

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Thomas B. Franks

Court of Appeals No. L-09-1107

Appellee

Trial Court No. CI0200707349

v.

Chas F. Mann Painting Co., et al.

Defendant

DECISION AND JUDGMENT

[Administrator, Bureau of Workers'
Compensation-Appellant]

Decided: January 29, 2010

* * * * *

Marc G. Williams-Young, for appellee.

Richard Cordray, Ohio Attorney General, and
Joshua W. Lanzinger, Assistant Attorney General, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a decision of the Lucas County Court of Common Pleas, following a bench trial, finding that appellee, Thomas B. Franks, was entitled to

continued participation in the state's workers' compensation fund. Upon review, we affirm the decision of the trial court.

{¶ 2} Appellee was an employee of Chas F. Mann Painting Company on December 30, 2004, when he injured his left shoulder while working. Specifically, he sustained a torn rotator cuff. He filed for workers' compensation benefits, and a claim was allowed (No. 04-443060). He returned to work in 2005.

{¶ 3} On November 26, 2005, he sustained a second injury to his left shoulder. He filed for workers' compensation benefits and a claim was allowed (05-896017).

{¶ 4} On January 9, 2006, appellee filed a motion with the Bureau of Workers' Compensation ("appellant"), under claim (Number 04-443060), seeking temporary total disability benefits from January 6, 2006 through April 6, 2006. Appellant denied his claim and appellee filed a timely appeal to the Lucas County Court of Common Pleas.

{¶ 5} On March 26, 2008, appellant filed a motion to dismiss appellee's appeal arguing that the common pleas court lacked subject matter jurisdiction. The trial court denied appellant's motion and the matter proceeded to trial on March 3, 2009. The trial court ruled in favor of appellee finding that he was entitled to continue to participate in the workers' compensation fund for the injury he sustained on December 30, 2004.

Appellant now appeals setting forth the following assignment of error:

{¶ 6} "The trial court erred as a matter of law when it denied Defendant-Appellant's motion to dismiss and found that the court had subject matter jurisdiction to hear Plaintiff-Appellee's worker's compensation appeal under R.C. 4123.512."

{¶ 7} "The only decisions reviewable pursuant to R.C. 4123.519 [now R.C. 4123.512] are those decisions involving a claimant's right to participate or continue to participate in the fund." *Afrates v. City of Lorain et al.* (1992), 63 Ohio St.3d 22, paragraph one of the syllabus. The Industrial Commission's decision to grant or deny additional benefits under an existing claim is not subject to appeal. *Newell v. TRW, Inc./Kelsay-Hayes Co.* (2001), 145 Ohio App.3d 198. Ohio courts have held that a claim for temporary total disability benefits amounts to an extent-of-disability issue rather than a right-to-participate issue. See, e.g., *Cafeo v. Internatl. Truck & Engine Corp.*, 2d Dist. No. 2003 CA 20, 2003-Ohio-4837, ¶ 10; *Martin v. Louisiana-Pacific Corp.* (1996), 113 Ohio App.3d 332, 336.

{¶ 8} In denying appellee's claim, the hearing officer stated:

{¶ 9} "This Staff Hearing Officer finds that a new injury occurred on 11/26/2005 and that has been submitted as an industrial injury and has been allowed as a new claim in claim #05-896017. Any disability the injured worker currently has is related to that new injury from 11/26/2005. This is based upon the treatment note of Doctor Frogameni, dated 5/4/2006."

{¶ 10} The record contains numerous documents authored by Dr. Frogameni that were admitted at trial. We can find no "treatment note" from Dr. Frogameni dated May 4, 2006. Given the evidence in the record that was before the hearing officer, we find no basis for her decision that appellee's request for temporary total disability was related to appellee's second injury. Therefore, the hearing officer was wrong to

automatically assume that appellee's request for temporary total disability under claim (No. 04-443060) was merely an extension of claim (No. 05-896017).

{¶ 11} Appellant correctly asserts that a denial of temporary total disability compensation, after having allowed a worker's claim for a compensable injury, relates merely to extent of worker's disability, and not his right to participate in fund, and thus is not appealable. R.C. 4123.512. Had the staff hearing officer recognized appellee's request for temporary total disability as a separate claim under claim (No. 04-443060), we would be inclined to agree with appellant that the hearing officer's decision went to the extent of appellee's December 2004 injury and thus, was not appealable. However, we are left with the hearing officer's choice of words in her decision where she states that any claim filed under claim (No. 04-443060) will now automatically be considered related to claim (No. 05-896017). The hearing officer effectively denied appellee any further right to participate in the fund under claim (No. 04-443060). The denial of the right to participate in the fund, as discussed above, is appealable pursuant to R.C. 4123.512. Accordingly, the trial court did not err in denying appellant's motion to dismiss. Appellant's sole assignment of error is found not well-taken.

{¶ 12} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Thomas B. Franks v. Chas F. Mann Painting Co., et al.
[Administrator, Bureau of Workers' Compensation-Appellant]
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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.