

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

QUESTION: When two Administrative Appeals are consolidated, can a Claimant dismiss his “portion” of the case without prejudice pursuant to Ohio Civ. R. 41(A), and re-file his portion at a later date?

On several occasions, we have considered cases involving attempts by workers' compensation Claimants to dismiss an administrative appeal without prejudice pursuant to Ohio Civ. R. 41(A), and re-file them within one year of the dismissal. Recently, the Ohio Court of Appeals, 4th Appellate District, was presented with a case involving appeals filed by both the Claimant and the Employer, which were consolidated by the trial court, and the question of whether a Claimant's dismissal of his portion of the Complaint resulted in a forfeiture of his right to re-file.

Yates v. G&J Pepsi-Cola Bottlers, Inc., 2016-Ohio-1436, involved a Claimant who injured his left shoulder at work. A workers' compensation claim was filed, which was allowed by the BWC. Several years later, the Claimant filed a motion seeking to have the claim additionally allowed for a “cervical disc herniation,” which was allowed over the Employer's objection. The Employer filed a Notice of Appeal pursuant to R.C. 4123.512, and pursuant to statute the Claimant filed a Complaint in the court of common pleas. While that action was pending, the Claimant sought an additional allowance for a condition in his right shoulder, which was denied. The Claimant filed a second Notice of Appeal and Complaint in the same court, and the cases were consolidated. Before trial, the Claimant filed a Notice of Dismissal Without Prejudice with regard to the right shoulder condition only, specifying a right to re-file within one year. When the Claimant re-filed that action within that period, the Employer filed a Motion to Dismiss, alleging that the Civ. R. 41(A) dismissal of his “portion” of the claim barred re-filing of that portion of the claim because the dismissal also resulted in a dismissal of the Notice of Appeal. Therefore, the Employer contended that only the cervical appeal remained. The trial court agreed, and granted judgment to the Employer, prompting an appeal as of right to the 4th District Court of Appeals.

The 4th District reversed, finding that the Claimant should have been permitted to re-file his Complaint. R.C. 4123.512 specifies that a Notice of Appeal initiates the administrative appeal process, not the filing of a Complaint. It follows that a dismissal of a Complaint does not result in the dismissal of the Notice of Appeal. It is a quirk of the statute that only the Claimant is designated as a “Plaintiff” or required to file a Complaint. In this case, the Claimant filed his Complaint in a timely fashion and simply sought to avail himself of a dismissal provided by the Civil Rules. There was nothing in the statute or Rules substantiating a forfeiture of the right to re-file. Additionally, the Court cited several Ohio cases finding that a Claimant can dismiss and re-file an Administrative Complaint pursuant to R.C. 4123.512, and the statute itself recognizes this right (in barring a Claimant's right to dismiss an appeal filed by the Employer.) *R.C. 4123.512(D)*. Finally, the language of the dismissal itself reflects a right to re-file.

The trial court in *Yates* apparently bought in to the Employer's argument that dismissal of a “portion” of a case is a dismissal of all of it. However, had the court agreed with the reasoning in

Yates, the end result would be the end of agreements to consolidate, and more litigation. 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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