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Gallagher Sharp Shop Talk: Worker' Compensation

QUESTION: Can a claimant sue a third party directly for fraud alleged to arise from a workers' compensation claim?

Court appeals arising from workers' compensation claims are creatures of statute. *Felty v AT&T Technologies, Inc.*, 65 Ohio St.3d 234 (1992). There are three ways that parties to a workers' compensation claim can seek judicial review: (1) direct appeal to the common pleas court pursuant to R.C. 4123.512, (2) a *mandamus* petition to the Tenth District Court of Appeals; or (3) a declaratory judgment action. Recently, the Seventh Appellate District considered a case involving a claimant who sued a third-party administrator (TPA) alleging fraud and conspiracy leading to a loss of benefits, and whether such direct action is permitted under Ohio law.

McCloud v Union, et al., 2018-Ohio-3730, began when a claimant was injured in a truck accident. A workers' compensation claim was filed, which was allowed and benefits were paid. The claimant's doctor, who was not familiar with workers' compensation, sought and received a blank C-86 motion to request additional treatment. The doctor's office competed and filed the motion seeking an EMG, trigger point injections, and the addition of "mild concussion" to the claim. At hearing, when questions arose as to whether the requests were valid, the claimant (representing himself) became enraged, arguing that it was the TPA who had made a mistake. The claimant also argued the BWC was complicit in the alleged "fraud." The claimant was offered the opportunity to withdraw the motion but declined, arguing he could not withdraw something that was "fraudulently submitted by another party." Claimant's motion was dismissed, prompting a lawsuit in the Jefferson County Common Pleas Court against the TPA and two of its employees. The suit contained seven claims, including two (2) counts of workers' compensation fraud, lack of capacity, forgery, theft by deception, and "threats and intimidation." Defendants filed a Civ.R. 12(B)(6) motion, arguing that the Complaint failed to state a claim under Ohio law and that the court lacked subject matter jurisdiction. After repeated hearings during which the trial court beseeched the claimant to hire a lawyer, the suit was dismissed. This prompted an appeal as of right to the Seventh Appellate District.

The Seventh District affirmed, finding that the trial court lacked subject matter jurisdiction. Even when construing allegations in the Complaint in favor of the claimant, and allowing for the liberal construction afforded to *pro se* plaintiffs, there was simply no basis for a direct action against the TPA or its employees. The Court also attempted to construe the action as an R.C. 4123.512 appeal, but the claimant had failed to name the Administrator, file a Notice of Appeal, or comply with other statutory requirements. In addition, because the motion at issue concerned TTD and treatment issues which involve "extent of disability" the only avenue of appeal was via a *mandamus* action. Because the claimant's Complaint arose from a workers' compensation claim, his only avenue was one of the three methods of appeal provided for by statute.

McCloud is a good recitation of the law governing the right to workers' compensation appeals. Essentially, the Court found that the existence of fraud or the fact that the suit was against a third party did not relieve the claimant of the need to follow the statute.

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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