

IN THE SUPREME COURT OF OHIO

BRIAN P. CALDWELL,
Plaintiff/Appellant,

vs.

WHIRLPOOL CORPORATION,
Defendant/Appellee

Case No. 2023-0809

On Appeal from the
Marion County
Court of Appeals,
Third Appellate District

Court of Appeals
Case No. 9-22-61

**BRIEF OF *AMICUS CURIAE*, OHIO CHAMBER OF COMMERCE IN SUPPORT OF
DEFENDANT-APPELLEE, WHIRLPOOL CORPORATION**

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STATEMENT OF INTEREST

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its nearly 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. A more favorable business climate in Ohio promotes Ohio's economy and benefits all Ohioans. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

STATEMENT OF THE FACTS AND CASE

Amicus adopts the Statement of Facts and Case as set forth in the Memorandum in Opposition of Jurisdiction filed by Appellee Whirlpool.

ARGUMENT

Appellants advance two propositions of law in the instant case both of which misstate the intent of the legislature and undermine Ohio's worker' compensation system in a way which can have significant impact on Ohio's businesses. It is for these reasons and those set forth below that Amicus urges the Court to reject the propositions of law proposed by Appellants and affirm the decision of the Third District.

Appellants' Proposition of Law No. 1: The Five-Year Limitation Under R.C. §4123.52 Does Not Apply to a R.C. §4123.512 Appeal.

The plain text of R.C. §4123.52 and R.C. §4123.512 provides no exception to the expiration of jurisdiction of the Ohio Industrial Commission when a case is pending in court. Further the application of R.C. §4123.52 to appeals under R.C. §4123.512 was correctly decided by the Court of Common Pleas and the Third District in the instant case.

A. R.C. §4123.52's five-year deadline applies equally to all Ohio Workers' Compensation claims regardless of whether they are appealed into the courts under R.C. §4123.512.

In an attempt to support their proposition of law, Appellants argue that R.C. §4123.52 applies only to the Ohio Industrial Commission (the Commission) and has no effect on the jurisdiction of the Common Pleas Court. Appellants argue that the filing of Caldwell's appeal to the common pleas court was all that was necessary to ensure continued jurisdiction. This argument is contrary to the plain language of R.C. §4123.52.

R.C. §4123.52 reads in pertinent part:

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 therefore. R.C. §4123.52 (emphasis added).

There is no question R.C. §4123.52 addresses the life of a claim regardless of whether an appeal is filed to a court. The jurisdiction vested in the Common Pleas Court pursuant to R.C. §4123.512 is limited to a determination of whether the claimant has a right to participate in the workers' compensation fund. R.C. §4123.512(D). R.C. §4123.512 does not give the common pleas court the authority to authorize the payment of medical benefits, compensation, or any other benefits provided by the workers' compensation scheme. That power remains in the hands of the Commission. Because the power to award benefits remains vested with the Commission, any finding by a court with respect to entitlement to participate is rendered moot after the expiration of the five-year limitation. The Commission is unable to grant benefits once the five-year limitation has run.

Furthermore, to extend this five-year period and allow the Commission to award benefits in a claim after the common pleas court finds an entitlement to participate, undermines the very purpose of R.C. §4123.52. This Court has described the purpose of R.C. §4123.52 by holding the statute "permit[s] finality [of the claim] through extinguishment after a set period of inactivity." *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, ¶ 8. It is the finality of a claim which many Ohio employers rely upon in conducting their business. Under Ohio's workers' compensation system employers can elect to "self-insure" whereby they agree to pay benefits to claimants directly in exchange for being exempt from the

requirement to pay regular premiums to the Bureau. R.C. §4123.35(B). These employers, Appellee Whirlpool Corporation among them, must plan for future compensation and ensure adequate funds are available to make such payments and rely on the finality provided by R.C. §4123.52 to make such plans. To permit claimants to circumvent the five-year limitation in R.C. §4123.52 by simply filing an appeal under R.C. §4123.512, as Appellants suggest, would make it increasingly difficult for employers to plan for their workers' compensation obligations because they could no longer rely on the prior holdings of this Court that R.C. §4123.52 provides a finality to the claim.

Appellants argue that the Third District's application of R.C. §4123.52 requires claimants to expedite their litigation to avoid running afoul of the five-year limitation. This argument ignores this Court's prior holding that "[o]nce a claim has been timely filed pursuant to R.C. 4123.84, '[i]t is incumbent upon a claimant to timely invoke the continuing jurisdiction granted to the commission by R.C. 4123.52 for additional compensation.'" *Sechler v. Krouse*, 56 Ohio St.2d 185, 190, 383 N.E.2d 572 (1978), quoting *Rummel v. Flowers*, 28 Ohio St.2d 230, 236, 277 N.E.2d 422 (1972). The burden is therefore with the claimant to timely invoke continuing jurisdiction such that their claim can be fully adjudicated prior to the expiration of the five-year limitation.

B. R.C. §4123.512 (G) does not create a relation back which negates the impact of R.C. §4123.52.

R.C. §4123.512(G) provides instruction to the Commission and the Bureau on the handling of a claim once a court appeal has concluded and a judgment in favor of the claimant has been entered:

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) (emphasis added).

The statute specifically provides instruction as to how the judgement, under R.C. §4123.512 (G), interacts with R.C. §4123.52. R.C. §4123.512 specifically provides that the Commission and Administrator must proceed “subject to” R.C. §4123.52. The General Assembly was deliberate in choosing its words and the Court “must give effect to the words the General Assembly has chosen.” *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, ¶ 12. In giving effect to the words chosen by the General Assembly “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage” R.C. §1.42. Merriam-Webster defines “subject to” as “affected by or possibly affected by (something).” *Subject to*, Merriam-Webster (Nov. 28, 2023) <https://www.merriam-webster.com/dictionary/subject%20to>. In other words, R.C. §4123.512 provides that the Commission and Administrator are to proceed with the claim based on the judgment of the court as that judgement would be affected by R.C. §4123.52. In cases where the five-year limit in R.C. §4123.52 has run, the Commission and Administrator are limited in their ability to take further action because they lack authority to exercise continuing jurisdiction. As previously stated, the purpose of R.C. §4123.52 is to establish a finality to a claim.

C. Other statutes within the Workers’ Compensation system do not conflict with application of R.C. §4123.52.

The plain language of the remaining portions of Chapter 4123 similarly supports the application of R.C. §4123.52 as the Third District has done. Appellants argue that R.C. §4123.95 instructs the courts to apply the provisions of Chapter 4123 “liberally ... in favor of employees.” However, application of R.C. §4123.52 in the way the Third District has done below does not conflict with this instruction. This Court has held that R.C. §4123.52 is constitutional and its application is neither “harsh [n]or oppressive”. *Sechler*. The simple fact that Caldwell or any other

claimant is dissatisfied with the outcome of their claim does not necessitate a deviation from the plain text of the statute to satisfy the instructions of R.C. §4123.95.

Appellants attempt to point to statutes within Chapter 4123 that discuss the payment of various benefits after a judicial determination to suggest an intent by the General Assembly to negate the effect of R.C. §4123.52. Statutes such as 4123.511(H) which provides for payment upon “the date of the final administrative or judicial determination,” or 4123.511(1)(2) where payment is to begin upon “the expiration of the time limitations for filing an appeal of an order,” cannot be read to somehow circumvent the divestment of jurisdiction provided in R.C. §4123.52. Rather, the plain text of the statutes is clear evidence of an intent by the General Assembly to describe the standard practice for claims which progress within the five-year period outlined in R.C. §4123.52.

D. This Court has previously held that application of R.C. §4123.52 is neither unreasonable nor is it unfair.

The burden is upon claimants to timely invoke the jurisdiction of the Commission such that they do not run afoul of the five-year period in R.C. §4123.52. *Sechler*, quoting *Rummel*. This requirement is the law of Ohio. Appellants argument that R.C. §4123.52 be not applied is contrary to decades of precedent and is asking this Court to abandon the tenant of stare decisis which this Court has described as “the bedrock of the American judicial system.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 1.

In support of the argument that application of R.C. §4123.52 is unfair, Appellants point to the difficulty of bringing a case to trial before the five-year period expires. It is important to note however, that as difficult as Appellant may argue it is to bring a case to trial, Caldwell had the opportunity to bring the instant case to trial well ahead of the expiration of the five-year period but rather chose to delay the trial by dismissing and re-filing the case. Caldwell’s ability to try the

instant case aside, the difficulties Appellants suggest do not negate the clear application of R.C. §4123.52.

There is little question that litigation takes time and there is a risk for claimants that their case may not make it to trial prior to the expiration of the five-year period. This issue, like all those presented in this case, is easily resolved by the plain text of the statutes in Chapter 4123. The General Assembly specifically addressed this issue in the text of R.C. §4123.512(I) providing that workers' compensation appeals under 4123.512 are to be given priority in the common pleas and appellate courts over all other civil actions except election cases, irrespective of position on the calendar. Allowing claimants to proceed in this way fundamentally would eliminate the purpose of R.C. §4123.52 of creating finality in the claim. *Sechler*.

Appellants cite to this Court's holding in *2200 Carnegie, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 35 Ohio St.3d 284, 2012-Ohio-5691 as support for the argument that the application of R.C. §4123.52 is unfair. However, *2200 Carnegie* dealt with the issue of parties being unable to control the actions of a third-party auditor in a valuation complaint. In such cases this Court has never placed a burden on complainants in property valuation to "timely invoke" the jurisdiction of the reviewing body. This Court has held however, that claimants must do exactly that, "timely invoke the continuing jurisdiction granted to the commission by R. C. 4123.52." *Sechler*. As such any comparison of the deadline in *2200 Carnegie* to this case is simply misplaced because of the unique nature of Ohio's Workers' Compensation system. Rather, reviewing this Court's precedent on the matter, R.C. §4123.52 is neither "harsh [n]or oppressive" nor is it unreasonable or unfair. *Id.*

E. Simply filing "in time" is not enough under R.C. §4123.52.

Appellants' argument that the filing of the request for additional conditions being timely, or that filing the appeal timely, should be enough ignores the plain text of R.C. §4123.52 and this

Court's precedent. As discussed above the plain text of R.C. §4123.52 divests the Commission of jurisdiction to award compensation or benefits after the conclusion of the five-year period and thus any finding by a court would be moot. Further, this Court's precedent clearly places the burden on the claimant to ensure adequate time to invoke the jurisdiction of the Commission. The statute and precedent leave no place for the type of exception Appellants are arguing for. It is the role of the General Assembly to create such an exception, not this Court. The General Assembly has shown a willingness to amend and revise R.C. §4123.52 to correct perceived inequalities or provide additional clarification into the intent and purpose of the statute including an amendment to the code since Caldwell was originally injured. The appropriate venue for Appellants to enact the changes in R.C. §4123.52 and R.C. §4123.512 is to call upon the General Assembly to again amend the statute if it is truly their intent for R.C. §4123.512 to circumvent the general prohibition in R.C. §4123.52.

A better analogy is this Court's holding in *State ex rel. Baker v. Indus. Comm.*, 97 Ohio St.3d 267, 2002-Ohio-6341, 779 N.E.2d 214. *Baker* dealt with a different provision of R.C. 4123.52 which prohibits the awarding of compensation for a disability more than two years prior to the application therefor. *State ex rel. Baker v. Indus. Comm.*, 97 Ohio St.3d 267, 2002-Ohio-6341, 779 N.E.2d 214, ¶ 7. In *Baker* the claimant had filed for disability benefits and requested that because it took several years for the claim to be allowed, he should be entitled to benefits stretching beyond the two-year limitations period in R.C. 4123.52. *Id.* at ¶ 8. This Court, however, held the time between "application and allowance were attributable to protracted litigation. There is, therefore, no justification for abandoning the controlling law in this case." *Id.* Just as the time it took to litigate was no justification for abandoning the two-year statute of limitations in *Baker*,

the time it takes to litigate is no justification for abandoning the five-year statute of limitations in this case.

F. The analysis by the Third District correctly applied R.C. §4123.52 to an appeal under R.C. §4123.512.

In its decision in the instant case, as well as previously in *Chatfield v. Whirlpool Corp.*, 2021-Ohio-4365 (3rd District), the Third District approached the question of the interaction between R.C. §4123.512 and R.C. §4123.52 in the terms of whether an appeal under R.C. §4123.512 “tolled” the expiration of the five-year period in R.C. §4123.52. While Appellants argue this logic is flawed because it frames R.C. §4123.52 in terms of a statute of limitations which Appellants argue Caldwell met simply by filing, Appellants do not offer an alternative analysis for this Court to adopt. Rather Appellants continue to argue that, as discussed above, the “as if” language in R.C. §4123.512(G) somehow acts to relate the decision of the court back both temporally and in effect. Appellants do suggest that mootness may be the proper analysis but still suggests that even under such an analysis, Caldwell would prevail because the Commission could pretend the decision of the court took place prior to the expiration of the five-year period. Fundamentally, while Caldwell may not agree with the decision of the Third District, and while the lower court may have struggled with the effects of the decision, the lower court nonetheless correctly applied R.C. §4123.52 consistent with this Court’s precedent and created a resolution which is neither “harsh [n]or oppressive”. *Sechler*.

Appellants’ Proposition of Law No. 2: The Savings Statute Applies to a R.C. §4123.512 Appeal and R.C. §4123.52 Does Not.

A. The Savings Statute Does Not Extend the Five-Year Period.

Amicus does not disagree that this Court has previously held the savings statute applies to cases under R.C. §4123.512 with respect to the sixty-day appeal period in R.C. §4123.512. *Lewis v. Connor*, 21 Ohio St.3d 1, 487 N.E.2d 285 (1985). In *Lewis* this Court found that R.C. §2305.19

allowed for the re-filing of an appeal under R.C. §4123.512 even after the sixty-day period had lapsed. However, this Court did not say that such a re-file establishes an extension of the five-year period in R.C. §4123.52. Nothing in the text of R.C. §§4123.512, 4123.52, 2305.19, or *Lewis* suggests that the savings statute can serve to pause the five-year period in R.C. §4123.52. To find differently would be inconsistent with the text of the statutes.

B. Caldwell failed to re-file before the expiration of the five-year period and thus cannot be protected by the savings statute.

If this Court were to be persuaded that the savings statute could extend the five-year period, or that the five-year period does not divest the Commission of jurisdiction as the text of the statute clearly provides, Caldwell nevertheless failed to properly invoke the savings statute to preserve his claim. Appellants argues that R.C. §4123.52 acts as a statute of limitations under which a claimant need only *file* an appeal under R.C. §4123.512 to allow the Commission to exercise jurisdiction. Under this argument the five-year period in R.C. §4123.52 would act as any other statute of limitations and be subject to the same requirements thereof. Courts have routinely found that the savings statute can only be invoked “if the claim was originally filed within the applicable statute of limitations, the original claim was dismissed after the expiration of the applicable statute of limitations, and the party re-files the claim within one year after the dismissal.” *Callaway v. Nucor Automotive Corp.*, 166 Ohio App.3d 56, 2006-Ohio-1343, 849 N.E.2d 62, ¶ 10 (10th Dist.). *See also Lindsey v. Schuler*, 7th Dist. Mahoning No. 11-MA-205, 2012-Ohio-3675; *Craver v. Doogan*, 12th Dist. Clermont No. CA2005-06-055, 2006-Ohio-1783. Again, assuming as Appellants would argue that R.C. §4123.52 operates as a statute of limitations, Caldwell would have needed to dismiss his case after the five-year period expired, and then re-file within one year. However, Caldwell failed to do this. There is no dispute the last payment in the claim was made January 11, 2017, and the five-year period expired January 11, 2022. Further there is no

disagreement Caldwell dismissed his case on April 30, 2021, and re-filed on April 20, 2022. Caldwell dismissed his case prior to the expiration of the statute of limitations Appellants argues for, and then failed to refile within the limitations period. As such the saving statute cannot be applied to this case even if this Court were to agree with Appellants' application of R.C. §4123.512 and R.C. §4123.52, which it should not. Caldwell failed to timely re-file his complaint and the savings statute cannot save his case.

CONCLUSION

For the forgoing reasons Amicus Ohio Chamber of Commerce urges the Court find in favor of the Appellee and affirm the decision of the Third District.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing, was served upon the following via certified mail, fax, email and/or electronic service via the Clerk of Courts, this 8th day of December, 2023:

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