From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is a decision to dismiss an application, without adjudicating the merits, appealable to common pleas court?

Ohio's workers' compensation system was designed with the stated goal to create a system that "operates largely outside of the courts." *Felty v. AT&T Technologies, Inc.*, 65 Ohio St.3d 234, 239, 602 N.E.2d 1141 (1992). For this reason, court appeals are strictly limited to decisions to grant, deny, or terminate an employee's participation or continued participation in the system. *Id.* Recently, the Fifth District Court of Appeals was presented with a novel case involving an unsigned FROI-1 application, a missed hearing, and the question of whether a dismissed claim terminates participation.

In *Siembieda v. Coastal Pet Products, Inc.*, 2013-Ohio-1629, the claimant injured her hand at work in July, 2009. Consistent with company policy, she filled out an "Employee Incident Report," but did not intend to file a claim. The employer's TPA nevertheless filed an FROI-1 with the BWC, electronically signing the claimant's name. The claim was initially denied and referred to a hearing, where a DHO denied the claim for lack of a "compensable diagnosis." (The claimant received notice and planned to attend, but got lost.) The claimant did not appeal the DHO order denying her claim. In October, 2010, the claimant filed a motion pursuant to R.C.§4123.52, asking the Industrial Commission to exercise "continuing jurisdiction" and dismiss the 2009 FROI-1 based upon a "mistake of fact or law" because the claimant never signed the application. A hearing was held and the DHO dismissed the 2009 application, prompting an appeal by the employer. An SHO then vacated the decision and denied the claim on the merits. The full Industrial Commission accepted the case, and vacated the SHO order, finding that the unsigned application could not be adjudicated, that a "mistake of fact and a mistake of law" occurred, and stating "the claim is neither allowed nor disallowed." The employer appealed, pursuant to R.C. §4123.512, but the trial court granted the claimant's motion to dismiss for lack of subject matter jurisdiction, prompting an appeal to the Fifth District.

The Fifth District affirmed, concluding that the Commission's decision to dismiss the appeal did not constitute a decision to "grant, deny, or terminate the right to participate." Citing *Greene v. Conrad*, the Court rejected the employer's argument that it lost the defense of *res judicata*, or that the same claim was previously denied. The Court cited a long line of cases stating that decisions other than on the merits (e.g., lack of medical evidence, investigation not complete) did not provide *res judicata* effect. The Court also relied upon the wording of the Commission's order that the claim was "neither allowed nor disallowed." Simply put, the Court found that because there was no true hearing "on the merits," a court appeal was not available.

This case is a classic example of "bad facts make bad law." While the claim did go to hearing and was arguably adjudicated on the merits, it was the employer's decision to file the claim in the first place that led to this decision. Had the claimant appeared at the DHO hearing, there is little doubt that the hearing would have been "on the merits." If you would like to submit a

question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me.

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