

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dwayne Robinson, Jr.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-812
Target Corporation et al.,	:	(C.P.C. No. 09CVD-06-8663)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 26, 2011

*Stephen E. Mindzak Law Offices, and Stephen E. Mindzak,
Eugene P. Weiss, for appellant.*

*Taft Stettinius & Hollister LLP, and Benjamin J. Parsons, for
appellee Target Corporation.*

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Dwayne Robinson, Jr., filed this appeal seeking to overturn the trial court's granting of summary judgment in his lawsuit asking for a jury determination of whether he has a right to participate in the workers' compensation system for the conditions of lumbar strain, thoracic strain and cervical strain. He assigns four errors for our consideration:

1. The court erred by granting summary judgment in this case.
2. The court erred in its application of R.C. 4123.512(A)'s 60-day time period when viewed in the context of the filing of a corrected order pursuant to the commission's exercise of its continuing jurisdiction.
3. The court erred by issuing its holding in light of the numerous cases which indicate the opposite result.
4. The court's decision was against the manifest weight of the evidence and is contrary to established law.

{¶2} Since all four assignments of error contain the same issue, we will address them together.

{¶3} Robinson was working for Target Corporation ("Target") when he was injured. He sought recognition of four claims, but had only the condition "chest wall strain" recognized initially. His counsel pursued the appropriate administrative appeals to obtain recognition of the lumbar, thoracic and cervical strain conditions, including an appeal from an order of a staff hearing officer to the full Industrial Commission ("commission").

{¶4} For reasons unknown, the commission did not appropriately log in the appeal documents. When counsel for Robinson inquired about the delay in the commission ruling on his appeal, he was informed that commission employees could not find the paperwork. Fortunately, counsel had kept a copy of his paperwork and was able to fax the commission a time-stamped copy of his appeal which showed that the appeal had been filed on June 14, 2006. The copy was faxed on February 26, 2007.

{¶5} The commission then entered an order refusing the appeal, but incorrectly listed the appeal as being filed on February 26, 2007, not the date the appeal was actually filed. Counsel for Robinson pointed out to the commission its error and the commission entered a second order overruling the actual, correct appeal.

{¶6} Counsel for Robinson then filed an appeal to the common pleas court. As allowed in such proceedings, counsel later dismissed the appeal to the common pleas court and refiled it within one year under Ohio's Savings Statute.

{¶7} Target moved for summary judgment on the refiled appeal, claiming that Robinson's counsel had been late in filing the initial appeal to the common pleas court. Target alleged that the appeal should have been filed within 60 days of the incorrect order from the commission, which purportedly overruled a non-existent appeal. A common pleas court judge accepted Target's position and granted summary judgment for Target, feeling bound by the 1929 Ohio Supreme Court case of *Perfection Stove Co. v. Scherer* (1929), 120 Ohio St. 445.

{¶8} A majority of this panel finds the *Perfection Stove Co.* case not to apply to the facts of Robinson's case and therefore reverse the trial court's finding.

{¶9} *Perfection Stove Co.* addressed a situation where a nunc pro tunc order was issued. No order which is literally a nunc pro tunc ("now for then") order was ever issued here. The second order, which overruled an actual appeal, made no direct mention of the first order and made no claim to literally replace the first order. The second order expressly advised Robinson and his counsel that they had 60 days to

appeal the second order to the common pleas court. The appeal to the common pleas court was pursued within that 60 days.

{¶10} The fact that the second order lists itself as a "corrected order" does not make it a nunc pro tunc order such as that addressed in the *Perfection Stove Co.* case. The second order in the *Perfection Stove Co.* case "did nothing more than eliminate from the [prior] order * * * a paragraph which had crept into that order by the mistake of a clerk * * * which, in fact, had not been ordered by the commission." *Id.* at 448. The second order in *Perfection Stove Co.*, being nunc pro tunc, literally replaced the first order.

{¶11} In Robinson's case, the first order should be considered a nullity because it ruled on a nonexistent appeal. The second order ruled upon the actual appeal.

{¶12} At the present time, the commission has continuing jurisdiction to make new orders and to allow 60 days from the new order for the parties to appeal. The commission did so here and expressly advised the parties that they had 60 days from the second order in which to appeal. Significant due process of law problems are presented if one government agency expressly tells the parties the time they have to pursue an appeal and then another government agency (a court) takes away that time for appeal.

{¶13} Whether *Perfection Stove Co.* has any applicability in the present time, given the commission's ability to exercise continuing jurisdiction, we cannot say. However, the majority of this panel views *Perfection Stove Co.* as, at best, applicable to a different situation than that presented by Robinson's case.

{¶14} We, therefore, sustain the first and second assignments of error. Our ruling on the first and second assignments of error renders the third and fourth assignments of

error moot. We vacate the summary judgment granted by the common pleas court and remand the case for further appropriate proceedings.

*Judgment reversed and remanded
for further proceedings.*

CONNOR, J., concurs.
BRYANT, P.J., dissents.

BRYANT, P.J., dissenting.

{¶15} Being unable to agree with the majority opinion, I respectfully dissent.

Facts and Procedural History

{¶16} Plaintiff's complaint alleges that on or about September 8, 2005, he sustained an injury in the course of and arising out of his employment with Target. The largely undisputed facts reveal plaintiff filed a workers' compensation claim. The District Hearing Officer allowed plaintiff's claim for chest wall strain but disallowed claims for lumbar strain, thoracic strain, and cervical strain; plaintiff timely appealed. The Staff Hearing Officer who heard the appeal on May 25, 2006 allowed plaintiff's claim for chest wall strain, disallowed his other three claims, and mailed the order containing the findings to the parties on May 31, 2006. Plaintiff timely appealed to the Industrial Commission of Ohio on June 14, 2006.

{¶17} After some time passed without a decision from the commission, plaintiff contacted the commission to inquire as to the status of his appeal. On learning the commission had no record of his appeal, plaintiff faxed a time-stamped copy of the appeal to the commission on February 26, 2007 as proof of timely filing.

{¶18} On March 27, 2007, the commission issued an order pursuant to R.C. 4123.511(E) refusing plaintiff's appeal from the Staff Hearing Officer's order. The order, however, incorrectly stated plaintiff appealed to the commission on February 26, 2007. At plaintiff's prompting, the commission issued a corrected order on April 19, 2007 that reflected June 14, 2006 as the date of plaintiff's appeal to the commission. Other than the corrected date and a revised caption stating "CORRECTED ORDER," the corrected order and the initial order are identical. The corrected order thus contains the same language found in the initial order advising that "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."

{¶19} On June 22, 2007, plaintiff filed an appeal in the common pleas court pursuant to R.C. 4123.512. In a July 27, 2010 decision and entry, the common pleas court granted Target's motion for summary judgment, concluding plaintiff's appeal was time-barred. As the court explained, the commission's initial order, not the corrected order, triggered the 60-day appeal period. Because plaintiff filed his appeal in the common pleas court more than 60 days after plaintiff received the commission's initial order, the court determined plaintiff's untimely appeal left the court without jurisdiction to hear plaintiff's appeal.

II. Plaintiff's Four Assignments of Error – Timeliness of His Appeal

{¶20} Both parties agree the issue on appeal resolves to whether plaintiff was required to file his appeal within 60 days of the initial order, or whether the time for an

appeal restarted when the commission issued the corrected order, but they differently frame the issue. Target urges us to look to the substance of the changes contained in the corrected order to determine whether the 60-day clock began anew from the date of that order. Plaintiff, on the other hand, asks us to examine whether the commission properly exercised its continuing jurisdiction to issue the corrected order.

A. *Perfection Stove Co. v. Scherer*

{¶21} In granting Target summary judgment, the common pleas court relied on the Supreme Court of Ohio's decision in *Perfection Stove Co. v. Scherer* (1929), 120 Ohio St. 445. In *Perfection Stove Co.*, the commission issued an order on December 21, 1926 denying the application of a deceased employee's parents seeking compensation for partial dependency. Like current R.C. 4123.512, the predecessor statute in effect at the time granted a right of appeal within 60 days of receiving the commission's order. Although the parents received the order on January 16, 1927, they did not appeal to the common pleas court until 75 days later, on April 1, 1927. When the commission issued a corrected order on June 6, 1927 to delete a paragraph erroneously included in the original order, the parents filed a second notice of appeal within 60 days of the corrected order.

{¶22} In dismissing both appeals, the Supreme Court concluded "[t]he order of the Industrial Commission of December 21, 1926, was a final order," so that "the statute of limitations within which an appeal is authorized to be prosecuted to the court of common pleas began to run from the date [the parents] received notice of such final order, which was January 16, 1927." *Id.* at 448. Addressing the latter June 6, 1927 entry, the court stated it "was a nunc pro tunc entry to make" the initial order of December 21, 1926

"speak the truth." Id. Moreover, "because it did not operate to deprive [the parents] of any rights" under the previous order, "nor make that order any less final, [it] was not effective to postpone the date when the period within which an appeal is authorized to be prosecuted begins to run." Id.

{¶23} The Supreme Court ultimately held it would "not permit a nunc pro tunc entry to so operate as to deprive a litigant of a right to appeal or prosecute error." Id. It further held, however, it would "not allow a nunc pro tunc entry to so operate as to extend" the appeal period "unless additional rights are created or an existing right denied by such nunc pro tunc entry, or unless the appeal or error proceeding grows out of such nunc pro tunc entry, as distinguished from the original order or entry." Id. at 448-49.

B. Application of *Perfection Stove Co.*

{¶24} Although nowhere in the corrected order at issue here does the commission state it was acting pursuant to its continuing jurisdiction, plaintiff contends the commission's correcting the appeal date through its corrected order is a valid exercise of the commission's continuing jurisdiction. According to plaintiff, even if the error was clerical, it was a clear mistake of fact sufficient to allow the commission to invoke its continuing jurisdiction. See *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 160 (stating the clerical error in that case "is clearly a mistake of fact"); *State ex rel. Schirtzinger v. Mihm*, 81 Ohio St.3d 459, 461, 1998-Ohio-512 (stating "[a] mistake of fact—which includes clerical error—justifies invocation of continuing jurisdiction"). Target does not dispute that the commission acted within its authority when it issued the

corrected order to accurately reflect the date plaintiff appealed from the Staff Hearing Officer's order.

{¶25} Plaintiff's contentions regarding the commission's continuing jurisdiction form the nub of his attempt to distance himself from *Perfection Stove Co.* Even though *Perfection Stove Co.* involved facts almost identical to those at issue here, plaintiff attempts to distinguish it by pointing out the commission here issued its corrected order within 60 days of its initial order, or within the time period for an appeal, while the commission in *Perfection Stove Co.* issued its corrected order 141 days after its original order. Asserting the commission loses jurisdiction to act when a party appeals from the commission's order or the 60-day appeal period expires, plaintiff contends the commission's corrected order in *Perfection Stove Co.* could not restart the appeal time because the commission, 141 days after its original order, lacked jurisdiction to correct its first order. As a result, the corrected order was void.

{¶26} The holding in *Perfection Stove Co.*, however, was not based on the distinction plaintiff draws but on the nature of the modified order. *Perfection Stove Co.* refused to allow what was essentially the commission's nunc pro tunc entry "to so operate as to extend the period within which an appeal or error proceeding may be prosecuted," absent "additional rights" being "created or an existing right denied by such nunc pro tunc entry, or unless the appeal or error proceeding grows out of such nunc pro tunc entry, as distinguished from the original order or entry." *Perfection Stove Co.* at 448-49.

{¶27} Because nunc pro tunc entries correct clerical rather than substantive errors, nunc pro tunc entries typically relate back to the date of the original entry and do

not extend the time for an appeal. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, ¶15, citing *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, ¶15 (stating "[a] nunc pro tunc entry is the procedure used to correct clerical errors in a judgment entry, but the entry does not extend the time within which to file an appeal, as it relates back to the original judgment entry"). See also *State v. Davis*, 10th Dist. No. 06AP-505, 2007-Ohio-944, ¶8 (noting that "[w]hen an initial entry is a final determination of the rights of the parties, a subsequent nunc pro tunc entry clarifying the initial entry relates back to the time of the filing of the initial entry, and does not extend the time for appeal"). (Citation omitted.) The timeliness of plaintiff's appeal therefore resolves to whether the corrected order is essentially a nunc pro tunc entry to correct a clerical error.

{¶28} In general, a clerical mistake is "the type of error identified with mistakes in transcription" rather than with any legal decision or conclusion. *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118. Stated another way, clerical errors consist of "blunders in execution," while substantive errors are "instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner." *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260, ¶15, quoting *Wardeh v. Altabchi*, 158 Ohio App.3d 325, 2004-Ohio-4423, ¶10, quoting *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247.

{¶29} Here, the parties agree plaintiff filed no appeal to the commission from the Staff Hearing Officer's order on February 26, 2007. Instead, plaintiff's counsel on that day faxed to the commission the time-stamped copy of plaintiff's June 14, 2006 appeal from

the Staff Hearing Officer's May 31, 2006 order. Although plaintiff expressly admitted in the trial court the error in dates was clerical in nature, plaintiff, citing R.C. 4123.511, now argues the practical effect of the error is more substantive than clerical.

{¶30} To that end, plaintiff asserts the initial order's incorrectly stating he filed his appeal from the Staff Hearing Officer's order on February 26, 2007 would be binding had the commission not revised it and could have resulted in Target's successfully asserting the trial court lacked jurisdiction because, on the face of the initial order, the appeal from the Staff Hearing Officer's order to the commission was not timely filed. Plaintiff's argument ignores that the commission file would include a time-stamped copy establishing the timeliness of his appeal from the Staff Hearing Officer's order to the commission.

{¶31} A mistake in a date often is deemed to be clerical rather than substantive in nature, even where the practical effect of the incorrect date included in a final order could be adverse to one of the parties. *Tejeda v. Toledo Surgeons, Inc.*, 186 Ohio App.3d 465, 2009-Ohio-3495, ¶43 (stating that the trial court's erroneously finding the appellee began working on November 1, 2000 "was likely a clerical mistake on the part of the trial court," where the employment contract listed the start date as December 1, 2000 and both parties agreed the appellee would have breached his contract had he started work on November 1, 2000). See also e.g., *State v. Ferrell*, 8th Dist. No. 92573, 2010-Ohio-1201, ¶44 (concluding "the error of the date in the original indictment was 'clerical' in nature, and the subsequent changes to the date that the prosecutor requested were to the same effect"); *Dennis J.H. v. Kathy S.S.*, 6th Dist. No. H-07-039, 2008-Ohio-2376, ¶16 (listing

examples of mechanical, clerical errors including "incorrect dates, misspelling, [and] inverted parties").

{¶32} Moreover, the substance of the commission's order is its decision not to hear the appeal from the Staff Hearing Officer's order allowing plaintiff to participate for one of his claims but denying participation for the others. See R.C. 4123.512 (allowing right to appeal only when order grants or denies the claimant's right to participate). Because the modification in the corrected order did not change the substance of the order addressing plaintiff's right to participate but corrected a mistake in the date of plaintiff's appeal from the Staff Hearing Officer's order, the correction again is more clerical than substantive and thus did not extend the time for an appeal to the trial court. See *Perfection Stove Co.* Plaintiff nonetheless asserts basic fairness and equity require his appeal be allowed in the trial court.

{¶33} Plaintiff initially argues that if his appeal is untimely, then a party who knows of an error in a final judgment will be required to appeal from the clerically erroneous final judgment to preserve appellate rights. Established case law so requires, and plaintiff presents no basis to distinguish it. See *State ex rel. Womack*.

{¶34} Noting the information about appeal rights contained in the corrected order, plaintiff also contends the four corners of the corrected order led him to believe he had 60 days to appeal from the order. Both the initial order and the corrected order include the same notice regarding the 60-day time period for an appeal, appropriately so since the initial order contained it, and the corrected order did not purport to be a new order but only to change one clerical error in the initial order. The boilerplate language, when read

in conjunction with the caption "CORRECTED ORDER," does not and cannot confer, contrary to statute, jurisdiction on the common pleas trial court to hear an untimely appeal. *IBM Corp. v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 06AP-108, 2006-Ohio-6258, ¶12 (stating that "under Ohio law, '[s]ubject matter jurisdiction is never waived, and neither a court nor the parties may confer jurisdiction where none existed originally' "), quoting *Hirt's Greenhouse, Inc. v. Strongsville* (Sep. 7, 1995), 8th Dist. No. 68374; *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, paragraph one of the syllabus (stating "[t]he jurisdictional requirements of [R.C. 4123.512] are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of that statute"). Plaintiff's arguments do not overcome the jurisdictional hurdle his untimely appeal creates.

{¶35} Accordingly, I would affirm the judgment of the trial court.
