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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can a claimant invoke Ohio's "savings statute" to re-file a workers' compensation complaint for a second time?

We previously discussed the workings of Ohio's "savings statute" – R.C. 2305.19 – which permits a Plaintiff to dismiss his complaint at any time before trial commences and re-file it within one year from the date of dismissal. (See *Shop Talk*, 1/27/16). This week, we will continue with a discussion of a recent case decided by the Ohio Court of Appeals, 12th Appellate District, considering the issue of whether a workers' compensation claimant whose complaint was involuntarily dismissed twice "without prejudice" can file a third time under Ohio law.

Johnson v. Jefferson Industrial Corp., 2015-Ohio-5035, concerned a claimant who injured his knee on March 17, 2009. On September 10, 2009, the claimant sought an additional allowance for "right ACL tear," which was denied administratively. The claimant filed a timely appeal to the common pleas court pursuant to RC 4123.512, but his complaint was dismissed without prejudice on June 30, 2010. On June 16, 2011, within the one year prescribed by the "savings statute," the claimant re-filed his action. At some point, the trial court ordered the claimant to undergo an independent medical examination (IME) or risk a dismissal with prejudice. On October 31, 2013, and despite the fact that the claimant had attended an IME, the trial court again involuntarily dismissed the appeal, but did so without prejudice. The claimant again waited nearly a full year before filing his complaint for a third time on October 31, 2014. In response, the BWC moved for summary judgment, arguing that because the claimant had previously re-filed his complaint, and that the claimant could not invoke the "savings statute" a second time. The trial court agreed and granted summary judgment to the BWC, prompting an appeal as of right to the 12th District Court of Appeals.

The Court of Appeals affirmed the trial court's decision that the claimant could not re-file his complaint a second time. The Court discussed the origins of the "savings statute" and correctly concluded that the "double dismissal" rule (that a claimant cannot voluntarily dismiss and re-file twice) did not apply because at least one of the dismissals was involuntary. However, this did not end the inquiry. In order to avail himself of the "savings statute" a second time, the claimant also had to demonstrate that he re-filed within the original applicable statute of limitations. The claimant argued that he had fulfilled this obligation by filing the claim within two years, that the BWC had jurisdiction for up to five years after payment of the last bill or compensation, and that the Industrial Commission maintained continuing jurisdiction, but the Court noted that those limitations were on the jurisdiction of the BWC/IC, not a trial court. The applicable statutes of limitations was: 1) the sixty (60) days from a refusal order to file a Notice of Appeal; and (2) the thirty (30) days during which a Complaint must be filed after a Notice of Appeal is filed. Because both dates had long since passed, Plaintiff had only one bite at the "savings statute" apple, and used that bite by dismissing and re-filing his action in June, 2011.

The claimant in *Johnson* has an argument, in that at least one of the dismissals in this case was involuntary (and likely in error, as the claimant had submitted to an IME). Notwithstanding this,

the Court in *Johnson* reaffirmed that the “savings statute” is a one-time-only tool and should be reserved for good cause. 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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