfield was made on September 28, 2015. *Chatfield, supra*, at ¶ 15. On June 19, 2019, Chatfield filed a motion for allowance of additional conditions that was denied. *Id.* at ¶ 11. Chatfield eventually filed an appeal with the court of common pleas on May 18, 2020. *Id.* at ¶ 4. On February 24, 2021, Whirlpool filed a motion for summary judgment, arguing "that Chatfield's claim had expired, as a matter of law, on September 28, 2020" because the five-year period allotted for such claims in R.C. 4123.52 had passed. *Id.* at ¶ 5.

{¶13} Chatfield argued that the filing of her motion on June 19, 2019 tolled the five-year period allotted in R.C. 4123.52. *Chatfield, supra*, at ¶ 11. This Court

rejected this argument, concluding that her claim had expired on September 28, 2020 and that the trial court did not err in granting summary judgment on this basis. *Id.* at ¶ 15. In the case presently before us, the parties do not dispute that Whirlpool made no payments to Caldwell after January 11, 2017. Thus, pursuant to our holding in *Chatfield*, Caldwell's claim had expired by operation of law by January 11, 2022. *See Cocherl v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 06AP-1100, 2007-Ohio-3225, ¶ 30 (finding a workers' compensation claim was "dead by operation of law" after the five-year period allotted by R.C. 4123.52).

{¶14} Against this conclusion, Caldwell argues that his reliance on Ohio's savings statute to refile this appeal distinguishes this situation from *Chatfield.* Caldwell notes that the savings statute is applicable to workers' compensation claims. *Lewis v. Connor*, 21 Ohio St.3d 1, 487 N.E.2d 285 (1985), at the syllabus. However, in this case, Caldwell was able to avail himself of the savings statute as he was permitted to refile this case with the trial court. The savings statute does not change the fact that this type of claim expires by operation of law after the five-years allotted under the conditions set forth R.C. 4123.52. *Chatfield, supra*, at ¶ 15.

{¶15} In *Chatfield*, the filing of the action with the court of common pleas did not toll the period set forth in R.C. 4123.52. Similarly, in the case presently before us, the refiling of an action with the court of common pleas did not toll the period set forth in R.C. 4123.52. The evidence in the record clearly establishes that this action has progressed beyond the five-year period that is permitted under R.C.

4123.52(A). As such, Caldwell's claims have expired. *Chatfield*, *supra*, at ¶ 15. Thus, having viewed the evidence in a light most favorable to the nonmoving party, we cannot conclude that the trial court erred by granting summary judgment. For this reason, Caldwell's first assignment of error is overruled.

Conclusion

{¶16} Having found no error prejudicial to the appellant in the particulars assigned and argued, the judgment of the Marion County Court of Common Pleas is affirmed.

Judgment Affirmed

MILLER, P.J. and WALDICK, J., concur.

/hls

Exhibit C

IN THE COMMON PLEAS COURT OF MARION COUNTY, OHIO
GENERAL DIVISION

	:	Case Number: 22 CV 127
Brian P. Caldwell Plaintiff,	:	
		Judge Edwards
vs	:	Magistrate Bear
	:	**JUDGMENT ENTRY**
Whirlpool Corp., et al Defendant.	:	

This comes on the Magistrate's Decision and the Objections of the Plaintiff. The Court does not find that the Plaintiff's Objections are persuasive to change the outcome of this case. However, the Objection indirectly raises a question of whether 4123.52 is statute of limitations or a statute of repose that the Court believes merits clarification if this matter is ultimately appealed.

This case was determined based upon the limitation in R.C. 4123.52 and the recent Third District case ***Chatfield v. Whirlpool Corp., 2021-Ohio-4365.***

In that case, the last medical bill was paid on September 28, 2015. **Id. at ¶2**. On June 19, 2019, the Plaintiff filed a motion for a new claim. It was denied on March 24, 2020, and the Industrial Commission refused the appeal. **Id. at ¶3**. The case was appealed to common pleas court on May 18, 2020. **Id.** While the case was pending, Whirlpool filed a prevailing motion that the claim expired as a

matter of law on September 28, 2020 with the passage of five years. **Id. at ¶6.**

The Third District Court of Appeals found that R.C. 4123.52 requires a Plaintiff to not only file but prevail within the five year limitation period. The facts in this case are similar and do not warrant a different result under a statute of limitations analysis.

One of the cases cited by the Plaintiff addresses the savings statute under a different former workers compensation time limit.[1]

> ***Where a notice of appeal is filed within the time prescribed by R.C. 4123.519 and the action is dismissed without prejudice after expiration of that time, R.C. 2305.19, the savings statute, is applicable to workers' compensation complaints filed in the common pleas court. Lewis v. Connor, 21 Ohio St. 3d 1, 1, 487 N.E.2d 285, 285 (1985)***

This case did not include R.C. 4123.52. As such, the Court does not find it controls here.

The Plaintiff cites a case that poses a more interesting question. A recent Ohio Supreme Court case contrasted a statute of repose with a statute of limitations and found the savings statute inapplicable to the statute of repose.

> ***A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." Black's Law Dictionary 1707 (11th Ed.2019). A statute of limitations operates on the remedy, not on the existence of the cause of action itself. Mominee v. Scherbarth, 28 Ohio St.3d 270, 290, 503 N.E.2d 717 (1986), fn. 17 (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." Black's at 1707. A statute of repose bars the claim—the right of action—itself. Treese v. Delaware, 95 Ohio App.3d 536, 545, 642 N.E.2d 1147 (10th Dist.1994). The United States Supreme Court has likened the bar imposed by a***

[1] Former 4123.519 was amended and recodified as 4123.512 by 1993 H 107, eff. 10-20-93

statute of repose to a discharge in bankruptcy—as providing "a fresh start" and "embod[ying] the idea that at some point a defendant should be able to put past events behind him." CTS Corp. at 9, 134 S.Ct. 2175.

67{¶ 10} Statutes of limitations and statutes of repose target different actors. Id. at 8, 134 S.Ct. 2175. Statutes of limitations emphasize plaintiffs' duty to diligently prosecute known claims. Id., citing Black's Law Dictionary 1546 (9th Ed.2009). Statutes of repose, on the other hand, emphasize defendants' entitlement to be free from liability after a legislatively determined time. Id. at 9, 134 S.Ct. 2175. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose. California Pub. Emps.' Retirement Sys. v. ANZ Securities, Inc., —— U.S. ——, 137 S.Ct. 2042, 2049, 198 L.Ed.2d 584 (2017). When the discovery rule—that is, the rule that the statute of limitations runs from the discovery of injury—governs the running of a statute of limitations, the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." Id. at ——, 137 S.Ct. at 2050.

8910{¶ 11} In contrast to statutes of limitations and statutes of repose, both of which limit the time in which a plaintiff may file an action, saving statutes extend that time. Saving statutes are remedial and are intended to provide a litigant an adjudication on the merits. Wasyk v. Trent, 174 Ohio St. 525, 528, 191 N.E.2d 58 (1963). Generally, a saving statute will provide that "where an action timely begun fails in some manner described in the statute, other than on the merits, another action may be brought within a stated period from such failure." Annotation, 6 A.L.R.3d 1043 (1966). It acts as an exception to the general bar of the statute of limitations. Chadwick v. Barba Lou, Inc., 69 Ohio St.2d 222, 232, 431 N.E.2d 660 (1982) (Krupansky, J., concurring in part and dissenting in part). Wilson v. Durrani, 2020-Ohio-6827, 164 Ohio St. 3d 419, 421–22, 173 N.E.3d 448, 451–52, reconsideration granted in part, 2021-Ohio-534, 161 Ohio St. 3d 1453, 163 N.E.3d 580

R.C. 4123.52 provides a five year limitation on new claims. The plaintiff must obtain a "modification, change, finding, or award" within five years of the last medical payment. Although not previously addressed, it appears that R.C. 4123.52 may be a statute of repose, versus a statute of limitations.

The Court adopts the Magistrate's Decision because the final outcome does not change under either analysis. However, the Court believes the distinction may be significant in other cases. The reasoning of a statute of repose is that a party be able to move on from past actions at some point appears to be more aligned with the reasoning of the language in R.C. 4123.52.

Applying ***Chatfield*** and construing R.C. 4123.52 as a statute of repose still places the Plaintiff's claim outside of the five year window at this time.

The Court would respectfully request that the Court of Appeals clarify the following if this case is appealed, so that the Court and litigants can better address this issue in future cases:

1. Is R.C. 4123.52 a statute of limitations or a statute of repose?

The Court also understands that the current state of the law places an additional burden on Plaintiffs that is somewhat distinct from similar limitations in other areas of the law. ***Wilson v. Durrani*** requires a party to file a claim within the statute of limitation and statute of repose. ***Chatfield*** and R.C. 4123.52 require a Plaintiff to prevail within the time limit.

As such, any Plaintiff seeking additional claims in Worker's Compensation should probably consider significant additional measures to protect their potential claims. This Court generally schedules Workers' Compensation cases for trial near the one year guideline set by the Ohio Supreme Court, to give the parties time to resolve their cases. It would seem prudent under the current state of the law for Plaintiffs to alert the Court to this deadline so trials can be set in advance of this deadline.

However, the Court must allow time for service, answers, and some preparation for cases. Additionally, this Court and many others have active dockets, including criminal dockets which take priority.[2] The law does not appear to provide any additional tolling for counsel, party, or Court unavailability at this time. It would be prudent to seek a schedule that allows for these real human issues to also be accounted for in advance of the R.C. 4123.52 deadline.

The Court would appreciate any guidance as to whether any events not related to the Plaintiff could toll this deadline. The Court, following the Rules of Superintendence, has had to continue civil trials to accommodate a significant number of criminal trials in the last year. As to the criminal trials, the unavailability of the Court tolls the time for the other criminal cases. It is the Court's preference that cases be determined on the merits. It would seem fundamentally unfair for a party to lose a case because the Court was not available to try a case that the injured worker was ready to try and took the steps necessary to prepare.

The Court also realizes that the current state of the law either as a statute of limitation or repose should give any Plaintiff pause as to the continued viability of using Civil Rule 41(A) as a means to obtain more time to prepare or resolve a case. The Court is aware of the change in practice from ***Wilson v. Durrani***.

The Court finds the controlling law at this time requires the Court to grant summary judgment for the employer. However, the unique applications of requiring a Plaintiff prevail, instead of merely file the claim as is the case with most statutes of limitation and repose, creates a unique set of issues that will

[2] The Criminal Speedy Trial Statutes in R.C. 2945.71-.73 seem to operate somewhat similarly to ***Chatfield*** and R.C. 4123.52. However, there are many more clear tolling events not present in R.C. 4123.52.

have to be addressed by further appellate court guidance in this or future cases.

The Court hereby adopts the following decision over the Objections of the Plaintiff. The Court adopts the following decision in addition to the analysis above:

This matter comes on the motion of Whirlpool Corporation for Summary Judgment. The motion is granted for the reasons herein.

Findings of Fact

This case comes from Claim No. 15-815939 with the Bureau of Workers Compensation. There was an injury on March 23, 2015. Complaint Para. 2. Claims were originally allowed. *Id.* at para. 4 This case derived from additional claims originally filed administratively on December 5, 2019. *Id.* at para. 5-7.

Whirlpool provided the affidavit of Pamela Sue Holland, who is responsible for maintaining records of this claim. Holland Affidavit paragraph 5. The Plaintiff was awarded six percent permanent partial disability benefits. *Id.* at para.7. The permanent partial disability payment was made on January 11, 2017. *Id.* at para. 9. The last medical bill payment was made on May 2, 2016. *Id.* at para. 11.

Conclusions of Law

Summary Judgment is governed by Ohio Civil rule 56.

> **...Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law... Civ. R. 56(C).**

The rule further states that judgment should be granted when the facts,

construed most favorably to the Defendant are such that **"that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. Civ. R. 56(C).**

The United States Supreme Court has stated that:

> **Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see *Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984). *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).**

The Employer cites the version of R.C. 4123.52 that was in effect in 2015 when the injury occurred as the relevant statute of limitations.

> ***(A) The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award***

compensation for a back period in excess of two years prior to the date of filing application therefor. Ohio Rev. Code Ann. § 4123.52 (West) (Effective: July 29, 2011 to September 14, 2020)

The case cited by the employer is also dispositive.

Here, as noted above, it is undisputed that the last of the medical benefits were paid on September 28, 2015, thereby establishing a five-year limitation period that expired on September 28, 2020. Just as the trial court found, the mere filing of Chatfield's motion for the additional conditions was not sufficient to toll the statute of limitations regarding the expiration of her claim. As a consequence, "[o]nce the applicable * * * period under R.C. 4123.52 expired, the Industrial Commission was without jurisdiction to make any further findings, awards, or orders, and [the injured worker's] claim was deemed to have lapsed." Williams at ¶ 16; see Cocherl v. Ohio Dept. of Transp., 10th Dist. Franklin No. 06AP-1100, 2007-Ohio-3225, ¶ 30 (finding workers' compensation claim was "dead by operation of law"). Chatfield v. Whirlpool Corp., 2021-Ohio-4365, ¶ 15

The last bill payment was in 2016. This is 2022, which is more than five years after that last medical payment. As such, summary judgment is warranted.

The Court has considered the August 8, 2022 response of the Plaintiff. In the absence of controlling law, it would be compelling. This particular statute of limitations operates in a manner that is different from any other the Court has encountered. The controlling law is that the claim can expire even if the case is timely filed if the time runs before the Plaintiff prevails. To the extent this may be unfairly harsh to injured workers, it is ultimately the determination of the Legislature. To the extent the Legislature has created this issue, it is the body who can remedy the issue. The Court is bound by the statute and the controlling interpretation of the Third District Court of Appeals.

Conclusion

In Conclusion, summary judgment is **GRANTED** to the Employer. Costs assessed to Brian P. Caldwell.

Judge Warren T. Edwards

Pursuant to Civil Rule 58(B), the Clerk is directed to serve upon the parties a notice of the filing of this Judgment entry and of the date of entry upon the Journal.

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Exhibit D

Ohio Revised Code

Section 4123.512 Appeal to court.

Effective: October 3, 2023
Legislation: House Bill 33

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. Except as otherwise provided in this division, the appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. Either the claimant or the employer may file a notice of an intent to settle the claim within thirty days after the date of the receipt of the order appealed from or of the order of the commission refusing to hear an appeal of a staff hearing officer's decision. The claimant or employer shall file notice of intent to settle with the administrator of workers' compensation, and the notice shall be served on the opposing party and the party's representative. The filing of the notice of intent to settle extends the time to file an appeal to one hundred fifty days, unless the opposing party files an objection to the notice of intent to settle within fourteen days after the date of the receipt of the notice of intent to settle. The party shall file the objection with the administrator, and the objection shall be served on the party that filed the notice of intent to settle and the party's representative. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer

the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the administrator of workers' compensation, the claimant, and the employer; the number of the claim; the date of the order appealed from; and the fact that the appellant appeals therefrom.

The administrator, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates or may result in a recovery from the employer if the employer is determined to be a noncomplying employer under section 4123.75 of the Revised Code.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the deposition filed in court and of copies of the deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, 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.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed five thousand dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim

as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H)(1) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. If an employer is a state risk and has paid an assessment for a violation of a specific safety requirement, and, in a final administrative or judicial action, it is determined that the employer did not violate the specific safety requirement, the administrator shall reimburse the employer from the surplus fund account under division (B) of section 4123.34 of the Revised Code for the amount of the assessment the employer paid for the violation.

(2)(a) Notwithstanding a final determination that payments of benefits made to or on behalf of a claimant should not have been made, the administrator or self-insuring employer shall award payment of medical or vocational rehabilitation services submitted for payment after the date of the final determination if all of the following apply:

(i) The services were approved and were rendered by the provider in good faith prior to the date of the final determination.

(ii) The services were payable under division (I) of section 4123.511 of the Revised Code prior to the date of the final determination.

(iii) The request for payment is submitted within the time limit set forth in section 4123.52 of the Revised Code.

(b) Payments made under division (H)(1) of this section shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. If the employer of the employee who is the subject of a claim described in division (H)(2)(a) of this section is a state fund employer, the payments made under that division shall not be charged to the employer's experience. If that employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(c) Division (H)(2) of this section shall apply only to a claim under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code arising on or after July 29, 2011.

(3) A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund account due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund account on account of those payments and shall not be required to pay any amounts into the surplus fund account on account of this section. The election made under this division is irrevocable.

(I) All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Ohio Revised Code

Section 4123.52 Continuing jurisdiction of commission.

Effective: October 3, 2023
Legislation: House Bill 81 (GA 133), House Bill 33 (GA 135)

(A) The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of medical benefits being provided under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last medical services being rendered or the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.

(B) Notwithstanding division (A) of this section, and except as otherwise provided in a rule that shall be adopted by the administrator, with the advice and consent of the bureau of workers' compensation board of directors, neither the administrator nor the commission shall make any finding or award for payment of medical or vocational rehabilitation services submitted for payment more than one year after the date the services were rendered or more than one year after the date the services became payable under division (I) of section 4123.511 of the Revised Code, whichever is later. No medical or vocational rehabilitation provider shall bill a claimant for services rendered if the administrator or commission is prohibited from making that payment under this division.

(C) Division (B) of this section does not apply to requests made by the centers for medicare and medicaid services in the United States department of health and human services for reimbursement of conditional payments made pursuant to section 1395y(b)(2) of title 42, United States Code

(commonly known as the "Medicare Secondary Payer Act").

(D) This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

(E) This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

(F) The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

(G) The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct or electronic document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in R.C. 1.52(B) that amendments are to be harmonized if reasonably capable of simultaneous operation.