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SUMMIT COUNTY  
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IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

JOSEPH HUMPHREY	)	CASE NO. AC 2003-09-5143
	)	
Plaintiff,	)	JUDGE JOHN R. MILLIGAN
	)	
-vs-	)	
	)	
GOODYEAR TIRE AND RUBBER )	)	RULING ON SUMMARY
COMPANY et al.,	)	JUDGMENT
	)	
Defendants,	)	
	)	
	)	Rule 58 Notice

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This matter came on for hearing on the Motion of the Defendant Goodyear Tire & Rubber Company to dismiss this Workers Compensation Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, filed Nov. 17, 2003, the Memorandum in Support, filed Nov. 17, 2003, the Plaintiff's Response, filed Nov. 24, 2003, and the Defendant's Reply, filed Dec. 5, 2003 (with leave).

Procedurally and legislatively Workers Compensation cases in Ohio occupy a unique, sequential standing. Initially, the remedial access is limited to administrative process before the Industrial Commission of Ohio, as between employee and employer. The administrative process is precedential to a viable, justiciable claim in the judicial system of Ohio. The administrative process is, itself, sequential, and particularly specific in asbestosis-employee claims. In 1996 the Industrial Commission, consistent with its rule making authority established a threshold requirement for processing an employee claim. I.C. 96-1-01.

A reading of the Industrial Commission rule clearly articulates the problem sought to be addressed and the issue of adequate threshold evidence required before the claim be referred within the administrative system to the Administrator for "examination by a qualified medical specialist." The agency established a tripartite prerequisite: (1) A written interpretation of x-rays by a certified "B reader," (2) Pulmonary functions studies

and interpretation by a licensed physician, and (3) An opinion of causal relationship by a licensed physician. I.C. 96-1-01. (Feb. 26, 1996).

The employee's right to participate (or not) in the workers compensation fund depends upon a factual determination by the decision makers within the administrative agency. When that decision is made the legislature has provided a remedy by way of appeal and complaint in the common pleas court. R.C. 4123.512. There is no other appellate recourse available to the adversely affected party (either the claimant or the employer). Logically the statute invests in the common pleas court the authority to determine whether the claimant has a right to participate in the fund. That is the ultimate, limited issue for the court and jury in common pleas court.

In the case sub judice it is undisputed from both the record of the administrative proceedings and the pleadings and supplications in this court that the claim never got beyond the specific-rule-imposed prerequisite, and was never, therefore, considered on its merits. The Industrial Commission issued an ex parte order reciting:

Since the FROI-1 in question does not contain a pulmonary function and interpretation by a licensed physician and an opinion of a causal relationship by a licensed physician it is therefore dismissed.

This order is interlocutory in nature and not subject to appeal pursuant to the Ohio Administrative Code Rule 4121-3-09.

Neither the claimant-employee nor the employer have had their "day in court" before the administrative tribunal. Until that day, Movant, employer argues, there is no "final order" either denying or allowing the claimant a right to participate in the fund. Whether the claimant's default or procedural error of the administrative agency, it is an issue not legislatively enabled for judicial, court, review. If the administrative agency has failed in its official duties there is no adequate remedy at law and the claimant may well have a cause of action in mandamus or other original, equitable petition. But he does not have it in this court and in this case.

Claimant-employee argues, in effect, when your case is dismissed, even for procedural default you loose - you have been denied a right to participate in the fund. You therefore have standing to appeal to the common pleas court.

It is clear to this court that the anticipated, sequential process in asbestos-workers compensation cases is logical and plain. Employees are given greater rights of judicial review than most other claimants who process administrative remedies from the executive-administrative branch of government; in worker's compensation cases generally the employee has a right to relitigate the question of right to participate in the fund, and to present additional, new evidence to make his case. He is not bound by the record made before the administrative tribunal as in cases governed by R.C. 119, The Administrative Code.

A logical quid-pro-quo for the expanded rights of an employee is the clear requirement that he jump through the hoops of the specific administrative rule as a precondition to being examined by the Industrial Commission's expert, and receiving hearings upon the merits of his or her claim. To overlook the prefatory requirements to a final administrative adjudication and allow appeal to common pleas court from this interlocutory order, and to allow de novo trial, would be to deny the employer the opportunity to challenge and contest the merits of the case at that administrative level.

The rationale and logic of Judge Reeve Kelsey is compelling in *Hanley v. Daimler-Chrysler Corp.*, Wood County C.P. No. 02 CV 748, 11/5/2003, unreported:

The burden is upon the claimant to prove each element of his claim. That burden would include establishing that the (sic) Mr. Hanley is suffering from asbestosis, that the asbestosis was incurred in the course of Mr. Hanley's employment with Daimler-Chrysler Corporation, that Mr. Hanley's application for benefits was filed within the time as required by law, and that Mr. Hanley has satisfied any other material issue to the claim. Satisfying first the requirements the Resolution and then the requirements of R.C. 4123.69(Y) is such material issue.

See also, *Anders v. Powertreain Divison, Genera lMotors Cororation*, et al, Defiance C.P., Case No. 02-CV-35772, 9/11/02, unreported.

It is this court's opinion and conclusion that the failure of the agency to adjudicate the merits of the claim is reviewable solely by mandamus or other original, extra-legislative, process ( Complainant's reliance on State ex Rel. Evans v. Ind. Comm. Of Ohio, et al, 1992, 64 Ohio St. 3d 236, is misplaced. Its facts and procural posture are significantly different.) It is patent that the "right to participate" decision has not yet been reached by the administrative agency. And until it has been, the claimant has no standing in the common pleas court pursuant to R.C. 4123.512.

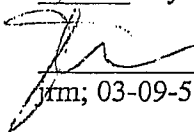
Thus this court is without subject matter jurisdiction, and the case is to be dismissed.

Exceptions to all parties.

So ordered.

  
JUDGE JOHN R. MILLIGAN

Notice: Please issue copy of this order upon the parties by mailing to the attorneys this \_\_\_\_\_ day of \_\_\_\_\_, 2003, by the undersigned.

  
jm; 03-09-5143