

From: Don Drinko
Sent: Wed 10/3/2018 4:20 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: In a workers' compensation appeal pursuant to R.C. § 4123.512, can a dismissal without prejudice remedy a failure to file a Complaint in a timely fashion?

Workers' compensation appeals are governed by R.C. § 4123.512. Under that statute, the only act necessary in order to "perfect" an appeal is the filing of a *Notice of Appeal* with the appropriate court of common pleas within sixty (60) days after the date of receipt of a refusal order. See R.C. § 4123.512 (A). The statute further provides that a claimant shall, within thirty (30) days after the filing of a *Notice of Appeal*, file a Petition (Complaint) setting forth a right to participate. R.C. § 4123.512 (D). Recently, the Fourth District Court of Appeals considered a case involving a claimant who failed to file the Complaint within the allotted time, and whether a dismissal of the case without prejudice can remedy that failure.

Jackson v A.M. Bulk Commodities, 2018-Ohio-3706, arose from an incident that occurred on November 22, 2015. A workers' compensation claim was filed, which was administratively denied by the Industrial Commission. Further appeals were refused by the Industrial Commission on June 9, 2016. On June 30, 2016, the claimant filed a *Notice of Appeal* to the Washington County Court of Common Pleas, but waited forty-two (42) days before filing her complaint. The employer immediately filed a *Motion to Dismiss*, arguing that the complaint was not filed within thirty (30) days as set forth in the statute, and therefore the trial court did not have subject matter jurisdiction. At that point, the claimant filed a *Notice of Voluntary Dismissal* without prejudice pursuant to Civ. R. 41(A). Less than a year later, the claimant re-filed both a *Notice of Appeal* and *Complaint* which was given a new case number. The employer again moved to dismiss, arguing that the voluntary dismissal and re-filing did not cure the untimeliness of the original complaint. The claimant argued that the Civ.R. 41(A) dismissal actually disposed of both the *Notice of Appeal* and *Complaint*, and that the re-filing of both simultaneously cured any supposed defect. In turn, the employer argued that the re-filed *Notice of Appeal* was not timely pursuant to R.C. § 4123.512 (A), and that there is no authority to support an argument that a Rule 41(A) dismissal dismisses both a *Notice of Appeal* and the complaint, and in fact the authority was to the contrary. The trial court granted the employer's *Motion to Dismiss*, prompting an appeal as of right to the Fourth District Court of Appeals.

The Court reversed, finding that the claimant had cured her neglect by properly dismissing both the *Notice of Appeal* and *Complaint* pursuant to Civ. R. 41(A). First, the Court had to deal with a prior decision of its own holding that a Civ.R. 41(A) dismissal dismisses only the *Complaint*, and not the underlying *Notice of Appeal*. See *Yates v G&G Pepsi Cola Bottlers*, 2016-Ohio-1436. The Court accomplished this by citing the fact that in the case at bar, the entry reflected dismissal of the "action," while the dismissal in *Yates* was of a "cause of action." The Court found that this distinction was a difference that was reflected in the statute itself. Because the claimant's dismissal in the 2016 case dismissed the entire "action," including the *Complaint* and *Notice of Appeal*, the re-filing of both at the same time cured any alleged defect. In a strongly

worded dissent, one of the Justices rejected this distinction, and argued that a Civ. R. 41(A) dismissal should only be interpreted to affect the complaint.

It would seem that the Plaintiff in *Jackson* had it both ways: a timely *Notice of Appeal* remained timely a year later, but an untimely *Complaint* was rehabilitated. The Court in *Jackson* certainly bent over backwards to permit the appeal, as best seen in its reasoning in distinguishing *Yates*.

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.

Donald G. Drinko, Esq.
GALLAGHER SHARP
1501 Euclid Avenue - 6th Floor
Cleveland, OH 44115
Direct Dial: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com