

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Charles E. Daniel,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-797 (C.P.C. No. 09CVD-8-12720)
Paul D. Williams et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on April 21, 2011

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*Thompson, Meier & Dersom, and Adam H. Leonatti, for appellant.*

*Law Office of Thomas Tootle Co., L.P.A., and Thomas Tootle, for appellee Paul D. Williams.*

*Michael DeWine, Attorney General, and Kevin J. Reis, for appellee Administrator, Bureau of Workers' Compensation.*

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Charles E. Daniel, appeals from the judgment of the Franklin County Court of Common Pleas dismissing his complaint against defendants-appellees Paul D. Williams, d.b.a. Paul the Gutterman, and Marsha P. Ryan, Administrator of the Ohio Bureau of Workers' Compensation ("BWC"), for lack of jurisdiction.

{¶2} This matter arises out of an incident that occurred on August 11, 2008, at which time appellant was employed as a laborer by appellee Williams. On this date, appellant was working on a roof in an apartment complex near Hayden Run Road in Franklin County, Ohio. Though there are conflicting versions as to what occurred that day, it is undisputed that while at the worksite, appellant was struck in the throat during an altercation and transferred to the hospital. Surgery was performed, and appellant remained in the hospital until August 22, 2008.

{¶3} An application for workers' compensation benefits was filed with the BWC on August 12, 2008, asserting that while working within the course and scope of his employment appellant was assaulted by two teenagers and struck in the throat by brass knuckles. The claim was denied based on a finding that appellant's injuries were not related to his employment because it was found that appellant removed himself from the course of his employment and became involved in an altercation unrelated to the same. The administrator's order indicates it was premised on August 11, 2008 medical reports from Riverside Methodist Hospital, a police report from the city of Columbus, and a statement from the mother of the teenagers involved in the incident. The order, which denotes it was mailed to appellant on August 28, 2008, stated that if appellant disagreed with the decision, he could file an appeal within 14 days of receipt of the order.

{¶4} According to appellant, though discharged from the hospital on August 22, 2008, his injuries prevented him from opening and reviewing his mail until September 19, 2008, at which time he first became aware that an application seeking workers' compensation benefits on his behalf had been filed and denied. After obtaining counsel, appellant filed an appeal of the order denying benefits on September 30, 2008. A district hearing officer ("DHO") heard the matter on April 6, 2009, and found the appeal was untimely for not having been filed within 14 days of appellant's receipt of the administrator's order.

{¶5} Appellant sought further review, and a staff hearing officer ("SHO"), agreeing that appellant's appeal was untimely, mailed a decision on May 16, 2009 affirming the DHO. The SHO also found that appellant was not entitled to relief under R.C. 4123.522 because relief under that statute is only available to an injured worker who fails to receive notice by no fault or neglect of the injured worker. The Industrial Commission of Ohio refused further appeals.

{¶6} On August 21, 2009, appellant filed a complaint in the Franklin County Court of Common Pleas, pursuant to R.C. 4123.512, challenging the BWC's order. On September 23, 2009, the BWC filed its answer and asserted affirmative defenses including (1) appellant's failure to exhaust administrative remedies and (2) lack of subject matter jurisdiction. The BWC filed a motion to dismiss or, alternatively, for summary judgment on the basis that the trial court lacked jurisdiction for appellant's failure to timely appeal from one of the administrative orders and failure to exhaust his administrative remedies. Appellant filed a memorandum contra with attachments, as well as a supplement to his memorandum contra. The trial court rendered a decision on July 26,

2010, finding that because appellant's appeal to the DHO was untimely, appellant failed to exhaust his administrative remedies. Accordingly, the trial court determined that jurisdiction was lacking and dismissed appellant's complaint. An entry reflecting the same was filed on August 17, 2010.

{¶7} This appeal followed and appellant brings the following nine assignments of error for our review:

**First Assignment of Error**

The Trial Court erred in concluding that Appellant was not entitled to *de novo* review under R.C. 4123.512 on the question of whether Appellant had exhausted—or was required to exhaust—administrative remedies in connection with the BWC's August 28, 2008 denial of the claim filed in Appellant's name.

**Second Assignment of Error**

The Trial Court erred by declining to strike the BWC's dispositive motions and response memorandum when those filings were based upon the decisions of the BWC and the Industrial Commission, as well as unsworn and speculative assertions by the BWC's counsel, none of which were admissible under Civil Rule 56 and R.C. 4123.512.

**Third Assignment of Error**

The Trial Court erred by resolving a disputed issue of material fact in a summary judgment proceeding, as follows:

Where Appellant swore that he had "no idea" who filed this workers' compensation claim and where nothing in the evidentiary record disclosed whether any party in interest had initiated the claim, the Trial Court made the speculative conclusion that the claim must have been initiated by the employer of record.

**Fourth Assignment of Error**

The Trial Court erred by resolving a disputed issue of material fact in a summary judgment proceeding, as follows:

Where Appellant swore that he did not submit any change of address notice to the BWC; that he was ignorant of the existence of the claim until September 19, 2008; and that he did not retain a representative until September 29, 2008; the Trial Court concluded that the BWC's August 13, 2008 letter identifying a change in Mr. Daniel's address of record conclusively established that "Plaintiff, or a representative for Plaintiff, submitted a change of address form to the BWC and thus was on notice of the claim."

#### **Fifth Assignment of Error**

The Trial Court erred by resolving a disputed issue of material fact in a summary judgment proceeding, as follows:

Where Appellant swore that the physical trauma of his August 11, 2008 injury—including the prolonged need for a tracheotomy tube, a 70-80 pound weight loss over a 2-week period, a heavy post-surgical medication regimen, and an inability to care for himself following discharge from the hospital—rendered him "totally incapable of opening, reading, and understanding the BWC's [denial] letter dated August 28, 2008 until September 19, 2008," the Trial Court ignored this testimony and evidence to conclude that Mr. Daniel had sufficiently recovered by September 5, 2008 to read and appeal the BWC's order.

#### **Sixth Assignment of Error**

The Trial Court erred by concluding that Appellant was a party to the August 28, 2008 decision of the BWC denying this claim, where Appellant did not file the claim, did not authorize the filing of the claim, was not aware a claim had been filed in his name, and where the evidentiary record does not disclose who did file the claim.

#### **Seventh Assignment of Error**

The Trial Court erred in rejecting Appellant's argument that, under the undisputed facts of this case, he was denied a full and fair opportunity to litigate the allowance of this workers' compensation claim before the BWC and that, pursuant to

*Greene v. Conrad* [(Aug. 21, 1997), 10th Dist. No. 96APE12-1780], he has standing [to] pursue this claim in the Trial Court regardless of whether he appealed the BWC's decision within 14 days of its arrival in his mailbox.

#### **Eighth Assignment of Error**

The Trial Court erred by concluding that—for purposes of R.C. 4123.511—an unrepresented injured worker "receives" a BWC claim denial order the day it arrives in his mailbox when the worker, as a result of his work injury, is physically incapable of opening, reading, and understanding the letter, and even though the worker did not initiate the claim and was not aware the claim was being processed.

#### **Ninth Assignment of Error**

The Trial Court erred in rejecting Mr. Daniel's argument that his administrative right to appeal the BWC's Order within fourteen days of its presumed arrival in his mailbox was legally "futile" pursuant to *Karches v. City of Cincinnati* [(1988), 38 Ohio St.3d 12], when it was undisputed that during the entire 14-day period in question Mr. Daniel was, as a result of his work injury, physically incapable of opening, reading, and understanding the BWC's denial order.

{¶8} Initially, we note appellant's assignments of error refer to the trial court granting summary judgment in favor of the BWC. The dispositive motion filed by the BWC was captioned "motion to dismiss, or in the alternative, motion for summary judgment." Although the trial court's decision does not expressly indicate whether it applied a summary judgment standard or a dismissal standard, the title of the trial court's decision filed on July 26, 2010 indicates it is a decision granting the BWC's motion to dismiss. Thus, we will review this appeal accordingly.

{¶9} The standard for reviewing the dismissal of a complaint for lack of jurisdiction, pursuant to Civ.R. 12(B)(1), is whether the complaint has raised any cause of action which the court has authority to decide. *State ex rel. Bush v. Spurlock* (1989), 42

Ohio St.3d 77, 80; *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56, 62. This court must determine whether the complaint contains sufficient allegations to demonstrate that the common pleas court has jurisdiction over the asserted claims. This is generally a question of law which we review independently of the trial court's decision. *Ford v. Tandy Transp., Inc.* (1993), 86 Ohio App.3d 364, 375. In determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint. It may also consider material pertinent to such inquiry without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus; *Ford*.

{¶10} For ease of discussion, we address appellant's assignments of error out of order. In his second assignment of error, appellant contends the trial court erred in not granting his motion to strike the BWC's dispositive motion. Appellant argued that because he was entitled to a de novo review, the administrative record could neither be considered by the trial court nor used as support for the BWC's dispositive motion.

{¶11} The BWC's dispositive motion related to jurisdiction and the Civil Rules permit jurisdiction to be used as a basis for dismissal. *State ex rel. Alaska Nursing Home, Inc. v. Bates* (June 3, 1975), 10th Dist. No. 74AP-347; Civ.R. 12(H)(3) ("[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

{¶12} Moreover, as set forth in the standard of review, when determining whether a cause of action has been alleged to withstand a motion to dismiss, pursuant to Civ.R. 12(B)(1), the trial court is not confined to the allegations within the complaint and may

consider material pertinent to the inquiry without converting the motion into one for summary judgment. Thus, the trial court was permitted to consider BWC's dispositive motion with supporting attachments under both Civ.R. 12(B)(1) and Civ.R. 56.

{¶13} Because the dispositive motion was filed in accordance with the Civil Rules, we find no error in the trial court's decision to overrule appellant's motion to strike. To the extent appellant includes an argument under this assignment of error that the trial court erred in granting the dispositive motion, such will be addressed in our analysis of his remaining assignments of error. Accordingly, we overrule appellant's second assignment of error.

{¶14} In his next three assigned errors, appellant contends the trial court erred in dismissing his complaint in the presence of disputed issues of fact.

{¶15} The issue raised in BWC's dispositive motion was one of jurisdiction based on appellant's failure to timely appeal from the administrator's August 28, 2008 order denying the claim for workers' compensation benefits. Pursuant to the doctrine of failure to exhaust administrative remedies, a party seeking court action in an administrative matter must first " ' "exhaust the available avenues of administrative relief through administrative appeal." ' " *Anderson v. Interface Elec., Inc.*, 10th Dist. No. 03AP-354, 2003-Ohio-7031, ¶11, quoting *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111, quoting *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29. In Ohio, the doctrine is a court-made rule of judicial economy which is " ' "generally required as a matter of preventing premature [judicial] interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to

compile a record which is adequate for judicial review." ' ' Id., quoting *Nemazee*, quoting *Weinberger v. Salfi* (1975), 422 U.S. 749, 765, 95 S.Ct. 2457, 2466; *Frick v. Univ. Hosps. of Cleveland* (1999), 133 Ohio App.3d 224, 228. If interested parties are not required to exhaust available administrative remedies, "there is the possibility that frequent and deliberate flouting of administrative processes could weaken the effectiveness of any agency by encouraging people to ignore its procedures." Id., quoting *Hawkes v. United Parcel Serv., Inc.* (May 24, 1990), 10th Dist. No. 89AP-1475.

{¶16} "Although failure to exhaust administrative remedies is not a jurisdictional defect per se, under Ohio law a complainant must exhaust any administrative remedies before invoking the common pleas court's jurisdiction." *Anderson* at ¶12, citing *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462, 1997-Ohio-253; *Campbell v. Ohio Bur. of Emp. Servs.* (1991), 74 Ohio App.3d 603, 605, citing *Noernberg* at 29. The doctrine has such force that " ' "[It is] the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." ' ' Id., quoting *Jones* at 462, quoting *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 50-51, 58 S.Ct. 459, 463.

{¶17} The administrative remedies prescribed in the matter before us are set forth in R.C. Chapter 4123. R.C. 4123.511(B)(1) provides, in relevant part, that if the administrator determines that a claimant is not entitled to an award of compensation, the claimant may appeal the order "within fourteen days after the date of the receipt of the order." If an appeal is filed in accordance with R.C. 4123.511(B)(1), the matter is reviewed by a DHO. Further review can be sought from a SHO and subsequently the Industrial Commission. After proceeding through the administrative process, an appeal

can be filed in the appropriate court of common pleas. R.C. 4123.511(M) provides that "no appeal is timely filed under this section unless the appeal is filed with the time limits set forth in this section." Thus, the statute contemplates the general nonappealability of commission orders, and in the case of claims for initial industrial allowance, withholding judicial review until after the claimant "runs the gamut of successive administrative hearings provided for under R.C. 4123.511." *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, ¶9.

{¶18} Determining a trial court's jurisdiction where a party failed to appeal an initial allowance of a claim was reviewed in *Wein v. Seaman Corp.* (1996), 116 Ohio App.3d 189. In that case, the employer did not contest the initial allowance of the claim, but contested the allowance of an amended claim that added additional conditions. In challenging the amended claim, however, the employer also challenged the allowance of the original claim. Noting the statutory framework of R.C. Chapter 4123, the *Wein* court stated "the statute mandates that an appeal from a decision awarding or declining to award compensation must be taken within fourteen days of receipt of the order." *Id.* at 191. While the employer timely appealed the amended claim, it did not timely appeal the order allowing the initial claim, "[t]hus, [the employee] did not properly invoke the jurisdiction of the trial court pursuant to R.C. 4123.512 with respect to the BWC's decision regarding [the employee's] first claim, since *only a timely appeal (within fourteen days) of the district hearing officer's decision to the appropriate administrative body, and a timely appeal from that body to the trial court, could have done so.*" *Id.* at 192. (Emphasis added.)

{¶19} A similar scenario was presented in *Leethe v. Fairborn USA, Inc.* (Aug. 6, 1997), 3d Dist. No. 16-97-01, where an application for workers' compensation benefits was filed with the BWC and denied by the administrator in an order mailed on March 21, 1996. On May 7, 1996, Leethe filed a notice of appeal, and a DHO heard the matter and allowed the claim for right carpal tunnel syndrome. A SHO vacated the DHO's order finding that the DHO had no jurisdiction because the May 7, 1996 appeal was untimely. The commission refused Leethe's appeal and Leethe appealed to the court of common pleas. The trial court granted the BWC's motion to dismiss for lack of jurisdiction. On appeal to the Third District Court of Appeals, the court noted that the administrator's order denying Leethe's claim notified Leethe of the 14-day period within which Leethe could file an appeal. Because Leethe did not timely appeal the administrator's initial allowance of her claim within that 14 days, she did not comply with R.C. 4123.511, and, therefore, the commission had no jurisdiction to hear the appeal.

{¶20} Similarly, the claimant in *Nicholas v. Gayston Corp.* (Nov. 6, 2000), 12th Dist. No. CA99-01-012, filed an appeal of a DHO's order disallowing her claim, but did so beyond the 14-day appeal period provided for in R.C. 4123.511. Relying on *Wein*, the Twelfth District stated, "a common pleas court lacks jurisdiction to consider the appeal of a final [industrial commission] decision when an appeal is not timely taken from the underlying administrative decision." Because Nicholas did not appeal the DHO's decision within 14 days of receipt of the order, the court held that the jurisdiction of the trial court was not properly invoked, and, therefore, the trial court's judgment was reversed and the matter was ordered dismissed for lack of jurisdiction.

{¶21} The order at issue here is the administrator's initial denial of the claim mailed to appellant on August 28, 2008. "R.C. 4123.522 provides 'a rebuttable presumption, sometimes called the "mailbox rule" that, once a notice is mailed, it is presumed to be received in due course.' " *State ex rel. Fresh Mark v. Indus. Comm. of Ohio*, 10th Dist. No. 06AP-459, 2007-Ohio-2876, ¶27, quoting *Weiss v. Ferro Corp.* (1989), 44 Ohio St.3d 178, 180. To rebut that presumption, the party alleging the failure to receive notice must prove that (1) the failure to notice was due to circumstances beyond the party's or the party's representative's control, (2) the failure of notice was not due to the party's or the party's representative's fault or neglect, and (3) neither the party nor the party's representative had prior actual knowledge of the information contained in the notice. *Id.*

{¶22} The SHO found that R.C. 4123.522 provides relief only for those who failed to receive notice due to circumstances beyond their control and through no fault of their own, and that R.C. 4123.522 does not provide relief to those who failed, for whatever reason, to open mail that was timely received. Therefore, even though appellant did not allegedly read the notice until September 19, 2008, because he timely received the notice, the SHO determined appellant was not entitled to relief pursuant to R.C. 4123.522. The trial court, agreeing with the BWC that it lacked jurisdiction over appellant's claims because of appellant's failure to timely appeal the administrator's initial order denying appellant's right to participate in the workers' compensation fund, dismissed appellant's complaint.

{¶23} In his third assignment of error, appellant contends the trial court erred in its determination because he was not a party to the administrator's order mailed on

August 28, 2008, since he did not file the claim seeking benefits on August 12, 2008, nor was he aware of its filing until he read the order denying benefits on September 19, 2008. We note again that the issue before us is jurisdiction. The order was mailed to appellant at his correct address on August 28, 2008, and under the mailbox rule cited previously, it is presumed to have been received in due course. The only thing that could provide the trial court with jurisdiction to consider the merits of appellant's appeal and entertain his argument that the administrator erred in considering an inadequate application for benefits was a *timely* appeal of the administrator's decision, procession through the administrative process, and a timely appeal from the administrative body to the trial court. *Wein; Leethe*. Though appellant challenges the trial court's finding that the party responsible for filing the claim on August 12, 2008 is irrelevant, we find no error in the trial court's conclusion because the identity of the person responsible for filing the claim does not alter the trial court's jurisdiction, which is lacking if an appeal is not timely taken from the underlying administrative decision. *Nicholas; Wein; Leethe*.

{¶24} Finding no merit to appellant's argument, we overrule appellant's third assignment of error.

{¶25} In his fourth assignment of error, appellant challenges the trial court's statement "that [appellant], or a representative for [appellant], submitted a change of address form to the BWC," and was therefore on notice of the claim filed on August 12, 2008. (July 22, 2010 Decision at 8.) Because he was hospitalized, appellant contends it was impossible that he filed a change of address form with the BWC, and, therefore, the trial court erred in using this as a basis to conclude that he had notice of the claim being filed. Appellant, however, takes this statement out of context because the next sentence

of the trial court's decision states, "[e]ven assuming that submitting a change of address form did not put [appellant] on notice [of the claim being filed], he still received the BWC Decision in the mail." (July 22, 2010 Decision at 8.) Thus, the trial court concluded the receipt of the BWC decision was sufficient to put appellant on notice that a claim was filed, denied, and needed to be appealed within 14 days of its receipt.

{¶26} Contrary to appellant's assertion, the trial court did not "reject" his uncontroverted testimony or conclude his "claimed ignorance of this claim while in the hospital was false." (Appellant's brief, 23.) Accordingly, we overrule appellant's fourth assignment of error.

{¶27} In his fifth assignment of error, appellant contends it was error for the trial court to weigh appellant's credibility regarding his assertion that he was physically incapable of "opening, reading, and understanding" the BWC's August 28, 2008 denial letter until September 19, 2008, and instead concluded appellant was sufficiently recovered by September 5, 2008. After review of the matter, we do not find that the trial court assessed credibility, nor do we find the trial court made specific findings in regards to appellant's physical condition.

{¶28} Appellant challenges footnote 3 of the trial court's decision in which the trial court stated, "[p]laintiff claims that he was incapacitated for at least two weeks after he left the hospital and could not deal with his affairs. \* \* \* Assuming that Plaintiff was incapacitated for two weeks, this would still put the date of receipt of the BWC Decision at September 5, 2008." The trial court's use of "two weeks" presumably comes from appellant's affidavit attached to his memorandum contra in which he states he was "bedfast for at least another two weeks" after being discharged from the hospital. Thus,

the trial court was not assessing credibility nor making a determination with regard to appellant's condition. Instead, the trial court was noting that even if appellant was correct in his assertion that the date of receipt of the order should be the date he was no longer incapacitated, appellant's September 30, 2008 appeal would still be untimely.

{¶29} Accordingly, we overrule appellant's fifth assignment of error.

{¶30} Because appellant has asserted only one argument for both his sixth and seventh assignments of error, they will be addressed together. According to appellant, implicit in the BWC's argument that appellant failed to exhaust administrative remedies is the assumption that the August 28, 2008 order constituted a final binding decision on the merits of his right to receive workers' compensation benefits, which "necessarily implicates the doctrine of res judicata." (Appellant's brief, 26.) Because res judicata is applicable only if the party against whom the doctrine is being used has had a full and fair opportunity to litigate the issue, and because he asserts he did not file the claim for workers' compensation benefits, it is appellant's position that, pursuant to *Greene v. Conrad* (Aug. 21, 1997), 10th Dist. No. 96APE12-1780, this action is not barred by res judicata.

{¶31} Appellant's reliance on both *Greene* and the doctrine of res judicata is misplaced. In *Greene*, the claimant applied for benefits with the BWC, and the BWC denied the application because requested information had not been provided. No appeal was taken from this decision. Subsequently, the claimant filed an identical application for benefits which was denied by the BWC on the basis of res judicata. Appeals were taken with respect to this order and on appeal this court held, "the mere administrative processing of [claimant's] application under R.C. 4123.511(B)(1) by the bureau's claims

examiner, which culminated in the denial of the claim for failure to provide requested information, was not an adjudication by a judicial or quasi-judicial entity entitled to res judicata effect." *Id.*

{¶32} Here, the issue of res judicata is not implicated as we are presented with a single order, and our review is limited to whether or not the trial court's jurisdiction was properly invoked. Accordingly, neither res judicata nor *Greene* is applicable to the instant matter, and we overrule appellant's sixth and seventh assignments of error.

{¶33} In his eighth assignment of error, appellant contends it was error for the trial court to conclude that for purposes of R.C. 4123.511, a claimant receives a claim denial when it arrives in his mailbox rather than when he is physically capable of opening, reading it, and understanding it.

{¶34} Pursuant to R.C. 4123.511(B)(1), if the administrator determines that a claimant is not entitled to an award of compensation, the claimant may appeal the order "within fourteen days after the date of the receipt of the order." R.C. 4123.522 provides in pertinent part:

If any person to whom a notice is mailed fails to receive the notice and the commission, upon hearing, determines that the failure was due to cause beyond the control and without the fault or neglect of such person or his representative and that such person or his representative did not have actual knowledge of the import of the information contained in the notice, such person may take the action afforded to such person within twenty-one days after the receipt of the notice of such determination of the commission. Delivery of the notice to the address of the person or his representative is prima-facie evidence of receipt of the notice by the person.

{¶35} R.C. 4123.522 provides "a rebuttal presumption, sometimes called the 'mailbox rule' that, once a notice is mailed, it is presumed to be received in due course."

*Fresh Mark* at ¶27, quoting *Weiss* at 180. In order to successfully rebut that presumption, the party alleging the failure to receive notice must prove that (1) the failure of notice was due to circumstances beyond the party's or the party's representative's control, (2) the failure of notice was not due to the party's or the party's representative's fault or neglect, and (3) neither the party nor the party's representative had prior actual knowledge of the information contained in the notice. *Id.*

{¶36} In *Fresh Mark*, the claimant did not timely appeal the denial of her request for workers' compensation benefits, and the claimant sought relief alleging she had no notice of the denial. Though the Industrial Commission granted relief to the claimant, this court held that granting relief was an abuse of discretion because notice was mailed to the correct address, notice was not returned, and claimant's affidavit failed to overcome the presumption of delivery. Specifically, this court held that though the claimant averred in an affidavit that notice had not been received because there was no evidence that the failure of notice was due to circumstances beyond the control of the claimant or her counsel, the presumption of notice had not been overcome.

{¶37} Similarly, in *Tipp City Schools v. Indus. Comm. of Ohio*, 10th Dist. No. 05AP-153, 2006-Ohio-6948, an employee was denied workers' compensation benefits and instead of filing an appeal, mistakenly filed a waiver of her right to appeal. A SHO determined that because the employee did not understand the forms and mistakenly filed a waiver of appeal rather than a notice of appeal, the appeal should be timely accepted, and, therefore, the employee's claims were adjudicated on their merits. On appeal to this court, we held the Industrial Commission abused its discretion in accepting the untimely appeal because "R.C. 4123.522 is a narrow statute designed to remedy a *single* specific

problem – a party's failure to receive notice of a commission decision." *Id.* at ¶23, quoting *State ex rel. Tisdale v. Cherry Hill Mgt., Inc.* (2000), 88 Ohio St.3d 423, 425. (Emphasis sic.) See also *State ex rel. Hadley v. Indus. Comm. of Ohio*, 10th Dist. No. 05AP-766, 2006-Ohio-3589 (presumption of the mailbox rule not rebutted where claimant did not show the failure to get notice was due to circumstances beyond her control or not due to her fault or neglect).

{¶38} Appellant was discharged from the hospital on August 22, 2008, and the administrator's order was mailed on August 28, 2008. Pursuant to the mailbox rule, appellant received the notice on or about September 1, 2008 and thus had 14 days from that date in which to file an appeal. Despite appellant's encouragement to find otherwise, based on the record as it currently stands, we cannot expand the definition of the word "receive" and make it applicable to the facts herein where appellant timely received the administrator's order but failed to read it until 18 days after its timely delivery.

{¶39} Accordingly, we overrule appellant's eighth assignment of error.

{¶40} In his ninth assignment of error, appellant contends that the trial court erred in rejecting his argument that he need not have timely appealed the administrator's August 28, 2008 order because to do so would have been futile. In reliance, appellant cites *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, in which the Supreme Court of Ohio held that there are two exceptions to the requirement that a litigant exhaust administrative remedies:

First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive.

Id. at 17. (Internal citations omitted.)

{¶41} According to appellant, a timely appeal would have been futile, and, therefore, he had no obligation to exhaust his administrative remedies by appealing within 14 days of receipt of the BWC's denial order. We find no merit to appellant's argument because there is no indication in the record, or provided by appellant, that a timely appeal to a DHO would have been a futile act. The administrator's order indicates the conclusion that appellant was not acting within the scope of his employment at the time of his injury was based on a medical report, a police report, and a statement from the mother of the teenagers involved in the altercation with appellant. Appellant provides no evidence to support his contention that a review by a DHO would have automatically resulted in the same conclusion such that a timely appeal to a DHO would have been futile. Therefore, the futility exception to the requirement that a litigant exhaust administrative remedies is not available to appellant.

{¶42} Accordingly, we overrule appellant's ninth assignment of error.

{¶43} In his first assignment of error, appellant contends the trial court's dismissal of his claims denied him the right to a de novo review for which R.C. 4123.512 provides. Appellant is correct that appeals, pursuant to R.C. 4123.512, are de novo and that a trial court must independently assess whether a claimant is entitled to participate in the workers' compensation fund without regard to the commission's findings. *Youghioghney & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71. However, it is axiomatic that jurisdiction is a condition precedent to a court's ability to hear a case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11.

{¶44} Because we have determined the trial court was correct in its conclusion that it lacked jurisdiction over this matter, appellant was not entitled to a de novo review of the merits of his claims. Accordingly, we overrule appellant's first assignment of error.

{¶45} For the foregoing reasons, appellant's nine assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

BROWN and DORRIAN, JJ., concur.

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