

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lapp Roofing & Sheet Metal Co., Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 05AP-950
	:	
The Industrial Commission of Ohio and Kevin Carter,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on March 6, 2007

Reminger & Reminger Co., L.P.A., and Shelby M. McMillan,
for relator.

Marc Dann, Attorney General, and *Charissa D. Payer,* for
respondent Industrial Commission of Ohio.

*Horenstein, Nicholson & Blumenthal, L.P.A., and L. Frederick
Sommer, III,* for respondent Kevin Carter.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Lapp Roofing & Sheet Metal Company, Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order holding that relator failed to administratively appeal an order of the Ohio Bureau of Workers' Compensation ("bureau")

involving claimant, Kevin Carter, and to enter an order that sets the appeal for hearing before a district hearing officer ("DHO").

{¶2} Pursuant to Civ.R. 53(D) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate found that the commission abused its discretion when it determined that relator failed to timely appeal the bureau's September 26, 2002 order granting the claimant temporary total disability ("TTD") compensation. The magistrate reasoned that relator's appeal of the bureau's September 24, 2002 order (which had been vacated and replaced by the September 26, 2002 order) substantially complied with the jurisdictional requirements of R.C. 4123.511(F) because it included sufficient information, in intelligible form, to place the parties on notice that an appeal had been filed from an identifiable final order which determined the parties' substantive rights and liabilities.

{¶3} The magistrate noted that, although the September 26, 2002 order vacated the September 24, 2002 order, it really just amended the September 24, 2002 order as to full weekly wage and average weekly wage. Therefore, in the magistrate's view, relator's appeal of the September 24, 2002 order also implicitly embraced the bureau's September 26, 2002 order. In reaching this conclusion, the magistrate relied upon the holding in *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8. Because the magistrate found that the commission failed to apply the standards set forth in *Fisher*, he has recommended that we grant the requested writ of mandamus and order the commission to set relator's appeal of the September 26, 2002 bureau order before a DHO.

{¶4} Respondent has filed an objection to the magistrate's decision arguing that *Fisher* required relator to at least correctly identify the date of the order it was appealing in order to substantially comply with R.C. 4123.511(F). Because relator failed to correctly identify the order it was appealing, it did not substantially comply with R.C. 4123.511(F), and the commission did not abuse its discretion when it found that relator failed to timely appeal the September 26, 2002 order. We disagree.

{¶5} R.C. 4123.511(F) provides in relevant part:

Every notice of an appeal * * * shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

{¶6} Although R.C. 4123.511(F) was not at issue in *Fisher*, *Fisher* involved a similar statute. We note that both R.C. 4123.511(F) at issue here, and former R.C. 4123.519 at issue in *Fisher*, require the same five elements to be included in the notice of appeal. The court in *Fisher* held that the jurisdictional requirements of former R.C. 4123.519 are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of that statute. *Fisher*, at paragraph one of the syllabus. Moreover, the court stated that substantial compliance for jurisdictional purposes occurs when a timely notice of appeal includes sufficient information, in intelligible form, to notify all parties to the proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities. *Id.* at paragraph two of the syllabus. Therefore, we agree with the magistrate that the principles articulated in *Fisher* also apply to an appeal pursuant to R.C. 4123.511(F).

{¶7} The court made clear in *Fisher* that substantial compliance occurs when the notice of appeal contains sufficient information to apprise the parties that an appeal has

been filed from an identifiable final order that has determined the parties' substantive rights and liabilities. In *Fisher*, the appealing party mistakenly indicated in its notice of appeal that the order being appealed from was that of the commission rather than the decision of the regional board of review. Nevertheless, because the court recognized defendants were well aware that the last factual and legal issues brought before the administrative body were determined by the regional board of review, and it would be those facts and legal determinations that would be at issue on appeal, the court found substantial compliance with the statutory requirements. In essence, the court found substantial compliance because the information contained in the notice of appeal was sufficient to notify the defendant of the order that was the subject of the appeal.

{¶8} Here, we agree with the magistrate that relator's October 8, 2002 notice of appeal letter contained sufficient information to place the claimant on notice that relator had filed an appeal from the bureau's September 26, 2002 order notwithstanding the fact that relator incorrectly identified the bureau's September 24, 2002 order in the letter. As previously noted, the September 26, 2002 order vacated the September 24, 2002 order. Relator would have no reason to appeal an adverse order that had already been vacated. Moreover, as even the claimant acknowledges, the September 24, 2002 order could not have been appealed because it was vacated. At the time relator submitted its notice of appeal letter on October 8, 2002, there was only one remaining order in the claim—the September 26, 2002 order. Relator's letter of appeal correctly identified the claimant and the relevant claim number. Therefore, even though the letter of appeal mistakenly referenced the September 24, 2002 order, the commission and the claimant had sufficient information to know that relator was appealing the September 26, 2002 order. Therefore,

relator substantially complied with the jurisdictional requirements of R.C. 4123.511(F). See, also, *State ex rel. Jones v. Indus. Comm.* (1992), 65 Ohio St.3d 133 (bureau substantially complied with statutory requirements even though it misidentified the order it was appealing in its notice of appeal when no party was misled or surprised and it would have been illogical to appeal the order it identified).

{¶9} The claimant also argues that relator is not entitled to relief in mandamus because relator failed to exhaust its administrative remedies. According to the claimant, these remedies are (1) Industrial Commission Resolution R98-1-03; (2) R.C. 4123.52; and (3) R.C. 4123.522. We find this argument unpersuasive.

{¶10} With respect to Industrial Commission Resolution R98-1-03 (request for reconsideration), claimant presents no legal authority supporting its argument that a party to a claim must file a request for reconsideration with the commission before filing a mandamus action. Nor are we aware of any legal support for this argument. In fact, this court in *State ex rel. Novak v. Indus. Comm.* (Nov. 12, 1993), Franklin App. No. 92AP-1326, specifically rejected this argument.

{¶11} Here, relator did exhaust the administrative appeal process with the commission. Relator did not have to seek reconsideration of the adverse decision before seeking relief in mandamus.

{¶12} Nor was relator required to seek relief under R.C. 4123.52 (commission's continuing jurisdiction) before seeking relief in mandamus. As previously noted, relator had exhausted the administrative appeals process with the commission. No statute required relator to seek relief under R.C. 4123.52. Therefore, relator appropriately sought relief in mandamus.

{¶13} Respondent also points to R.C. 4123.522 in support of its argument. This statute entitles employers, employees and their respective representatives to written notice of any, determination, order, award or decision in matters to which they are parties. The statute grants certain remedies to any person who, through no fault of their own, fails to receive the required notice or does not have actual knowledge of the import of the information contained in the notice. Relator has never contended that it did not receive the September 26, 2002 order or that it did not understand the import of that order. Rather, relator contends that it mistakenly identified the September 24, 2002 order rather than the September 26, 2002 order in its letter of appeal. Therefore, R.C. 4123.522 is simply irrelevant.

{¶14} Lastly, claimant contends that the mandamus action is barred by the doctrine of laches. The claimant argues that relator's delay in bringing the mandamus action materially prejudiced his rights. We disagree.

{¶15} Although relator waited approximately two and one-half years to file its petition for a writ of mandamus, the Supreme Court of Ohio has held a delay of four years after the issuance of the commission's final order was not sufficient to invoke the doctrine of laches. *State ex rel. Case v. Indus. Comm.* (1986), 28 Ohio St.3d 383. Moreover, we fail to see how this delay prejudiced the claimant. The claimant's claim has been allowed and the claimant has been receiving TTD compensation. The claimant has failed to articulate how the delay prejudiced his ability to protect his interests. The possibility that relator might ultimately prevail on the merits of its appeal does not demonstrate that the delay in filing the petition prejudiced the claimant.

{¶16} For the foregoing reasons, we overrule the claimant's objection.

{¶17} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus and order the commission to vacate its staff hearing officer's order of March 7, 2003, and to enter an order that sets relator's appeal of the September 26, 2002 bureau order before a DHO.

*Objection overruled;
writ of mandamus granted.*

PETREE, J., concurs.
SADLER, P.J., dissents.

SADLER, P.J., dissenting.

{¶18} Because I disagree with the majority's conclusion that relator's October 8, 2002 letter substantially complies with the requirements of R.C. 4123.511(F), I respectfully dissent.

{¶19} In the companion cases of *Mullins v. Whiteway Mfg. Co.* (1984), 15 Ohio St.3d 18, 15 OBR 15, 471 N.E.2d 1383, and *Wells v. Chrysler Corp.* (1984), 15 Ohio St.3d 21, 15 OBR 18, 472 N.E.2d 331, the Supreme Court of Ohio introduced the "substantial compliance" standard for cases involving R.C. 4123.519 (now known as R.C. 4123.512). In those cases the court advised that among the "* * * mitigating factors * * *" to be considered when examining the sufficiency of a notice of appeal * * * [are] whether appellant has substantially complied with the statutory appeal provisions and *whether the purpose of the unsatisfied provision is sufficiently important to require compliance for jurisdictional purposes.*" *Mullins*, supra, at 21. (Emphasis added.)

{¶20} Applicable here, R.C. 4123.511(F) requires that a notice of appeal "state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom." Relator's October 8, 2002 letter states the names of the claimant and employer, the claim number and the fact that relator "objected" to the bureau's September 24, 2002 order. If relator's "objection" and request for hearing is construed as an indication that relator intended to "appeal," then relator complied with every requirement of R.C. 4123.511(F) except that which required it to include within its notice the date of the decision appealed from.

{¶21} Under *Mullins*, then, in determining whether relator's notice of appeal is sufficient, we must consider "whether the purpose of the unsatisfied [date-related] provision is sufficiently important to require compliance for jurisdictional purposes." In my view, the provision requiring that the notice of appeal include the date of the decision appealed from is sufficiently important, on the record before us, to make compliance therewith a jurisdictional prerequisite in the present case.

{¶22} The Supreme Court of Ohio has held that in an injured worker's appeal to the court of common pleas, seeking participation in the workers' compensation system, the provision requiring inclusion of the date of the decision appealed from in the notice of appeal is *not* jurisdictional. *Mullins*, supra, at paragraph one of the syllabus. However, I believe that *Mullins* is readily distinguishable because in that case, an appeal pursuant to R.C. 4123.512 (formerly R.C. 4123.519), the appealing party filed both the notice of appeal and the complaint, which included a multi-paragraph statement of the claim. These predicates to the successful commencement of such an action under the Ohio Rules of Civil Procedure ensured that all other parties would be given ample notice of the

precise decision being appealed, notwithstanding the fact that the text of the notice of appeal did not itself contain the date of the offending decision.

{¶23} By contrast, here there are no procedural strictures in place, apart from the enumerated requirements of R.C. 4123.511(F), that operated to ensure all parties would be afforded notice "that an appeal ha[d] been filed from an identifiable final order which ha[d] determined the parties' substantive rights and liabilities." *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 30 OBR 16, 505 N.E.2d 975, paragraph two of the syllabus. In *Mullins*, the substantive allegations in the complaint served to lessen the importance of strict compliance with the statutory requirement that the notice of appeal contain the date of the decision being appealed. I perceive no set of facts or circumstances in the instant case that similarly serves to diminish the importance of the purpose for the unsatisfied date-related provision.

{¶24} Here, relator's October 8, 2002 letter failed to give notice that an appeal had been filed from an identifiable final order determining the parties' substantive rights and liabilities. The only information by which relator identified the order it sought to appeal was the date of an order that had been vacated and no longer had any force and effect. The majority is satisfied that the other parties, through reference to other documents in the claim file and the process of deduction, "had sufficient information to know that relator was appealing the September 26, 2002 order." Ante, ¶8. But the Supreme Court of Ohio has never countenanced a directive to non-appealing parties to look so far from the appeal-related filing itself to deduce what matters are being appealed. The October 8, 2002 letter makes no mention of the bureau's September 26, 2002 order, and contains no information from which a party could discern that relator intended to appeal that order.

For these reasons, I would find that relator did not substantially comply with R.C. 4123.511(F), and would therefore not reach the issues of exhaustion of administrative remedies and application of the doctrine of laches.

{¶25} I would sustain respondent's objections, reject the magistrate's conclusions of law, and deny the requested writ of mandamus. Because the majority has determined otherwise, I dissent.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

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v.	:	No. 05AP-950
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The Industrial Commission of Ohio and Kevin Carter,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on March 30, 2006

Reminger & Reminger Co., L.P.A., and Shelby M. McMillan,
for relator.

Jim Petro, Attorney General, and Charissa D. Payer, for
respondent Industrial Commission of Ohio.

*Horenstein, Nicholson & Blumenthal, L.P.A., and L. Frederick
Sommer, III,* for respondent Kevin Carter.

IN MANDAMUS

{¶26} In this original action, relator, Lapp Roofing & Sheet Metal Co., Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order holding that relator failed to administratively appeal an order of the Ohio Bureau of Workers' Compensation ("bureau"), and to enter an order that sets the appeal for hearing before a district hearing officer ("DHO").

Findings of Fact:

{¶27} 1. On September 12, 2002, Kevin Carter ("claimant") filed an application for workers' compensation benefits. In his application, claimant alleged that he sustained an industrial injury on September 11, 2002, in the scope of and arising out of his employment as a roofer with relator, a state-fund employer. Relator refused to certify the industrial claim.

{¶28} 2. On September 24, 2002, the bureau mailed an order that allows the claim for multiple injures, awards temporary total disability ("TTD") compensation beginning September 12, 2002, and sets the full weekly wage ("FWW"). The September 24, 2002 bureau order failed to set the average weekly wage ("AWW").

{¶29} 3. On September 26, 2002, the bureau mailed another order stating:

This order replaces the BWC order dated 09-24-2002, which has been vacated for the following reason: The full weekly wage (FWW) and/or average weekly wage (AWW) previously set in the claim is being modified.

{¶30} The September 26, 2002 bureau order went on to increase FWW and to set AWW.

{¶31} 4. On October 8, 2002, relator's vice-president of finance filed with the bureau a letter stating:

Re: Claim # 02-851402, injured worker – Kevin Carter

Dear BWC:

This letter is to advise you that Lapp Roofing & Sheet Metal Co., Inc. objects to the BWC tentative order dated September 24, 2002 in the above captioned claim. We hereby request that this matter be set for hearing.

{¶32} 5. An appeal hearing was scheduled for January 2, 2003, before a DHO.

Following the hearing, the DHO issued an order stating:

It is the finding and order of the Hearing Officer that the employer's appeal filed 10/8/02 is denied for the reason that the employer appealed the administrator's order of 9/24/02 which was vacated by the Bureau of Workers' Compensation on 9/26/02. The Hearing Officer finds that the employer did not appeal the 9/26/02 order, therefore, there is no issue to be heard at this time.

This order is based on the Bureau of Workers' Compensation order dated 9/26/02 which vacated their 9/24/02 order and the fact that the employer only appealed the 9/24/02 order on 10/8/02 after it was vacated.

{¶33} 6. Relator administratively appealed the DHO's order of January 2, 2003.

{¶34} 7. Following a March 7, 2003 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of January 2, 2003. The SHO's order states:

It is the finding of the Staff Hearing Officer that the employer's appeal filed 10/08/2002, to the 09/24/2002, Bureau of Workers' Compensation order cannot be applied to the 09/26/2002 Bureau of Workers' Compensation order, which vacated the 09/24/2002 order, modifying the average weekly wage/full weekly wage but allowing the conditions to remain the same. Therefore, the Staff Hearing Officer finds that the 09/26/2002 Bureau of Workers' Compensation order was not timely appealed and therefore remains in effect.

{¶35} 8. On April 10, 2003, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 7, 2003.

{¶36} 9. On September 7, 2005, relator, Lapp Roofing & Sheet Metal Co., Inc., filed this mandamus action.

Conclusions of Law:

{¶37} The main issue is whether the commission abused its discretion by determining that relator failed to appeal the bureau's order mailed September 26, 2002.

{¶38} Finding that the commission abused its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶39} In order to show an abuse of discretion, relator must show that its October 8, 2002 letter meets the requirements for a notice of appeal provided at R.C. 4123.511(F).

{¶40} Pertinent here, R.C. 4123.511(F) provides:

Every notice of an appeal * * * shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

{¶41} By analogy, providing for the appeal of commission orders to a court of common pleas, former R.C. 4123.519 sets forth five elements to be included in a notice of appeal:

Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

{¶42} The magistrate notes that R.C. 4123.511(F) at issue here is essentially identical to former R.C. 4123.519. Both R.C. 4123.511(F) and former 4123.519 set forth the same five elements to be included in the notice of appeal.

{¶43} Paragraphs one and two of the syllabus of *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, state:

1. The jurisdictional requirements of R.C. 4123.519 are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of that statute. * * *
2. Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. 4123.519 includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal

has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.

{¶44} In *Fisher*, the commission disallowed the claimant's appeal in an order dated April 20, 1984. In his notice of appeal filed with the common pleas court, the claimant stated that he was giving notice of appeal from a decision of the commission "dated May 2nd, 1984." Apparently, the notice of appeal correctly identified the claim number, the claimant and the employer. *Id.* at 8.

{¶45} In *Fisher*, the common pleas court dismissed the appeal on grounds that the notice of appeal failed to vest the court with jurisdiction. On further appeal, the court of appeals affirmed, holding that the notice of appeal was fatally defective. On appeal to the Supreme Court of Ohio, the *Fisher* court reversed the judgment of the court of appeals and remanded the case to the common pleas court for further proceedings. The *Fisher* court explained:

We are guided in this determination by the fundamental tenet of judicial review in Ohio that courts should decide cases on their merits. * * *

Appellant herein has sufficiently complied with the jurisdictional dictates of R.C. 4123.519 as set forth by this court so as to meet the requirements of substantial compliance. By correctly designating the parties to the action, and the case number, all concerned parties had sufficient information from which they could determine that a particular claim or action was forthcoming. No party has alleged, and no party can now demonstrate, surprise or unfair prejudice to its interest.

Id. at 11.

{¶46} In the magistrate's view, *Fisher* compels a finding of substantial compliance in this action.

{¶47} Significantly, while the September 26, 2002 bureau order vacates the September 24, 2002 bureau order, it then reiterates the findings of the September 24, 2002 bureau order as to the claim allowances and the award of TTD compensation. The September 26, 2002 bureau order then modifies the prior setting of FWW and also sets AWW that the prior order failed to set. Thus, in actuality, the September 26, 2002 bureau order only amends the September 24, 2002 order as to FWW and AWW.

{¶48} Given that the September 26, 2002 bureau order in actuality only amends in part the prior bureau order, and that both orders result from the same administrative body, i.e., the bureau, in the magistrate's view, relator's October 8, 2002 letter at least implicitly embraces the September 26, 2002 bureau order as well. Under such circumstances, there should have been no doubt on the part of claimant that he was on notice that the bureau's order of September 26, 2002 was being appealed.

{¶49} Following the test for substantial compliance set forth by the *Fisher* court in its syllabus, relator's October 8, 2002 letter did include sufficient information, in intelligible form, to place the claimant on notice that relator had filed an appeal from the bureau's September 26, 2002 order notwithstanding that relator incorrectly identified the bureau's September 24, 2002 order.

{¶50} A review of the DHO's order of January 2, 2003, and the SHO's order of March 7, 2003, discloses that neither hearing officer applied the substantial compliance test set forth in *Fisher*. The hearing officers simply held the view that, because the September 24, 2002 bureau order had been vacated, relator's sole identification of the September 24, 2002 order was fatal to its October 8, 2002 notice of appeal (letter). The commission's explanation for its decision simply ignores the relevant relationship between

the two bureau orders and fails to render an analysis under the substantial compliance test.

{¶51} Accordingly, based on the foregoing analysis, this court must issue a writ of mandamus ordering the commission to vacate its SHO's order of March 7, 2003, that finds that relator failed to appeal the September 26, 2002 bureau order, and to enter an order that sets relator's appeal of the September 26, 2002 bureau order before a DHO.

s/s Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE