

**From:** Don Drinko  
**Sent:** Wed 6/1/2016 4:15 PM  
**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: What exactly is the impact when a workers' compensation claim is withdrawn, rather than decided on the merits?**

In Ohio, there are any situations, such as the application of statutes governing subrogation, employer immunity, and the "fellow-servant doctrine," which are dependent upon whether a workers' compensation claim is "compensable." However, it is sometimes unclear as to when a claim becomes "compensable," or when a "denied" claim is truly denied. Recently, the Fifth Appellate District was presented with a case involving a car accident, a claim that was "denied" but then withdrawn, and whether this "denial" was in fact a denial.

*Barton v. Simpson*, 2016-Ohio-2998, arose from an automobile accident on July 12, 2010. The claimant was working in a summer work program through a local college, and was a passenger in a motor vehicle being driven by another summer worker. A third worker was operating a vehicle that was following the claimant's vehicle. After the first vehicle stopped, the trailing vehicle struck the rear of the first vehicle, injuring the claimant. Prior to the collision, it was established that the claimant was sitting in the rear of the first vehicle squirting water at the trailing vehicle. A workers' compensation claim was filed on July 15, 2010, which the BWC denied on August 6, 2010 on the basis that the claimant was injured as a result of "horseplay." The claimant filed an appeal of the denial to the Industrial Commission, but subsequently withdrew the claim in a letter from his attorney. On May 31, 2011, the claimant sued both drivers, alleging that they were negligent. On June 21, 2012, the trailing driver filed a motion for summary judgment alleging that the "fellow servant doctrine," codified at R.C. 4123.741, precluded an action against a fellow employee. The claimant opposed the motion, alleging that the application of the "fellow servant doctrine" required a recognized workers' compensation claim, and the BWC had denied his claim. The trial court disagreed and granted the motion, as well as a subsequent motion filed by the other driver on October 19, 2015. The claimant filed an appeal as of right to the Ohio Court of Appeals, Fifth Appellate District.

The Fifth District affirmed summary judgment on behalf of both drivers based upon the "fellow servant doctrine." Like many other provisions of Ohio's Workers' Compensation Act, the application of the "fellow servant doctrine" is contingent upon a claim being "compensable," or a recognition that the claimant was injured in the course of and arising from his employment. In this case, the claim originally filed by the claimant was denied, and appeal was filed. However, the claimant's responsibilities did not end there. Like appeals pursuant to R.C. 4123.512, it was incumbent upon claimant to exhaust administrative remedies spelled out in R.C. 4123.511 before the determination was final. Because the claimant elected to withdraw his claim, rather than proceed with the requisite appeals, the denial was vacated, as was the finding that the claimant was injured as a result of "horseplay." In effect, it was as if the claim never existed, and therefore the other drivers were free to argue that the "fellow servant doctrine" applied.

The claimant's decision to withdraw his claim in *Barton* will likely preclude any recovery. The fellow employees have been exonerated, and the statute of limitations on the withdrawn claim

long ago expired. (Withdrawal of a claim does not toll the statute.) The claimant would have been better served proceeding the workers' comp appeal. 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.  
Certified Workers' Compensation Specialist  
GALLAGHER SHARP  
1501 Euclid Avenue - 6th Floor  
Cleveland, OH 44115  
Direct Dial: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)