



bureau have identified and protected interests. The administrative process is precedential to a viable, justiciable appellate review in the judicial system of Ohio. The administrative process is, itself, sequential, and particularly specific in asbestos-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.

Workers Compensation law creates a special remedy, fashioned to grant relief to an employee who is injured in the course of employment notwithstanding lack of negligence or fault on the part of the employer.

A reading of R.C. 4123.68, Schedule (Y), and Industrial Commission rule, 96-1-01, clearly articulate the problem sought to be addressed and the issue of adequate threshold evidence required before the claim is to be referred within the administrative system by 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).<sup>1</sup>

The legislature can impose jurisdictional requirements for application of injury claims, where such classifications are not unreasonable, arbitrary, and have a rational relationship to a permissible governmental objective. *Showalter v. A.C. Williams*, (1983) 13 Ohio App. 3d 199, a silicosis case.

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 the focused, limited question of 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. *Thomas v. Conrad*, (1998) 81 Ohio St. 3d 475.

This court is entitled to look beyond the particular order from which the appeal is launched, and determine whether the underlying order is interlocutory. Here it clearly is. See *The State of Ohio ex rel Ernest Auto Body Shop v. Fuerst, Judge*, (1987) 30 Ohio St. 3d 138; *Walker v. Trimble, Administrator*, 1994 Ohio App. LEXIS 4700 (8<sup>th</sup> Dist. Cuyahoga Cty. No. 66303); and *Singer Sewing Machine Co. v. Puckett*, (1964) 176 Ohio St. 32.

The Court in considering this matter takes judicial notice of the official record of the administrative proceedings which affirmatively demonstrate that the claimant has

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<sup>1</sup> The rationale for the 1996 administrative rule may be found, in part, in the 1959 decision of the Ohio Supreme Court, *State, ex rel. The Fulton Foundry & Machine Co. v. Industrial Commission of Ohio*, 168 Ohio St.410, 155 N.E.2d 898, 7 Ohio Op.2d 254.

repeatedly failed to provide the prefatory tests essential to a factual, merit decision as to the claim of asbestosis.

This Claimant, who was represented by counsel at all times throughout the administrative process, was well aware of the deficit in compliance with Resolution R96-1-01. His original claim was accompanied by a "B reader" certified report, the first of the three requirements. (Exhibit A, attached and incorporated.) On June 6, 2002, the contested matter was heard. The District Hearing Officer found:

claimant has failed to meet the minimum evidence requirements as established by Industrial Commission Resolution R96-1-01 to warrant an examination by a state specialist. Specifically, the following has not been provided: Pulmonary functions studies with an interpretation by a licensed physician; An opinion of causal relationship by a licensed physician. Therefore, the claim is disallowed. (Exhibit B, attached.)

On June 18, 2002, the claimant filed his administrative appeal from the above ruling. On the Notice of Appeal claimant alleged the prior decision was "contrary to facts and law," and he failed to identify whether he planned to submit new evidence (which is required to be filed as an attachment).

The administrative appeal was heard on August 13, 2002, at which time the June 6, 2002, order of the District Hearing Officer was affirmed, the application filed by the claimant on January 10, 2002 was denied and the precise language quoted above, advising the parties of the deficits, was inserted into the order of the Staff Hearing Officer (Exhibit C, attached.)

Again, claimant appealed the order of the Staff Hearing Officer by Notice of Appeal, August 28, 2002, containing the same allegation and evidentiary claim omission as on the earlier administrative appeal.

On August 30, 2002, the appeal was reviewed by two staff hearing officers on behalf of the commission, who concurred in the decision and refused the appeal. (Exhibit D, attached.)

The Notice of Appeal to Summit County Common Pleas Court was filed with the Industrial Commission on November 8, 2002.

The Certificate of Records Custodian is attached. (Exhibit E.)

Thus, it is an undisputed material fact that the claimant filed only an x-ray B-Reader, and failed to file a pulmonary function study and interpretation by a licensed physician and an opinion of causal relationship by a licensed physician pursuant to Resolution No. 96-1-01. See *Affidavit of Lawrence Friedlander, 11/26/2003*, and the attachments from the bureau.

There is a strong, rational basis for these sequential requirements as a condition of bureau examination and merit hearing as to all parties:

- (1) The claimant is entitled to know that there is more than a mere possibility that he may have the disease of asbestosis. The B reader is nothing more than a yellow flag, warning of the possibility and propriety of further medical examination. The anxiety naturally caused to a claimant by the B reader report needs to be assuaged by the further, specific examination and diagnosis contemplated by the administrative rule.
- (2) The employer likewise has a significant interest and stake in the orderly sequential process. The consequences of failure to provide the two additional steps contemplated by the rule effectively deny the employer the essential evidence to make reasoned, intelligent decisions about the merit of the claim. It is evident from discovery issues thus far at the common pleas level in many of the cases that employers are categorically disadvantaged by the failure of the claimant to follow the rule.
- (3) The Bureau of Workers Compensation is also burdened by the litigation generated where the claimant has failed in his or her prefatory duty of medical and probable cause supplication.

It is in the best interests of all parties that the merit of these cases be determined expeditiously and fairly to all affected parties. That is not possible when the claimant fails to comply with the provisions of the rule.

In this case the Plaintiff sought to bypass the clear adjudicative process within the bureau which would have generated a definitive merit decision, and move directly to the common pleas court and a jury trial. If allowed, this process would emasculate the administrative authority in clear contradiction of the statute and rule. Based upon the undisputed facts it is clear to this court that the anticipated, sequential process in asbestos-workers compensation cases has not been followed.

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. Powertrain Division, General Motors Corporation, et al*, Defiance C.P., Case No. 02-CV-35772, 9/11/02, unreported.

Although this court finds no direct authority on the issue of whether failure to comply with the rules of the administrative agency by the asbestos claimant render its adverse

rulings appealable to common pleas court, the logic and rationale of *Felty v. AT&T Technologies, Inc.*, 65 Ohio St. 3d, 602 N.E.2d at 1145, reaffirmed by the Supreme Court in *Thomas v. Conrad, Adm., NCR Corporation*, (April 22, 1998), 81 Ohio St.3d 475, 692 N.E.2d 205, 1998 Ohio LEXIS 1053, is compelling. The holdings therein resonate: "The only decisions of the commission that may be appealed to the courts of common pleas...are those that are final and that resolve an employee's right to participate or to continue to participate...Only those decisions that finalize the allowance or disallowance of a claim are appealable."

Failure to exhaust the administrative process is an affirmative defense. See *Jones v. Village of Chagrin Falls*, 77 Ohio St. 3d 456, and cases cited: *Nagel v. City of Avon*, 2002 Ohio 5427; 2002 Ohio App. LEXIS 5419 (Lorain App. 9<sup>th</sup> Dist. 2002). This issue has been raised in the answers of the Defendants and the Bureau, and is ripe for determination as a matter of law. In this case the employer pled, by answer, that this court lacked subject matter jurisdiction and the petition failed to state a claim, both of which clearly encompass the failure of the employee to exhaust his administrative remedies and rights.

The administrative agency never reached the "right to participate" point of decision, a prerequisite to direct judicial review. Until it has, the claimant has no standing in the common pleas court pursuant to R.C. 4123.512.

This court has no authority to remand this case to the Bureau for the purpose of the parties completing the required sequential steps. See *Green v. B.F. Goodrich*, Summit Co. C/A, 85 Ohio App. 3d 223, 619 N.E. 2d 497, 11993 LEXIS 545.

The court finds there is no genuine issue as to the material fact that claimant failed to comply with the provisions of R.C. 4123.68, and Resolution 96-1-01, Industrial Commission of Ohio. As a consequence there is no such final order of the commission amenable to the judicial review process contemplated in R.C. 4123.512.

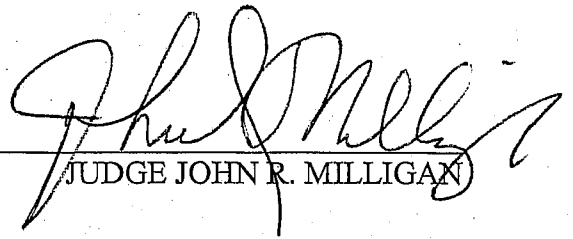
Here, construing the evidence most favorably to the Plaintiff, there is no genuinely disputed issue as to any material fact and the Defendants are entitled to summary judgment as a matter of law, pursuant to the provisions of Civ.R. 56(C). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

This court concludes that it is without subject matter jurisdiction, the motion for summary judgment is granted, and the case is dismissed. Costs are assessed to the Plaintiff.

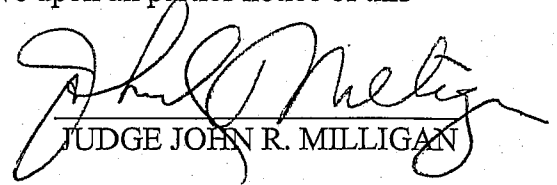
This is a final judgment of the court. There is no just cause for delay.

Exceptions to all parties.

So ordered.

  
JUDGE JOHN R. MILLIGAN

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties notice of this Judgment and its date of entry upon the journal.

  
JUDGE JOHN R. MILLIGAN

Ray A. Harron, M.D.  
Diplomate of the American Board of Radiology  
Diplomate of the American Board of Nuclear Medicine

Davis, Earl  
Date of Reading: 01/16/00

CHEST DATED 09/29/99: There are primary s, secondary s sized opacities involving the two lowest lung zones, profusion 1/0.

IMPRESSION:

1. Bilateral interstitial fibrosis consistent with asbestosis.

Ray A. Harron, M.D.  
Diplomate of the American  
Board of Radiology

RAH/kc

EXHIBIT

A

# RECORD OF PROCEEDINGS

Claim Number: 00-820328  
LT-DD-SI-COV  
PCN: 2021291 Earl Davis

Claims Heard: 00-820328

EARL DAVIS  
749 ORLANDO AVE  
AKRON OH 44320-1856

Date of Injury: 1/16/2000

Risk Number: 20003890-0  
Manual Number:

This claim has been previously : CONTESTED.

This matter was heard on 06/06/2002 before District Hearing Officer Larry B. Comanor pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

FROI-1 First Report Of An Injury, OD Or Death filed by Injured Worker on 01/10/2002.

Issue: 1) Occupational Disease Allowance

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: WYMAN  
APPEARANCE FOR THE EMPLOYER: ROSIN  
APPEARANCE FOR THE ADMINISTRATOR: NONE

It is the order of the District Hearing Officer that the FROI-1 First Report Of An Injury, OD Or Death filed by Injured Worker on 01/10/2002 is DENIED.

It is the finding of the District Hearing Officer that claimant did not contract an occupational disease in the course of employment.

It is the finding of the Hearing Officer that claimant has failed to meet the minimum evidence requirements as established by Industrial Commission Resolution R96-1-01 to warrant an examination by a state specialist.

Specifically, the following has not been provided:

Pulmonary functions studies with an interpretation by a licensed physician;

An opinion of causal relationship by a licensed physician.

Therefore, the claim is disallowed.

The Self-Insured employer is hereby ordered to comply with the above findings.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Akron District Office, 161 South High Street, Suite 301, Akron OH 44308.

FINDINGS MAILED  
JUN 11 2002  
rdg/rdg  
I.C. AKRON

EXHIBIT  
B

# RECORD OF PROCEEDINGS

Claim Number: 00-820328

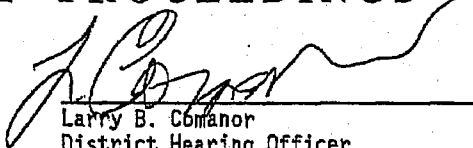
Typed By: rdg

Date Typed: 06/06/2002

Date Received: 02/23/2002

Notice of Contested Claim: 02/20/2002

Findings Mailed:

  
Larry B. Comanor  
District Hearing Officer

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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00-820328  
Earl Davis  
749 Orlando Ave  
Akron OH 44320-1856

ID No: 21753-91  
Kelley & Ferraro  
1300 E 9th St Ste 1901  
Cleveland OH 44114-1503

Risk No: 20003890-0  
Daimler Chrysler Corp  
Cims 485 07 26  
Attn August L Biache Jr  
1000 Chrysler Dr  
Auburn Hills MI 48326-2766

ID No: 1694-80  
Esis  
PO Box 5061  
Southfield MI 48086

ID No: 20403-91  
Buckingham, Doolittle & Burroughs  
P.O. Box 1500  
50 South Main Street  
Akron OH 44309-1500

BWC, LAW DIRECTOR

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 00-820328  
LT-OD-SI-COV  
PCN: 2021291 Earl Davis

Claims Heard: 00-820328

EARL DAVIS  
74 ORLANDO AVE  
AKRON OH 44320-1856

Date of Injury: 1/16/2000

Risk Number: 20003890-0  
Manual Number:

This claim has been previously allowed for: DISALLOWED.

This matter was heard on 08/13/2002 before Staff Hearing Officer Lavonne Meriwether pursuant to the provisions of Ohio Revised Code Section 4121.5(B) and 4123.511(D) on the following:

IC-12 Notice Of Appeal filed by Injured Worker on 06/18/2002.  
Issue 1) Occupational Disease Allowance

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Uz1  
APPEARANCE FOR THE EMPLOYER: Rosin  
APPEARANCE FOR THE ADMINISTRATOR: ---

The order of the District Hearing Officer, from the hearing dated 06/06/2002, is affirmed.

It is the order of the Hearing Officer that the FROI-1 Application filed by the injured worker on 1/10/2002 is denied.

It is the finding of the Hearing Officer that the injured worker did not contract an occupational disease in the course of employment.

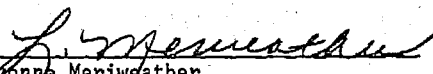
It is the finding of the Hearing Officer that the injured worker has failed to meet the minimum evidence requirements as established by Industrial Commission Resolution R96-1-01 to warrant an examination by a state specialist.

Specifically, the following has not been provided:  
Pulmonary function studies with an interpretation by a licensed physician;  
An opinion of causal relationship by a licensed physician.

Therefore, the claim is disallowed.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Akron District Office, 161 South High Street, Suite 301, Akron OH 44308.

Typed By: js  
Date Typed: 08/13/2002

  
Lavonne Meriwether  
Staff Hearing Officer

Finding Mailed:

FINDINGS

AUG 15 2002

MAILED

EXHIBIT

C

# RECORD OF PROCEEDINGS

Claim Number: 00-820328

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

---

00-820328  
Earl Davis  
749 Orlando Ave  
Akron OH 44320-1856

ID No: 21753-91  
Kelley & Ferraro  
1300 E 9th St Ste 1901  
Cleveland OH 44114-1503

Risk No: 20003890-0  
Daimler Chrysler Corp  
Cms 485 07 26  
Attn August L Biache Jr  
1000 Chrysler Dr  
Auburn Hills MI 48326-2766

ID No: 1694-80  
Esis  
PO Box 5061  
Southfield MI 48086

ID No: 21494-91  
Buckingham, Doolittle & Burroughs  
191 West Nationwide Blvd Ste 300  
Columbus OH 43215

ID No: 20403-91  
Buckingham, Doolittle & Burroughs  
P.O. Box 1500  
50 South Main Street  
Akron OH 44309-1500

BWC, LAW DIRECTOR

MEDICAL 09/10/2002

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 00-820328  
LT-OD-SI-COV  
PCN: 2021291 Earl Davis

Claims Heard: 00-820328

EARL DAVIS  
749 ORLANDO AVE  
AKRON OH 44320-1856

INDUSTRIAL COM. OF OHIO  
02 SEP 10 AM 10:16  
FINDING MAILED 1

Date of Injury: 1/16/2000

Risk Number: 20003890-0  
Manual Number:


IC-12 Notice Of Appeal filed by Injured Worker on 08/27/2002.  
Issue: 1) Occupational Disease Allowance

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 08/27/2002 by the Injured Worker from the order issued 08/15/2002 by the Staff Hearing Officer be refused and that copies of this order be mailed to all interested parties.

This appeal was reviewed by two Staff Hearing Officers on behalf of the commission. Both Staff Hearing Officers concur with this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN OHIO REVISED CODE 4123.512.

Date Reviewed: 08/30/2002 (RP)  
Typed By: lcs  
Date Typed: 09/05/2002  
Findings Mailed:

  
\_\_\_\_\_  
B. Smith  
Staff Hearing Officer

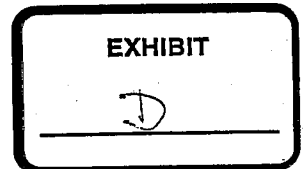
The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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Earl Davis  
749 Orlando Ave  
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Cleveland OH 44114-1503

Risk No: 20003890-0  
Daimler Chrysler Corp  
Cims 485 07 26  
Attn August L Biache Jr  
1000 Chrysler Dr  
Auburn Hills MI 48326-2766

ID No: 1667-80  
Buckingham, Dolittle & Burroughs  
1375 E 9th St Ste 1700  
Cleveland OH 44114



MEDICAL 89/10/2002

The Industrial Commission of Ohio

**RECORD OF PROCEEDINGS**

Claim Number: 00-820328

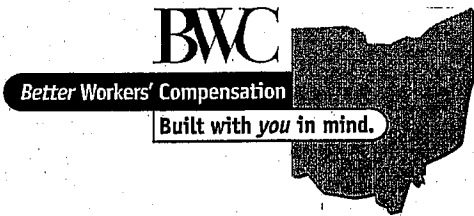
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PO Box 5061  
Southfield MI 48086

ID No: 21494-91  
Buckingham, Doolittle & Burroughs  
191 West Nationwide Blvd Ste 300  
Columbus OH 43215

ID No: 20403-91  
Buckingham, Doolittle & Burroughs  
P.O. Box 1500  
50 South Main Street  
Akron OH 44309-1500

BWC, LAW DIRECTOR

(SHREFUSE - SHO Refusal - Rev. 2/02)



The Ohio Bureau of Workers' Compensation  
400 3rd Street, S.E., P.O. Box 24801, Canton, Ohio 44701-4801

Phone: (330) 438-0638

## CERTIFICATE OF RECORDS CUSTODIAN

RECORDS OF: EARL DAVIS CLAIM NO. 00-820328

I, Leslie Knuth, Custodian of Records, do hereby certify that the originals of the documents provided were prepared and maintained in the ordinary course of business; that the attached copies are true and complete reproductions of all the records requested and that these records are maintained under my custody.

A handwritten signature in cursive script that reads 'Leslie Knuth'. The signature is written in black ink and is positioned above a horizontal line.

Leslie Knuth  
Custodian of Records  
Canton Service Office

Subscribed to and sworn in my presence  
this 21<sup>st</sup> day of January, 2004

A handwritten signature in cursive script that reads 'Theresa M. Riegel'. The signature is written in black ink and is positioned above a horizontal line.

Notary Public  
Commission Expires October 26, 2004

Please be advised that if this subpoena concerns an action against a third party tortfeasor, the Bureau of Workers' Compensation hereby notifies you of its subrogation interest as set forth in Ohio Revised Code Section 4123.93. If this subpoena concerns either an insurance claim or an action involving a third party tortfeasor, please contact the BWC Law Section Subrogation Department at (614) 466-6600.

EXHIBIT

E