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Gallagher Sharp Shop Talk: Workers' Compensation

Question: What is the status of a recent decision by the Cuyahoga County Court of Common Pleas holding that a law prohibiting a claimant from voluntarily dismissing a complaint without prejudice in an employer's appeal was unconstitutional?

Among the revisions to Ohio's workers' compensation system brought about by the passage of S.B. 7 in 2006, one of the most important to employers was a change to R.C. §4123.512(D), which prohibits a claimant from voluntarily dismissing a complaint without prejudice in appeals brought by employers. Prior to this change, employers would routinely expend time and legal fees preparing appeals for trial, only to have the claimant file a Notice of Dismissal pursuant to Ohio Civ.R. 41(A) on the eve of (or often, on the day of) trial. The claimant would then spend nearly two years collecting benefits, and the employer subject to increased costs and premiums, before a trial was scheduled. The State's 2006 reforms required that claimants secure permission from the employer before they could dismiss their complaint without prejudice.

In December, 2014, a trial judge in the Cuyahoga County Court of Common Pleas, in the matter of *Ferguson v. Ohio*, held this change to be unconstitutional. The plaintiff in *Ferguson* had tried unsuccessfully to dismiss his Complaint in an action arising from an appeal filed by his employer. The claimant then filed a separate declaratory judgment action asking the Court to declare the S.B. 7 revisions to R.C. §4123.512 unconstitutional. Judge Robert McClelland agreed with the plaintiff and held that the provisions of Civ.R. 41(A) trump the language contained in R.C. §4123.512, and that the new law therefore violated Ohio's "separation of powers" doctrine. Judge McClelland further held that the revisions violated the "equal protection" doctrine and the claimant's due process rights because they sought to restrict the rights of claimants to the benefit of employers. The State of Ohio appealed Judge McClelland's decision to the Ohio Court of Appeals, Eighth Appellate District, who issued their opinion on October 29, 2015.

In an opinion that should anger employers, the Eighth District affirmed Judge McClelland's decision, holding that the amended provisions of R.C. §4123.512 are unconstitutional. The Court stated that the Supreme Court has held that the Civil Rules apply to workers' compensation appeals, and that there was no valid "state interest" in limiting the ability of a claimant to dismiss and refile pursuant Civ.R. 41(A)(1)(a). Citing *Kaiser v. Ameri-Temps*, 84 Ohio St.3d 411, 704 N.E.2d 1212 (1999), the Court ruled that workers' compensation appeals were not "special proceedings," that dismissal and refile were procedural issues, there is no portion of the Civil Rules which require that a claimant obtain permission before dismissing a case, and therefore the new law violated the Ohio Constitution. *Ohio Constitution Article 4, §5(B)*. The Court also agreed that the revisions failed under the "rational basis" test required by the Equal Protection and Due Process clauses. "Although the State developed the statutory scheme for the workers' compensation systems, both employees and employers gave up substantial litigation rights to participate in the system." *Id. at ¶ 28*. The Court also adopted dicta from *Kaiser* that "the employer ultimately suffers no prejudice as any illegitimate benefits paid during the interim... are repaid if the employee's claim does not prevail." *Kaiser* at 415.

What Judge McClelland and the Eighth District panel seem to be missing is that employers do not recoup the time, attorney fees, and increased premiums that are expended when a claimant dismisses their appeal. In addition, in the event a self-insured employer opted out of the Surplus Fund, these unearned benefits are never repaid. On December 11, 2005, the State of Ohio and Attorney General filed a Notice of Appeal to the Supreme Court of Ohio. This appeal will be critical to employers, because a return to the “old system” will again permit employees to amass nearly three (3) years of benefits before an employer has its day in court. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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