

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

**Question: How does the death of the claimant affect her court appeal of a denied claim?**

This week, we will address a question from a member: “We are a self-insured employer: When an injured employee files an appeal into court pursuant to R.C. §4123.512, and subsequently passes away, what happens to her court appeal? Can her husband continue to prosecute? Does the answer change when the cause of death is unrelated to the conditions in court? What are the procedures to be followed?”

As a general rule, Ohio workers' compensation claims abate at death of the claimant. This means that actions on the application pending with the BWC at the time of death are terminated, including appeals before the Industrial Commission. (*OAC §4123.5-21(A)*) When the claimant has perfected an appeal in common pleas court which has not been decided, that appeal will similarly abate at the moment of death, and a surviving spouse cannot be substituted as the party plaintiff on an allowance appeal. *Rodgers v. Ford Motor Co.*, 2003-Ohio-977, (5<sup>th</sup> App. Dist., 2003). In the event the death is as a result of the alleged injury or illness at issue in the appeal, and thus subject to a claim for death benefits, those benefits are considered separate and distinct from the underlying claim by the BWC. Therefore, it is incumbent upon the dependent(s) to initiate a new application for death benefits consistent with the statute of limitations, and the previous denial of a claim during the claimant's lifetime will not bar such a claim. *Wells v. General Motors Corp.*, 69 Ohio App.3d 433, 590 N.E.2d 1315 (8<sup>th</sup> App. Dist., 1990). Things become a little more murky when it is the employer's appeal, because abatement does not generally occur in the case of an allowance appeal initiated by an employer. If necessary, the Attorney General's office will step in to prosecute the claim and defend the decisions of the BWC and Industrial Commission. There are other exceptions to the abatement rule; for example, medical payments for services performed for allowed conditions must still be made provided they comply with existing guidelines, and in some cases accrued compensation that has been awarded but not paid may be owed to the surviving spouse, but unendorsed checks may not be cashed by a dependent. (*OAC 4123-3-10(A)(3)(a)*)

Procedurally, it is incumbent upon counsel for the deceased Plaintiff to file a Suggestion of Death in the court of common pleas, notifying the court of the death of the plaintiff. At that point, it has been my experience that many courts will dismiss the action *sua sponte*. In cases where the court refuses to act, a motion to dismiss pursuant to Ohio Civ. R. 12(B)(1) [lack of subject matter jurisdiction] or a motion for summary judgment may be in order. 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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