

DIANA ZALESKI
2004 FEB 25 PM 2:00
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

LEON CHAFFEE)

Plaintiff,)

-vs-)

DAIMLER CHRYSLER CO., et al.,)

Defendants,)

CASE NO. AC 2003-03-1451

JUDGE JOHN R. MILLIGAN

ORDER ON SUMMARY
JUDGMENT

FINAL AND APPEALABLE
RULE 56 NOTICE

This matter came on for hearing on the Motion of the Defendant, Daimler Chrysler Corp., et al, for Summary Judgment, the Plaintiff's Brief in Opposition and the Defendant's Reply Brief.

THE MOTION FOR SUMMARY JUDGMENT IS SUSTAINED AND THE WITHIN CAUSE IS DISMISSED WITH PREJUDICE. THIS IS THE FINAL JUDGMENT OF THE COURT.

This court has previously entertained and ruled upon similar motions in other pending asbestos workers compensation cases. See *Davis v. Daimler Chrysler Co., et al, Summit County Common Pleas, No. AC 2002-11-6366, decided January 23, 2004.*

The court writes separately to distinguish the precedent process before the administrative tribunal here and in *Davis*.

The rationale in *Davis* is incorporated by reference and need not be replicated here.

In the case sub judice there are three orders of the Industrial Commission that are part of the record to which the Employee's notice of appeal is addressed. (Exhibits A, B, and C, Plaintiff's Response Brief.)

1. On July 3, 2002, the District Hearing Officer stated:

Upon review and consideration of all the evidence in the claim file and statements at hearing, the claim is disallowed as there is insufficient evidence to allow the claim or to refer the claim for a medical examination with a qualified medical specialist.

2. On December 5, 2002, the Staff Hearing Officer stated:

The Staff Hearing Officer affirms the District Hearing Officer's decision to disallow this claim because medical proof on file does not establish that the claimant contracted an occupational disease in the course of employment. This claim remains disallowed for lack of medical evidence.

3. On January 4, 2003, the Staff Hearing Officer stated:

...the appeal filed 12/20/2002 by the Injured Worker...be refused.

The employee filed his complaint in this court on March 5, 2003, and issue has been joined.

In his response Plaintiff concedes that he failed to comply with the prefatory, tripartite supplication requirements of Industrial Commission Resolution 96-1-01 as it implements R.C. 4123.68, Schedule (Y). Exhibit A, the July 3, 2002, order observes that there is "insufficient evidence to allow the claim or to refer the claim for a medical examination with a qualified medical specialist."

Plaintiff argues that he had no choice but to file an appeal to the Court of Common Pleas when he received the third order refusing his appeal, Exhibit C, January 4, 2003. He claims that if a state specialist examination is required prior to the allowance of the claim, the "Industrial Commission should have administratively suspended the claim rather than denying the claim." Brief, pg.3.

This court concludes, as a matter of law, that the process within the administrative agency was still ministerial, inasmuch as the claim never got to the merit level it would have achieved had the Plaintiff-claimant done what he was required to do to receive an order granting appointment of a specialist and merit hearing. The claimant is the architect of this deficit in the process.

A number of cases involving continuing jurisdiction of the workers compensation bureau and distinctions between ministerial acts and adjudicative acts vis-à-vis judicial appeal and review are instructive. See *Marinkovic v. Diversified Inventory Solution, Inc., et al*, *Summit County Court of Appeals*, 147 Ohio App.3d 497, 771 N.E.2d 291, decided 2/6/2002; *Greene v. Conrad*, 1997 Ohio App. LEXIS 3714, decided 8/21/97, Franklin County Court of Appeals.

The issue of ministerial versus judicial administrative determination is further analyzed in *Druck v. Dynalectric Company of Ohio*, 2003 Ohio App. LEXIS 3420, Montgomery Court of Appeals, 7/11/2003.

It is not insignificant that counsel for the Plaintiff in this and other cases knows how to complete and protect the record in asbestos, workers compensation cases. See *Joseph Eddy v. Daimler Chrysler et al.*, Summit County Common Pleas Court AC 2003-01-0088; BWC No. 99-804793.

In the Eddy case, there are four relevant orders from the Industrial Commission (attached as Exhibits D, E, F and G) and reproduced in relevant part below:

1. On May 15, 2002, the Hearing Officer in disallowing the claim stated:

The District Hearing Officer denies this Occupational Disease claim * * * due to a lack of medical evidence casually relating the injured worker's condition to his employment.

Before referral to a qualified medical specialist, the Industrial Commission of Ohio Adjudicatory Resolution R. 96-1-01 requires not only an x-ray by a certified "B-reader," but also Pulmonary Functions Studies interpreted by a licensed physician and a causal relationship statement.

2. On June 25, 2002, the Hearing Officer in vacating the previous order stated:

This claim is referred for the appropriate Bureau of Workers' Compensation pulmonary specialist examination on the issue of allowance claim.

There is now enough preliminary evidence in file to warrant the scheduling * * *. This finding is based upon the Staff Hearing Officer Hearing Brief filed 6/19/02.

3. On October 21, 2002, in denying the claim, the Hearing Officer stated:

After reviewing that specialist examination, the 8/26/02 report of Dr. Donnerberg, and after reviewing the 8/26/01 report of Dr. Shonfeld plus the 10/6/1999 x-ray report of Dr. Gravel, the Staff Hearing Officer finds that claim is denied based on Dr. Donnerberg's 8/26/02 report.

The Staff Hearing Officer finds that the claimant does not have any type of asbestos related disease. *Therefore, the claim remains denied as stated in the 5/13/02 District Hearing Officer order, however, the claim is denied on its merits (based on Dr. Donnerberg's exam) and not denied on procedural grounds as the 5/13/02 District Hearing Officer order stated.* Emphasis added.

4. On November 6, 2002, the Staff Hearing Officer stated:

...the appeal filed 10/28/02 by the Injured Worker ...be refused.

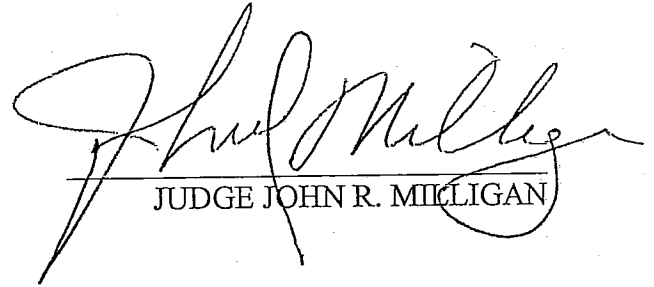
This court concludes that the Plaintiff has yet to meet the threshold, ministerial qualification for merit determination of his claim before the Bureau of Workers Compensation.

For the reasons stated in Davis, as well as above, this court does not have subject matter jurisdiction to entertain the administrative appeal and complaint of the Plaintiff.

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

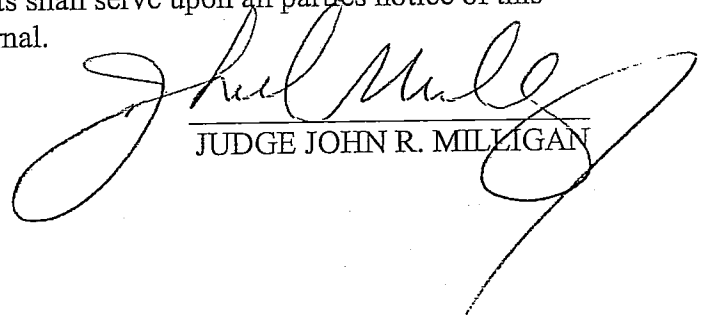
Exceptions to all parties.

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

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-804793
LT-OD-SI-COV
PCN: 2020561 Joe Eddy

Claims Heard: 99-804793

JOE EDDY
RR 1 BOX 33C
NEWPORT OH 45768-9005

Date of Diagnosis: 12/27/1999

Risk Number: 20003890-0
Manual Number:

This claim has been previously contested.

This matter was heard on 05/13/2002 before District Hearing Officer Thomas Kawalec 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 12/26/2001.
Issue: 1) Injury Or Occupational Disease Allowance - MEDICAL SUFFICIENCY FOR STATUTORY EXAM

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: N/A
APPEARANCE FOR THE EMPLOYER: Mr. Williams
APPEARANCE FOR THE ADMINISTRATOR: N/A

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FINDINGS

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 12/26/2001 is denied.

The District Hearing Officer denies this Occupational Disease claim which involves the worker due to a lack of medical evidence causally relating the injured worker's condition to his employment.

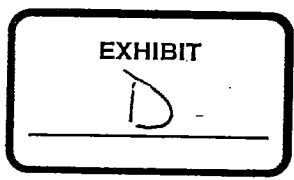
Before referral to a qualified medical specialist, the Industrial Commission of Ohio Adjudicatory Resolution R 96-1-01 requires not only an x-ray by a certified "B Reader," but also Pulmonary Functions Studies interpreted by a licensed physician and a causal relationship statement.

All evidence on file was reviewed and considered.

Therefore, the District Hearing Officer finds the injured worker did not contract an Occupational Disease from his employment and 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.chioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Zanesville District Office, 905 Zane Street, Zanesville OH 43701.

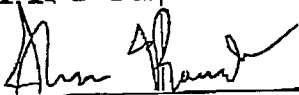


The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-804793

Typed By: jk
Date Typed: 05/13/2002
Date Received: 02/20/2002
Notice of Contested Claim: 02/11/2002
Findings Mailed:


Thomas Kawalec
District 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.

99-804793
Joe Eddy
RR 1 Box 33C
Newport OH 45768-9005

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: 40-80
Esis, Inc.
PO Box 24920
Columbus OH 43224-0920

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

BWC, LAW DIRECTOR

MAILED

2002 MAY 15 AM 5:17

FINDINGS

(DHOSI - DHO Self-Insured - Rev. 4/10/02)

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 99-804793
LT-OD-SI-COV
PCN: 2020561 Joe Eddy

Claims Heard: 99-804793

JOE EDDY
RR 1 BOX 33C
NEWPORT OH 45768-9005

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FINDINGS

Date of Diagnosis: 12/27/1999

Risk Number: 20003890-0
Manual Number:

This claim has been previously disallowed.

This matter was heard on 05/20/2002 before Staff Hearing Officer Matthew Finnegan pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

IC-12 Notice Of Appeal of DHD order from the hearing dated 05/13/2002, filed by Injured Worker on 05/24/2002.
Issue: 1) Injury Or Occupational Disease Allowance - MEDICAL SUFFICIENCY FOR STATUTORY EXAM

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: N/A
APPEARANCE FOR THE EMPLOYER: Mr. Williams
APPEARANCE FOR THE ADMINISTRATOR: N/A

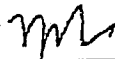
The order of the District Hearing Officer, from the hearing dated 05/13/2002, is vacated.

This claim is referred for the appropriate Bureau of Workers' Compensation pulmonary specialist examination on the issue of allowance of claim.

There is now enough preliminary evidence in file to warrant the scheduling of a Bureau of Workers' Compensation pulmonary specialist examination. This finding is based on the Staff Hearing Officer Hearing Brief filed 06/19/2002.

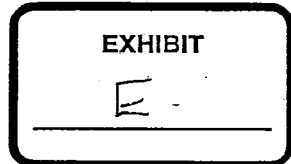
An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Zanesville District Office, 905 Zane Street, Zanesville OH 43701.

Typed By: kad
Date Typed: 06/20/2002


Matthew Finnegan
Staff Hearing Officer

Findings Mailed:

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.



The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-804793

99-804793
Joe Eddy
RR 1 Box 33C
Newport OH 45768-9005

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 Biacha Jr
1000 Chrysler Dr
Auburn Hills MI 48326-2766

ID No: 40-80
Esis, Inc.
PO Box 24920
Columbus OH 43224-0920

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

BWC, LAW DIRECTOR

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FINDINGS
MAILED

(SH01 - SHO Appeal - Rev. 4/10/02)

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 99-804793
 LT-OD-SI-COV
 PCN: 2020561 Joe Eddy

Claims Heard: 99-804793

JOE EDDY
 RR 1 BOX 33C
 NEWPORT OH 45768-9005

FINDINGS
 OCT 21 2002
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Date of Diagnosis: 12/27/1999

Risk Number: 20003890-0
 Manual Number:

This claim has been previously disallowed.

This matter was heard on 10/17/2002 before Staff Hearing Officer Robert Pellitt pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

IC-12 Notice Of Appeal of DHO order from the hearing dated 05/13/2002, filed by Injured Worker on 05/24/2002.
 Issue: 1) Injury Or Occupational Disease Allowance - MEDICAL SUFFICIENCY FOR STATUTORY EXAM

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: N/A
 APPEARANCE FOR THE EMPLOYER: Hess
 APPEARANCE FOR THE ADMINISTRATOR: N/A

The order of the District Hearing Officer, from the hearing dated 05/13/2002, is modified to the following extent:

The Staff Hearing Officer notes that pursuant to the 06/20/2002 Staff Hearing Officer order, it was found that there was sufficient evidence to warrant the scheduling of a Bureau of Workers' Compensation specialist examination.

After reviewing that specialist examination, the 08/26/2002 report of Dr. Donnerberg, and after reviewing the 08/26/2001 report of Dr. Schonfeld plus the 10/06/1999 x-ray report of Dr. Gravel, the Staff Hearing Officer finds that claim is denied based on Dr. Donnerberg's 08/26/2002 report.

The Staff Hearing Officer finds that the claimant does not have any type of asbestos related disease. Therefore, the claim remains denied as stated in the 05/13/2002 District Hearing Officer order, however, the claim is denied on its merits (based on Dr. Donnerberg's exam) and not denied on procedural grounds as the 05/13/2002 District Hearing Officer order stated.

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 or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Zanesville District Office, 905 Zane Street, Zanesville OH 43701.

Typed By: kad
 Date Typed: 10/17/2002

Robert Pellitt
 Staff Hearing Officer

Findings Mailed:

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-804793

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:

99-804793

Joe Eddy

RR 1 Box 33C

Newport OH 45768-9005

Risk No: 20003890-0

Daimler Chrysler Corp

4400 Chrysler Drive

Toledo OH 43608

ID No: 21753-91

Kelley & Ferraro

1300 E 9th St Ste 1901

Cleveland OH 44114-1503

ID No: 1667-80

Buckingham, Doolittle & Burroughs

1375 E 9th St Ste 1700

Cleveland OH 44114

ID No: 21494-91

Buckingham, Doolittle & Burroughs

191 West Nationwide Blvd Ste 300

PO Box 151120

Columbus OH 43215

ID No: 40-80

Esis, Inc.

PO Box 24920

Columbus OH 43224-0920

ID No: 20403-91

Buckingham, Doolittle & Burroughs

P.O. Box 1500

50 South Main Street

Akron OH 44309-1500

BWC, LAW DIRECTOR

FINDINGS
OCT 21 2002
MAILED

(SH01 - SHO Appeal - Rev. 4/10/02)

MEDICAL 11/08/2002

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 99-804793
LT-OD-SI-COV
PCN: 2020561 Joe Eddy

Claims Heard: 99-804793

JOE EDDY
RR 1 BOX 33C
NEWPORT OH 45768-9005

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FINDING MAILED 1

Date of Diagnosis: 12/27/1999

Risk Number: 20003890-0
Manual Number:

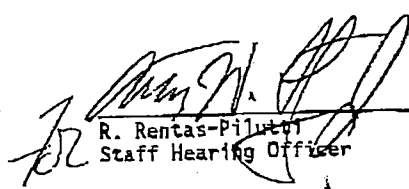
IC-12 Notice Of Appeal filed by Injured Worker on 10/28/2002.
Issue: 1) Injury Or Occupational Disease Allowance - MEDICAL SUFFICIENCY
FOR STATUTORY EXAM

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 10/28/2002 by the Injured Worker from the order issued 10/19/2002 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.

Data Reviewed: 10/30/2002 (BS)
Typed By: lcs
Date Typed: 11/04/2002
Findings Mailed:


R. Rentas-Pilutoni
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.

99-804793
Joe Eddy
RR 1 Box 33C
Newport OH 45768-9005

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

Risk No: 20003890-0
Daimler Chrysler Corp
4400 Chrysler Drive
Toledo OH 43608

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

EXHIBIT
6

MEDICAL 11/08/2002

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 99-804793

ID No: 21494-91
Buckingham, Doolittle & Burroughs
191 West Nationwide Blvd Ste 300
PO Box 151120
Columbus OH 43215

ID No: 40-80
Esis, Inc.
PO Box 24920
Columbus OH 43224-0920

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)